

LAW OFFICE OF LORI A. GOLDSTEIN, LLC

Special Client Bulletin: Covid-19 - New Federal Leave Law and Other Employer Considerations (Updated 3/31/20)

The global situation with coronavirus and COVID-19 continues to evolve. Employers should be aware of legal obligations, continue to monitor the workplace and stay current with information and regular updates. This bulletin covers the newly enacted Families First Coronavirus Response Act (“FFCRA”), impact of other applicable laws including paid sick leave and disability accommodations, interim options like furloughs or layoffs and related unemployment claims, and SBA Small Business Disaster Loan Assistance. See my COVID FAQ for further updates.

Coronavirus – Families First Coronavirus Response Act (“FFCRA”)

Effective: 4/1/20 – 12/31/20

5 Key Items:

- Up to 2 weeks of paid leave to all employees for certain COVID-19 related matters;
- FMLA leave (partially paid) to care for the employee’s child, if the child’s school or other place of care has been closed, or the child care provider is unavailable, due to a COVID-19 related emergency as declared by the Federal, State or local government;
- Tax credits for 100% of the FFCRA-mandated paid leave wages, subject to certain caps, related Medicare taxes, and related expenses for maintaining group health plan coverage;
- Greater access to unemployment insurance for employees who are off work for certain reasons related to COVID-19; and
- Coverage of COVID-19 testing at no cost under health plans.

Covered Employers: Government employers and companies with fewer than 500 employees, including those with fewer than 50 employees and nonprofits. However, a small business (<50) may claim an exemption if an authorized officer of the business has determined that:

1. The provision of leave would result in the small business’s expenses and financial obligations exceeding available business revenues and cause the small business to cease operating at a minimal capacity;
2. The absence of the employee(s) would entail a substantial risk to the financial health or operational capabilities of the small business because of their specialized skills, knowledge of the business, or responsibilities; or
3. There are not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the services provided by the employee(s) requesting leave, and these labor or services are needed for the small business to operate at a minimal capacity.

Emergency Paid Sick Leave

Employee eligibility: All current employees, regardless of tenure.

Leave entitlement: 2 work weeks of paid leave (80 hours for full-time, pro-rata for part-timers.) This includes **intermittent leave** if employee unable to work normal schedule and employer and employee agree.

Reasons for paid sick leave (and assuming the employee cannot work or telework per normal schedule) – employee:

1. is subject to a Federal, State, or local quarantine or isolation order related to COVID-19;
2. has been advised by a health care provider to self-quarantine related to COVID-19;
3. is experiencing COVID-19 symptoms and is seeking a medical diagnosis;
4. is caring for an individual subject to an order described in (1) or self-quarantine as described in (2);
5. is caring for his or her child whose school or place of care is closed (or child care provider is unavailable) due to COVID-19 related reasons; or
6. is experiencing any other substantially-similar condition specified by the U.S. Department of Health and Human Services.

Amount of pay: Companies must pay an employee taking leave for any of the first three reasons listed above at his/her regular rate of pay*. When an employee takes paid sick leave for a family member or child, s/he gets paid at 2/3** the employee's regular rate.

*Specifically, the greater of the employee's regular rate of pay or the applicable minimum wage, but pay is **capped at \$511 per day or \$5,110 in total.**

2/3s of the employee's regular rate or the applicable minimum wage, but pay is **capped \$200 per day or \$2,000 in total.

These limits match the caps on the tax credits discussed below.

Employers with PTO or sick leave policies: The employee gets paid sick time under the new law *in addition to* any PTO in the bank (the leaves run consecutively.) Employer **can't require employees to first use up PTO. Companies should not change their PTO rules while Act is in effect.**

No carryover into 2021 or payout at termination

Replacement: Can't require employees to identify a replacement employee to cover his or her shift while taking sick leave.

Notice to Employees: The Secretary of Labor is working on a poster that companies must post.

Penalties for violation: Similar to FLSA, which includes unpaid wages x 2, reimbursement of claimant's attorneys' fees.

Emergency FMLA

Employee eligibility: Employees that have been working for at least 30 calendar days. Includes full-time, part-time and temps.

Leave entitlement: 12 weeks, including **intermittent leave** if employee unable to work normal schedule and employer and employee agree.

Reasons for taking emergency FMLA are very limited:

An employees may use leave only if the employee is **unable to work (or telework)** due to a need for leave to **care for the employee's child** under 18 years of age if the child's **school or other place of care has been closed, or the child care provider of such child is unavailable**, due to a public health emergency.

Combination of unpaid/paid leave:

- The first 10 days of emergency FMLA leave are unpaid, except when the employee elects to run accrued PTO concurrently.
- After two weeks, employees get paid at least two-thirds of the employee's usual pay, **capped at no more than \$200 per day and \$10,000 total (match tax credits.)**

Employee notice requirement: As much as is practicable.

- **Reinstatement rights:** The default FMLA rules apply, except with employers that have **fewer than 25 employees**, but only if each of the following **conditions** are met:
 - The employee takes leave to care for the employee's child because the child's school or other place of care has been closed, or the childcare provider of such child is unavailable due a COVID-19 related emergency declared by a Federal, State or local authority.
 - The position held by the employee when the leave commenced does not exist due to economic conditions or other changes in operating conditions of the employer that affect employment and are caused by a public health emergency during the period of leave.
 - The employer makes reasonable efforts to restore the employee to a position equivalent to the position the employee held when the leave commenced, with equivalent employment benefits, pay, and other terms and conditions of employment.
 - If the reasonable efforts of the employer fail, the employer makes reasonable efforts to contact the employee if an equivalent position described becomes available. This "contact period" remains in effect for the one-year period beginning on the earlier of: (a) the date on which the qualifying need related to a public health emergency concludes; or (b) the date that is 12 weeks after the date on which the employee's leave commences.

FFCRA Benefits 100% Funded by Government through Tax Credits

Refundable tax credit for 100% of qualified paid sick and family leave wages an employer pays for each calendar quarter. Tax credits also available for self-employed individuals.

Sick Leave, Disability Accommodations and other Applicable Laws

While FFCRA provides emergency relief through December, employers should be aware of laws that are applicable generally, as well as any temporary changes mandated by FFCRA. Make sure employee handbook policies are current, compliant and consistently enforced. Employers who provide group health insurance should discuss with their insurers and legal counsel how to handle during "inactive" employment.

1. **Paid Sick Leave:** Employers covered by state or local paid sick leave laws should be aware of and comply with the mandates. Under the Chicago and Cook County Earned Sick Leave Ordinances, employees (including part-time and most seasonal employees) earn 1 hour of paid sick leave per 40 hours worked, for a maximum of 40/year.
2. **Disability Laws:** The Americans with Disabilities Act (ADA) (for employers with 15+ employees) prohibits discrimination against individuals with disabilities and requires reasonable

accommodations (including medical leave.) The law also prohibits adverse action against individuals who have a history of a disability, or who are "regarded as" having a disability, as well as employees "associated" with a person with disabilities (e.g. ill spouse or child.)

3. Confidentiality: The ADA restricts the medical information that employers may obtain, and requires that all employee medical information be kept confidential and separate from the employee's personnel file. This can be challenging when an employer learns that an employee has a contagious illness, such as COVID-19. If the employer learns that its workforce may have been exposed to COVID-19, the employer should simply tell employees generally of the exposure or potential exposure (and precautions to take), but not provide information that would identify the individual employee.

Direct Threat: The law gives employers the ability to assess whether an employee is a "direct threat." This is defined as "[a] significant risk of substantial harm to health or safety of self or others that cannot be eliminated or reduced by reasonable accommodation." If the employer learns that a particular employee is infected or has been exposed to COVID-19, the employer can send the employee for a medical evaluation to determine the extent of the risk to other employees and how best to accommodate the employee who is ill.

Whether a direct threat exists depends on an individualized assessment of the employee's present ability to perform the essential functions of the job safely, based on medical judgment and current medical information. The doctor should also review the patient's job description and determine whether there are any "reasonable accommodations" that would reduce or eliminate the risk of harm. I recommend using a medical certification form for the medical provider to complete.

Temperature Checks: Employers can require current employees to undergo medical examinations (including temperature checks) if the examinations are "job-related and consistent with business necessity." The same applies to job applicants after a conditional job offer is made and only if required of all applicants for the position. The Equal Employment Opportunity Commission has confirmed that employers can take temperatures of all employees during this COVID-19 pandemic.

Similar laws exist in many other states and cities. All Illinois employers (with 1 or more employee) are covered by the Illinois Human Rights Act provisions on disability discrimination and accommodations

EEOC Guidance

The EEOC has provided guidance (a publication entitled Pandemic Preparedness in the Workplace and the Americans With Disabilities Act), consistent with these workplace protections and rules, that can help employers implement strategies to navigate the impact of COVID-19 in the workplace.

The World Health Organization (WHO) has declared COVID-19 to be an international pandemic. The EEOC pandemic publication includes a separate section that answers common employer questions about what to do after a pandemic has been declared. Applying these principles to the COVID-19 pandemic, the following EEOC FAQ may be useful:

- **How much information may an employer request from an employee who calls in sick, in order to protect the rest of its workforce during the COVID-19 pandemic?**

During a pandemic, ADA-covered employers may ask such employees if they are experiencing symptoms of the pandemic virus. For COVID-19, these include symptoms such as fever, chills, cough, shortness of breath, or sore throat.

Employers must maintain all information about employee illness as a confidential medical record in compliance with the ADA.

- **When may an ADA-covered employer take the body temperature of employees during the COVID-19 pandemic?**
 - Generally, measuring an employee's body temperature is a medical examination. Because the CDC and state/local health authorities have acknowledged community spread of COVID-19 and issued attendant precautions, employers may measure employees' body temperature. However, employers should be aware that some people with COVID-19 do not have a fever.
 - **Does the ADA allow employers to require employees to stay home if they have symptoms of the COVID-19?**
 - Yes. The CDC states that employees who become ill with symptoms of COVID-19 should leave the workplace. The ADA does not interfere with employers following this advice.
 - **When employees return to work, does the ADA allow employers to require doctors' notes certifying their fitness for duty?**
 - Yes. Such inquiries are permitted under the ADA either because they would not be disability-related or, if the pandemic influenza were truly severe, they would be justified under the ADA standards for disability-related inquiries of employees. As a practical matter, however, doctors and other health care professionals may be too busy during and immediately after a pandemic outbreak to provide fitness-for-duty documentation. Therefore, new approaches may be necessary, such as reliance on local clinics to provide a form, a stamp, or an e-mail to certify that an individual does not have the pandemic virus.
 - **If an employer is hiring, may it screen applicants for symptoms of COVID-19?**
 - Yes. An employer may screen job applicants for symptoms of COVID-19 after making a conditional job offer, as long as it does so for all entering employees in the same type of job. This ADA rule applies whether or not the applicant has a disability.
 - **May an employer take an applicant's temperature as part of a post-offer, pre-employment medical exam?**
 - Yes. Any medical exams are permitted after an employer has made a conditional offer of employment. However, employers should be aware that some people with COVID-19 do not have a fever.
 - **May an employer delay the start date of an applicant who has COVID-19 or symptoms associated with it?**
 - Yes. According to current CDC guidance, an individual who has COVID-19 or symptoms associated with it should not be in the workplace.
 - **May an employer withdraw a job offer when it needs the applicant to start immediately but the individual has COVID-19 or symptoms of it?**
 - Based on current CDC guidance, this individual cannot safely enter the workplace, and therefore the employer may withdraw the job offer.
4. FMLA: For employers with at least 50 employees working within 75 miles, the federal Family and Medical Leave Act (FMLA) applies. This allows eligible employees to take up to 12 weeks of unpaid leave for his or her own "serious health condition" or that of a spouse, parent or child. To be eligible, employees must have worked for the employer for at least 12 months and have at

least 1250 hours of service during the prior 12 months. Certain state and local laws also provide for paid or unpaid medical leave.

5. Health and Safety: Employers have a duty to provide a working environment "free from recognized hazards that are causing or are likely to cause death or serious physical harm to its employees," per the Occupational Safety and Health Act (OSHA) and state and local laws. The CDC has issued some interim guidance for employers to help prevent workplace exposures in general work settings (outside health care workplaces.)

CDC recommends the following (full details on its website):

- Actively encourage sick employees to stay home. Employees with symptoms of acute respiratory illness should not come to work until they are free of fever, signs of a fever, and any other symptoms for at least 24 hours, without the use of fever-reducing or other symptom-altering medicines.
- Separate sick employees. Employees who appear to have acute respiratory illness symptoms, such as cough or shortness of breath, should be separated from other employees and sent home immediately.
- Employees should be instructed to notify their supervisors if they have family members with COVID-19 and to refer to CDC guidance on conducting a risk assessment of their potential exposure.
- Emphasize respiratory and hand hygiene. You can use posters that encourage staying home when sick, cough and sneeze etiquette, and hand hygiene. Provide tissues and no-touch disposal receptacles for use by employees.
- Routinely clean all frequently touched surfaces in the workplace, such as workstations, countertops, and doorknobs.

Furloughs, Layoffs and Unemployment Claims

Many employers are struggling with work slowdowns, decreased business and challenges with continuing to pay workers. Options for dealing with these issues include layoffs, reduced schedules, and furloughs (unpaid leave.) Decisions that affect only certain employees should be based on business/operational reasons (e.g. related to employees' duties and company needs, or based on tenure), and not for legally protected reasons (e.g. gender, age.)

These employees will generally be eligible for full or partial unemployment compensation, dependent on state law. In many states like Illinois, if an employee has worked at least 30 work days for an employer, and is earning less than the applicable state weekly unemployment benefit, she can apply for partial unemployment benefits to make up the difference. FFCRA provides funding for emergency grants to states for processing and paying unemployment insurance benefits.

Additionally, the Illinois Department of Employment Security (IDES) issued emergency rules to support workers who are temporarily jobless due to the pandemic. IDES has waived the standard requirement that claimants certify weekly that they are able, available for, and actively seeking work. Instead, the employee will be considered as actively seeking work as long as he is prepared to return to his job when the employer reopens.

Unemployment benefits are also available to employees diagnosed with COVID-19, or must stay home to care for an infected spouse, parent or child, or because of a government-imposed or government-recommended quarantine. An individual in any of those situations would be considered to be unemployed through no fault of his or her own. These individuals would have to certify that they are able and available for work, but this could include work that could be performed from home (e.g., virtual assistant services, data entry) for which there is a labor market for that work.

Employees who quit their job because of general concerned over COVID-19 would not be eligible for unemployment benefits. This is considered leaving work voluntarily without a good reason attributable to the employer.

Small Business Disaster Loan Assistance

The SBA has announced assistance for small businesses in affected states and counties through economic injury disaster loans, including Cook County. Loans amounts are up to \$2,000,000, with a 3.75% interest rate for small businesses, and 2.75% for non-profits More details at:

<https://disasterloan.sba.gov/ela/Declarations>

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