

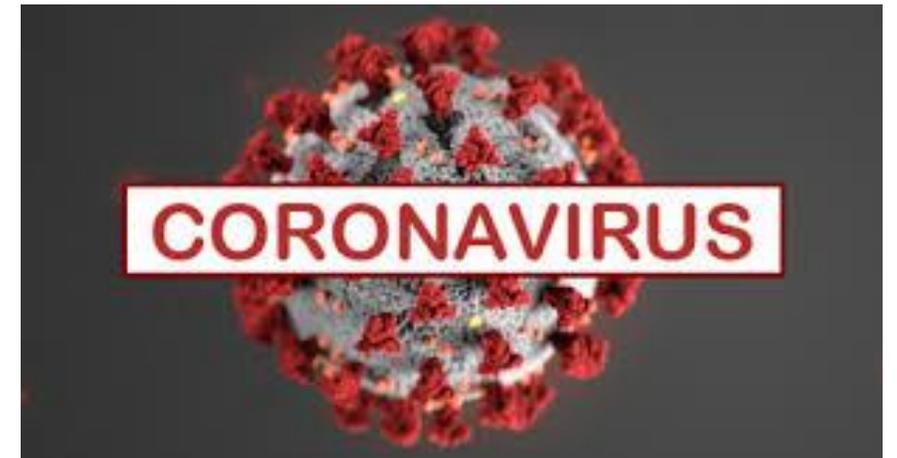


# Return To Work: Employee Considerations

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# Today's Goals

1. Return-to-Work Concerns
2. Safety Considerations
3. Illness Concerns
4. Families First Coronavirus Response Act



# COVID-19 - Legal Risks

**The wave of COVID-19 litigation is not coming --- it has arrived!!**

- FFCRA Violations
- ADA
- FMLA
- Discrimination and Harassment
- Wage & Hour Violations
- OSHA
- Public Policy Violations
- NLRB Charges

# Return-to-Work Concerns

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# Is the Employee Required to Return-to-Work?

Yes, with some notable exceptions, including:

- FFCRA
- FMLA (concurrent use of PTO, STD, Workers' Compensation)
- State, County or Local Mandates
- ADA
- Company Policy (including PMLA)
- Unpaid LOA (insurance, UIA, restoration rights)

# What if the employee refuses to come in because they are making more \$\$ through unemployment?

- Document in writing the RTW request;
- Employee may not be entitled to UIA;
- Do not threaten – simply advise how you will respond to UIA inquiry;
- Discuss COBRA (\$\$ now employee must pay for insurance \$\$); and
- Discuss restoration/re-hire rights.

# What if the employee is fearful to return?

This requires personal communication with the employee:

- Respond with empathy.
- Discuss your company's safety measures: cleaning and disinfecting, staggering shifts, changing physical layouts, etc.
- Describe the real business reason for bringing them back (telework not a reasonable long-term solution);
- Discuss your company's record: no cases, limited cases, no cases since a certain date, no hospitalizations;
- Get to the bottom of their specific concern
  - Does the reason require an ADA accommodation (difference between I am fearful and I have anxiety attacks)?  
Note: 1 in 5 U.S. adults experience mental illness each year.
  - Is this covered under FMLA?
  - Covered by Non-FMLA LOA?
- Be consistent in your approach and response!!!

# What if the employee discloses that he/she is immunocompromised?

- Go through the ADA interactive dialogue to find out if he/she needs accommodations.
- Accommodations could include:
  - Look for a mask that is made of a moisture-wicking and breathable fabric;
  - Use a bandana or neck gaitor;
  - Use a Plastic Face Shield;
  - Telecommuting;
  - Obtain Options from his/her physician; or
  - Leave of Absence.
- Is this covered by the FMLA? STD?
- Is this covered by the FFCRA?

# Safety Considerations



# How will you keep me safe?

- Follow ALL Guidelines and Requirements:
  - State Requirements;
  - County Requirements;
  - City Requirements;
  - CDC Guidelines
- Recognize Guidelines and Requirements Frequently Change (e.g. mask requirements, isolation periods)
- Communicate Efforts to Employees (early and often)
- Be Open to Adapt and Improve

# Will everyone wear a mask? What if an employee refuses?

- Follow ALL Guidelines and Requirements:
  - State Requirements;
  - County Requirements;
  - City Requirements;
  - CDC Guidelines
- Recognize the need for possible accommodations
- Be able to communicate the “why” for this safety precaution
- Be consistent in your approach and response!!!

# Can you ask employees about symptoms and health information?

- EEOC has approved this practice in pandemic situations
- But make certain your company is ensuring:
  - Consistency
  - Confidentiality
  - Even-handed application (no discrimination)
  - Making decisions by facts, not stereotypes

# Can you take temperatures?

EEOC has approved this practice in pandemic situations but do not forget the “other” issues related to taking temperatures:

- determining how you are going to do this (e.g. before entry, 6 feet separation, administered by one person);
- providing PPE to the screener;
- pre-planning as to how you are going to treat people with a temperature (e.g. simply send home, allow re-test (the dreaded hoodie effect));
- ensuring consistency to avoid claims of discrimination
- paying the employee for the time spent taking the test
- ensuring social distancing of 6 feet if lined up for the test
- being prepared for or proactively addressing employee morale issues for having to take their temperature recorded; and
- understanding that this may provide a possible false sense of security because a fever is not necessarily required to be positive for COVID-19.

# Can you require COVID-19 testing?

Yes, this is allowed by the EEOC in pandemic situations but ensure that your company is implementing best practices:

- Ensure consistency in the enforcement. For example, require all employees that have reported symptoms to be tested and not just attendance violators or persons you do not believe are being honest (so you can avoid claims of discrimination for age, disability or otherwise).
- Identify that you are only seeking a viral test. Please note the current EEOC Guidance only addresses COVID-19 testing and not necessarily the expanded antibody testing.
- Identify a person or persons that will address this on behalf of your company and ensure confidentiality of any testing results.
- Keep in mind the limitations in testing in that “accurate testing only reveals if the virus is currently present; a negative test does not mean the employee will not acquire the virus later.”
- Regardless of testing, appropriate infection controls still need to be in place and followed.
- Recognize application if FFCRA is sent home in response to state or local quarantine order.

Finally, the State has even set up a website identifying possible testing locations at [www.Michigan.gov/CoronavirusTest](http://www.Michigan.gov/CoronavirusTest). Interested persons are encouraged to first contact their health care provider or testing site before going to be tested.

# Illness Considerations

**COVID 19**  
CORONAVIRUS DISEASE

## STOP THE SPREAD OF GERMS

Help prevent the spread of respiratory diseases like COVID-19.

- Avoid close contact with people who are sick.
- Cover your cough or sneeze with a tissue, then throw the tissue in the trash.
- Avoid touching your eyes, nose, and mouth.
- Clean and disinfect frequently touched objects and surfaces.
- Stay home when you are sick, except to get medical care.
- Wash your hands often with soap and water for at least 20 seconds.

For more information: [www.cdc.gov/COVID19](http://www.cdc.gov/COVID19)

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# Will I get time off or get paid if I get sick?

- FFCRA
- FMLA
  - Possibly Compensated through:
    - concurrent use of PTO;
    - STD
    - Workers' Compensation
- PTO, Sick Time, Vacation or Other Paid Time Off (including PMLA)
- Non-FMLA LOA
- Unpaid LOA (insurance, UIA, restoration rights)

# What if someone in my family gets sick and I have to care for them?

## FFCRA:

- Possible coverage under the Emergency Paid Sick Leave  
Reason 4: Caring for someone who is subject to a government quarantine or isolation order or have been advised by a health care provider to quarantine or self-isolate.
- Need to document:
  - Name and relationship of the person caring for; and
  - Name of Government Entity or Health Care Provider:
- Code Payroll Time to received FFCRA Credit

## FMLA:

- Possible coverage to care for the employee's spouse, son, daughter, or parent who has a serious health condition.

# What if my co-worker gets sick? How will I know?

- CDC obligations regarding performing risk assessment
- Possible Self-Quarantine for 14 days Since Exposure
- Monitor Symptoms
- Protect Employee's Confidentiality

# Families First Coronavirus Response Act



# FMLA vs EFMLEA vs EPSLA

FMLA	FMLA Expansion Act	Emergency Paid Sick Leave Act
12 months and 1,250 hours worked	Employees working for 30 days	All employees
	Must be unable to work (or telework) AND	Must be unable to work (or telework) AND
	Must be caring for a minor son or daughter because the child's school or place of care is closed or unavailable due to a declared health emergency for COVID-19 by a Federal, State, or local authority	Must fall into one of six categories (1) Employee subject to quarantine from government (2) Employee subject to quarantine from health care provider (3) Employee has COVID-19 symptoms and seeking diagnosis (4) Employee is caring for individual subject to quarantine (5) Employee is caring for child because school or childcare is closed for COVID-19 (6) Employee has another similar condition specified by DHHS

# Extended FMLA–Benefits & Caps

FMLA	FMLA Expansion Act	Applicable Caps
Entire Period is Unpaid	First 2 Weeks:  Unpaid	May be eligible for paid leave under Emergency Paid Sick Leave  2/3 regular rate - capped at \$200 per day
	Remaining 10 weeks:  Employee would be entitled to receive 2/3 of regular rate	Capped at \$200 per day
		\$10,000 in the aggregate for entire duration if only used FMLA Expansion Act or \$12,000 if employee used FMLA Expansion Act and Emergency Sick Leave
		*Could require employee to use PTO to make up the difference

# Emergency Paid Sick Leave – Benefits & Caps

REASON	BENEFIT AND CAPS
Required to quarantine or isolate by Federal, State, or local officials because of COVID-19;	Full regular rate of pay capped at \$511 per day and \$5,110 in the aggregate
Advised by a health care provider to self-quarantine because employee may have COVID-19 or was exposed;	
Experiencing symptoms of COVID-19 and seeking a medical diagnosis;	
Caring for an individual who is subject to a quarantine order by government officials or a health care provider;	Two-thirds of the regular rate of pay capped at \$200 per day and \$2,000 in the aggregate
Caring for a son or daughter because the child’s school or place of care has been closed or is unavailable due to COVID-19 precautions;	
Condition specified by the Secretary of Health and Human Services in consultation with the Secretary of the Treasury and the Secretary of Labor.	

# HYPOTHETICAL 1

- Employee earns \$80,000/year (\$38.46 per hour)
- Employee has been diagnosed with COVID-19
- Employee cannot work from home
- First two weeks (up to 80 hours) under the Employee Paid Sick Leave Act at full regular rate
- \$307.68 per day (less than \$511 per day cap)
- Total Benefit = \$3,076.80 (80 hours x \$38.46)

# What happens when the planned school year ends, will the employee still be entitled to time off?

- Care for a minor child whose school **or** child care service is closed due to COVID-19 precautions.
- Need to Document:
  - Name and age of the child being cared for;
  - Name of school, place of care, or child care provider that closed or became unavailable due to COVID-19 reasons;
  - Employee to certify there is no other suitable person available to care for the child during the period of requested leave;
  - If the child is older than 14 years old, need to identify the reasons care is needed

# HYPOTHETICAL 2

- Hourly employee's 9-yr old child's school closed down until June 8<sup>th</sup>
- Summer Camp also closed due to COVID-19
- Employee is unable to work at home because home-schooling child and then due to lack of childcare
- Employee earns \$18/hour (\$144 per day and \$720 per week)
- First Two weeks (up to 80 hours) the Employee Paid Sick Leave Act
  - For week 1:  $2/3$  of daily rate (\$144) = \$96.00 per day (below the \$200 cap)
  - For week 2:  $2/3$  of daily rate (\$144) = \$96.00 per day (below the \$200 cap)
- Remaining 10 weeks under the FMLA Expansion:
  - $2/3$  of daily rate (\$144) = \$96.00 per day (below the \$200 cap)
- 12 weeks for a total of \$8,640 (below the \$12,000 cap)
- Can require PTO to be used for remaining  $1/3$  difference

# Can FFCRA be taken intermittently?

- Intermittent leave is an option and not a requirement. In other words, you as the employer must agree.
- If there is an agreement to use it intermittently, confirm this agreement in writing (including the time increments).
- Be Consistent!
- Intermittent leave is limited to leave for paid sick leave or expanded family and medical leave is only to care for the employee's son or daughter whose school or place of care is closed, or whose child care provider is unavailable.
- The goal of allowing the FFCRA leave is to stop the spread of COVID. Therefore, intermittent leave, even if agreed to by the employer, is NOT allowed for any employees who **report to an employer's worksite**, if the leave is taken because the 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 due to concerns related to COVID-19;
  - (3) Is experiencing symptoms of COVID-19 and is taking leave to obtain a medical diagnosis;
  - (4) Is caring for an individual who either is subject to a quarantine or isolation order related to COVID-19 or has been advised by a health care provider to self-quarantine due to concerns related to COVID-19; or
  - (5) is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services.

# Can an employee take FFCRA if off on unemployment?

- The two do not work together
- FFCRA benefits under either Expanded FMLA or Emergency Paid Sick Leave Act are for employees only
- Unemployment is for former employees (layoff, furlough, termination)



# *LIGHTNING* ROUND



## Other Common FFCRA Questions

- Can you take EPSLA for two different reasons?
- Is there a 12-week cap for FMLA and EFMLEA?
- Is there a 12-week cap for FMLA and EPSLA?
- Can I require an employee to use PTO to cover unpaid time for EFMLEA?
- What happens if the employee cannot give me the supporting documentation?

# Questions?

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