



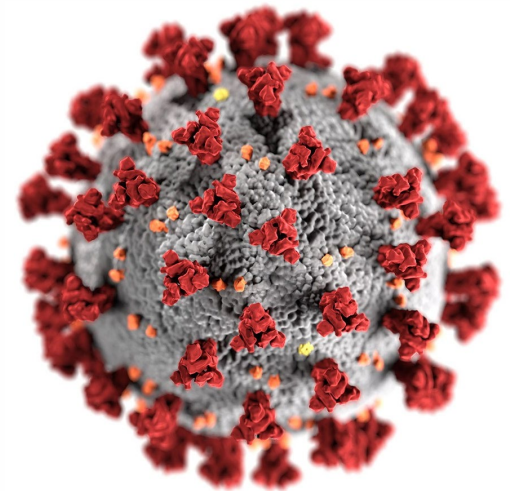
HR ISSUES IN A COVID-19 WORLD

A Roundtable Discussion

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Does the ADA interactive process apply for people saying they must continue to telework due to medical conditions and COVID-19?

- (ADA) does not grant an employee a general right to refuse work due to a disability. And, a generalized fear of COVID-19 is not, in and of itself, a covered disability under the ADA.
- However, consider the refusal as an indicator that there may be a reason for the fear and refusal to work – Inquire about why ...
- If the refusal is based on a medical condition or other covered disability, OR if caring for vulnerable individual in the home
- You are in ADA-Land, and the Interactive Process is triggered.
 - As part of the interactive process, discuss all workplace protocols that are in place to reduce the risk of COVID-19 (e.g., PPE, social distancing, etc.)
 - If the employee still refuses to return to work, the employer may require a medical certification of the employee's alleged restrictions – BUT ...
 - If accommodation is made, place a time limit for re-assessment

Would an employee who is afraid of coming to work be eligible for Emergency Paid Sick Leave under FFCRA?

- No, an employee's concern for contracting the virus is not included within the six allowable reasons for leave. The employee, however, may be eligible for leave under another employer policy (such as a leave of absence, accrued vacation, etc.) as per the requirements of that policy.
- If an employee's fear, however, is related to a serious health condition, they may be eligible for traditional FMLA leave. Normal notice and certification procedures would be followed for that determination.
- An employee's fear, if related to a serious health condition, the ADAAA interactive process may also be triggered.

How do we handle an employee who refuses to return to work?

- Absent an ADA-covered situation ...
- An employee generally does not have the right to refuse work because of a potentially unsafe condition in the workplace.
 - That said, an employer may not discriminate against an employee who exercises “any right afforded” by OSHA.
 - Under OSHA, an employee may only refuse to come to work if:
 - He/she asked the employer to eliminate a hazard in the workplace but the employer has failed or refused to do so;
 - He/she has a “good faith” belief that an imminent danger exists;
 - A “reasonable” person would agree there is a “real danger” of death or serious injury; AND
 - There is no time to get the hazard corrected through appropriate channels (i.e., OSHA inspections, etc.).

How do we handle an employee who refuses to return to work?

- Employers should undertake and, most importantly, document the following steps, as suggested by OSHA:
 - Assess the level of risk of COVID-19 exposure for each of their employees based on OSHA's employee exposure chart;
 - Train employees about and enforce rules/policies pertaining to proper workplace sanitation and hygiene (e.g., wash hands for 20 seconds, use hand sanitizer regularly, etc.);
 - Assess and provide employees with appropriate PPE (e.g., face coverings, gloves, gowns, respirators, etc.) and train on its proper use, maintenance, and cleaning;
 - If normal PPE is unobtainable due to shortages, assess and provide employees with comparable alternatives
 - Note, in most instances for employees in the low and medium exposure risk categories, N95 respirators are not necessary or recommended;

How do we handle an employee who refuses to return to work?

- Assess and implement appropriate administrative controls (e.g., temporary shutdown of nonessential activities, staggered shifts, limited customer access, one-way aisles, encouragement of sick workers to stay home, social distancing where feasible, etc.);
- Assess and implement appropriate engineering controls (e.g., exhaust or ventilation systems, physical barriers or partitions, installation of drive-thru windows for customers, etc.); and,
- Investigate and address, if necessary, internal complaints from employees about alleged workplace hazards.
- It is imperative that employers DOCUMENT their good faith efforts to reduce or eliminate COVID-19 hazards in the workplace.
- Contemporaneous documentation and implementation of these efforts is needed to meet your burden of proof in any legal challenges.

Would an employee who is afraid of coming to work and contracting COVID-19 be eligible for FFCRA emergency paid sick leave?

- No. An employee's concern for contracting the virus is not included within the six allowable reasons for leave.
- The employee, however, may be eligible for leave under another employer policy (such as a leave of absence, accrued vacation, etc.) as per the requirements of that policy.
- If an employee's fear, however, is related to a serious health condition, they may be eligible for traditional FMLA leave. Normal notice and certification procedures would be followed for that determination.

We're safe in our offices, but how do we know our employees are being safe away from the office? Can we ask where they've been?

- You are allowed to ask questions about exposure to COVID-19 during said trip. These would not be disability-related inquiries.
- You should follow the advice of the CDC and state/local public health authorities regarding information needed to permit an employee's return to the workplace after visiting a specified location, whether for business or personal reasons.
- Placing employee on precautionary quarantine status
- Consider implementing a COVID-19 Travel Restrictions policy
 - Restrict business travel as much as possible
 - Require notification prior to, and upon return, of where an employee has gone on personal travel
 - Generally cannot prohibit otherwise legal activity, such as travel abroad by an employee.
 - You can mandate screening upon return, and you can monitor those employees returning from such travel for signs of illness.

FFCRA requirements: Are the leave days taken from the employee's leave days, or does the District/Employer incur the burden?

- The **Expanded FMLA** added the lack of child care provision as a qualifying reason for granting FMLA leave.
 - Under the Expanded FMLA the first ten days (80 Hours) for lack of Child Care is without pay, covered by existing leave or Emergency Paid Sick Leave.
 - The remaining 10 weeks is paid at 2/3 salary not to exceed \$200 a day or \$10,000 total (or a total of \$12,000 if Emergency Paid Sick Leave was used) for the qualifying child care issue only.
 - an employee can choose to use their accrued paid leave to supplement the 2/3 pay and make themselves whole, or use 100% of their accrued paid leave, and save the Expanded FMLA for use another time before December 31, 2020.
- Covered employers are responsible for paying out **FMLA+** leave
 - Private sector employers can get a dollar-for-dollar payroll tax credit
 - Public sector employers do not qualify for the payroll tax credit

FFCRA requirements: Are the leave days taken from the employee's leave days, or does the District/Employer incur the burden?

- Emergency Paid Sick Leave (**EPSL**) pays for 2 weeks (80 hours) of leave for:
 1. Quarantine,
 2. advised by a health care provider to quarantine,
 3. experiencing symptoms that may be related to COVID,
 4. caring for someone in category 1 or 2,
 5. the lack of child care or
 6. experiencing substantially similar symptoms.
- Under EPSL an employee can use intermittent leave only for reasons 4 or 5, reasons 1-3 and 6 must be taken in full day increments.
- Employees should be paid their regular rate for categories 1-3 and for categories 4-6 at 2/3 regular rate. For categories 1-3 not to exceed \$511 for per day or \$5,110 and for categories 4-6 \$200 per day not to exceed \$2000.
- Covered employers are responsible for paying out EPSL leave
 - Private sector employers can get a dollar-for-dollar payroll tax credit
 - Public sector employers do not qualify for the payroll tax credit

Are there any parameters to curtail abuse of the FFCRA, EPSL and FMLA+ ?

- DOL's guidelines - employer can request documentation from an employee prior to taking leave of absence under both the Emergency FMLA Expansion and the EPSLA.
 - employers may want to take a more flexible approach and err on the side of providing the leave of absence.
 - advise employees that the employer reserves the right to request those documents at a later date or when the employee has access to them.
- Ask for a detailed explanation of the reasons an employee cannot work including, if possible, specific, verifiable details (e.g., specific symptoms, circumstances of exposure, age of any children, identity of childcare provider, etc.).
- Clearly document with the employee the reason the employee is requesting for the leave and have this confirmed in writing by the employee.
- If you later learn that the reason was not legitimate then consider disciplinary action at that time.

If temperature checking employees before the workday, does NM require that temperature readings are recorded?

- Order: businesses permitted to operate must do so in compliance with COVID-Safe Practices in "All Together New Mexico: COVID-Safe Practices for Individuals and Employers"
 - *(Public Health Order; June 30, 2020; effective through July 15, 2020)*
- COVID-Safe Practices for Individuals and Employers: "Screen employees before they enter the workplace each day (verbally or with a written form or text-based or other app)."
- Additional industry specific guidance contained in the document
- Keeping written records is important as evidence – "if it's not written down, it never happened."
- Records are PHI, covered by HIPAA – must be kept in a highly secured and confidential file, usually in HR with other employee medical records.

Can we require employees who have been away from the workplace during a pandemic to provide a fit-for-duty certification?

- Yes, but it is best to have a “Fitness for Duty Certification” policy in place.
- Employers can require employees who have been away from the workplace during the COVID-19 pandemic to provide a doctor’s note certifying fitness to return to work.
- Such inquiries are permitted under the ADA either because they would not be disability-related or, with COVID-19, they would be justified under the ADA’s direct threat 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 this pandemic to provide fitness-for-duty documentation.

When recalling employees to work, do we need to have the employees complete new hire paperwork?

- Again, in a shocking development, “It depends.”
 - Furlough or Temporary Layoff – the are different
 - What did your furlough/layoff letter say? FT, or PT?
- Furlough – employee still in employment status, on payroll
 - Benefits eligibility, etc.
 - Expectation is that the employee will return
 - Generally, “new hire paperwork” not required
 - Issue conditional letter of offer to return to work – EE signature
- Layoff – employee is removed from payroll, separated from employment
 - Issue conditional letter of offer as with new hire – EE signature
 - Best practice is to follow normal hiring procedures

When recalling employees to work, do we need to have the employees complete new hire paperwork?

1. Determine employment application and benefits enrollment requirements for rehired workers.
2. Decide whether full or adjusted orientation procedures will be utilized.
3. Submit new-hire reports for new and rehired workers.
4. Notify state unemployment agencies of recalled workers, whether rehired or not.
5. Address I-9 issues
 - If completed remotely, complete in person upon return to the workplace.
 - Update any expired work authorization documents or make note of which need updating as soon as new documents are received by the employee.
 - Determine if you will have employees complete Section 3 of their original I-9 or complete a new I-9 form.

What should I do if an employee is diagnosed with COVID-19?

If one of your employees has a confirmed COVID-19 diagnosis, you should:

- Follow guidelines set by state and local authorities
- Ask the infected employee to work from home or take sick leave for fourteen (14) days.
- Ask the infected employee to identify all individuals who worked in close proximity in the previous fourteen (14) day period. Once identified, you should ask these individuals to also work from home or take sick leave for fourteen (14) days.
- While not a requirement, you should communicate to the workforce that an individual in the company has been diagnosed with COVID-19. Do not identify by name the infected employee, or you could risk a violation of confidentiality laws.
- Employees should be prohibited from entering the workplace until a deep cleaning can be executed.
- Recommend those who can work remote do so if you have not already.

How do FFCRA requirements interact with CBAs?

Compliance with the FFCRA will affect the terms and conditions of the CBA, you may be required to provide notice and the opportunity to bargain to the union over any required changes to the contract.

- Determine obligations to bargain when implementing changes to mandatory bargaining subjects such as wages and benefits.
- Identify the need to add a force majeure clause into a CBA to protect the employer from contractual obligations during an event that is beyond the employer's control.
 - "an event or effect that can be neither anticipated nor controlled."
- Review existing no-strike clauses to ensure continued work during future infectious disease outbreaks.
- Determine obligations for hazard pay under Section 502 of the National Labor Relations Act (NLRA) during "abnormally dangerous conditions."

Are Remote Teleworkers Covered Under Workers' Compensation?

- **Yes. In general, an employee injury or illness is compensable under workers' compensation** if it arises out of and in the course of employment, regardless of the location the injury occurs.
- **OSHA General Duty Clause applies** to home-based workers.
- Employees typically have the burden of proving that the injury is work-related.
- Courts have found that the hazards an employee encounters when performing work at home are also hazards of their employment.

What employment policy changes should we be making?

- FFCRA policies for EPSL and FMLA+
- Paid-leave policies adjusted to reflect regulatory requirements and actual business needs.
- Attendance policies relaxed to encourage sick employees to stay home.
- Time-off request procedures clarified to indicate when time off can be required by the employer, should sick employees need to be sent home.
- Flexible scheduling options implemented allowing for compressed workweeks and flexible start and stop times.
- Meal and rest break policies adjusted to stagger times and processes implemented to encourage physical distancing.

What employment policy changes should we be making?

- Travel policies updated to reflect essential versus nonessential travel and the impact of domestic or global travel restrictions.
 - Travel Restrictions Policy – business and personal travel
- Telecommuting policies detailed to reflect the type of work that is able to be done remotely and the procedures for requesting telework.
- Information technology policies revised to reflect remote work hardware, software and support.
- A general contagious communicable diseases policy to address employees with infectious, long-term, life-threatening, or other serious diseases or illnesses
- Infectious exposure control – PPE, cleanup, etc.
- Policies and procedures for layoff and furlough in business downturn

If the company does not have forty (40) hours of work for my employees right now, what are our options?

- **Keep pay as is.** Pay exempt employees their full salary. Pay non-exempt employees for the hours they are normally and regularly scheduled to work.
- **Reduce non-exempt employees' hours** and pay them for the hours that they actually work.
- **Reduce exempt employees' hours** and reduce their salary accordingly. Remember to keep the salary above the applicable State and/or Federal threshold to maintain exempt status.
- **Temporarily convert exempt employees to non-exempt**
- **For practitioners of law or medicine** - The requirements of § 541.300 and subpart G (salary requirements) of this part do not apply to the employees described in this section.

If you decide to reduce hours or wages, the intention to reduce should be communicated to employees and should not become effective until the payroll following the communication.

Are there wage and hour issues we need to worry about?

- Clearly define expectations and requirements for employees who work from home.
 - Timekeeping, OT, safety, working off the clock
- Work Schedules – many states and local governments have laws re:
 - notice of scheduled changes
 - reporting to work but not provided a full shift of work
- Temperature screenings, medical questionnaire – compensable
- Temporary workers – employee v. independent contractor
- Compensation Changes – policies, contracts, etc.
 - Reduction in hours or pay for non-exempt
 - Issues with exempt employees –
 - Improper deductions
 - Prospective reduction in salary – economic slowdown
 - Temporary conversion to non-exempt – econ. slowdown

Are there wage and hour issues we need to worry about?

- Compensation Changes – continued
 - Determine if employee status changes—exempt to nonexempt or full- to part-time status—are needed to reopen or if those already made will continue.
 - How you will handle any missed annual pay increases and if those will be applied retroactively.
 - Will any pay cuts be made or revoked? (Exempt issues)
 - How will bonuses be affected, including eligibility for or continuation of, etc.
 - Will hazard pay or “COVID response pay” be offered or revoked?
 - Consider a pay equity audit as workers return, as pay may have been reduced or frozen and may have impacted women, minorities, etc. differently.

Can I ask an employee who is coming into the workplace if they have family members who have COVID-19 or associated symptoms?

- Only asking an employee about contact with family members unnecessarily limits the possible extent of an employee's potential exposure to COVID-19.
- A better question is whether an individual has had contact with
 - anyone who the employee knows has been diagnosed with COVID-19, or
 - who may have symptoms associated with the disease.
- The EEOC has said this general question is sounder, as the Genetic Information Nondiscrimination Act prohibits employers from asking employees medical questions about family members.

Are employers required to provide hazardous duty pay to employees due to COVID-19 concerns?

- The U.S. Department of Labor does not regulate hazard pay and does not require that employers provide hazard pay.
- An employee is only entitled to hazard pay either through an employment agreement, or in specific instances, where provided by statute.
- In the current COVID-19 situation, if you decide to give certain workers “premium pay,” give it a name other than “hazard pay,” or “hazardous duty pay.” One term we’ve heard used that we like, is “COVID-19 Response Pay.”
- While employers may not be required to give additional pay, it may be beneficial in the long run for public relations and employee recruitment and retention purposes.

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