Frequently Asked Questions about COVID-19 and Return to Work

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1. Can employees be asked to work through a payroll suspension?

Question: A small employer in Oregon asks if it can ask employees to work through a payroll suspension. If so, how long can employees be asked to work before compensation is required?

Answer:
State and federal law require that employees be paid at least the minimum wage for all hours worked. Employers covered by both the state and federal minimum wage laws must follow the law that is more favorable to the employee and pay the more generous state rate. The state law covers all public and private employers, regardless of size.
"Hours worked" includes all time an employee must be on duty, on the employer's premises, or at any other prescribed place of work, as well as any additional time the employee is permitted to work.
According to OR Rev. Statutes, 652.120, employers must establish and maintain regular paydays and pay all employees all wages due and owing them on that day. The payday may not extend beyond a period of 35 days from the time that the employees entered upon their work, or from the date of the last regular payday. Therefore, paydays may not be more than 35 days apart. The employer may establish paydays at more frequent intervals.
Employers that violate the Oregon wage payment law are liable for unpaid wages in a civil action, plus costs, attorneys' fees, and exemplary damages of up to 30 days' wages.
Please note that this law does not prevent any employer from entering into a written agreement, prior to the rendering of any services, and mutually satisfactory with the employer's employees, as to the payment of wages at a future date.

2. Can we mandate that employees use PTO while on furlough?

Question: Absent a collective bargaining agreement (CBA) or other policy restricting paid time off (PTO) use, employers can require employees to use PTO during unpaid furloughs. However, if a CBA or other employment contract is in place, its provisions need to be reviewed to determine if they limit the employer's options in regard to furloughs.

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Answer: There are state laws that can come into play. Some states have furlough-specific laws to consider, like special notices employers must provide employees. But it's not only furlough-specific laws you should consider. For example, if the employer is in a state that requires vacation and paid time off to be paid out as wages at termination, it may be obligated to pay out the accrued paid time during the furlough if the employer does not provide a firm date for the furlough to end.
However, in states that do not require the payout of accrued time off for indefinite furloughs, some employers will allow employees to choose to use the paid time off instead of requiring the use so that employees may reserve their paid time off for later use and so that they may become eligible for unemployment compensation.

If there's no state law, existing company policy, or CBA that dictates otherwise, it is likely that you may require that employees take their paid time off before they are furloughed. Your organization should state that employees must take any paid leave first and then will be placed on an unpaid temporary leave of absence or furloughed and eligible for unemployment compensation. Note: Any paid sick leave should not be required to be used for the otherwise unpaid furlough since paid sick leave generally is reserved for use when an employee is ill or to care for an ill family member.

Most states have eliminated waiting periods and requirements that employees be actively seeking employment to make it easier for employees to receive unemployment benefits immediately upon loss of pay related to COVID-19. In addition, the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) provides for 13 weeks of $600 unemployment compensation payments (available from April 5, 2020 until July 31, 2020)

Finally, as a practical matter, not requiring the use of paid time off also helps the employer conserve cash during the economic slowdown.

3. What should an employer do if an employee whose job normally requires a lot of interaction with clients or customers wants to stay at home because the employee lives with a high-risk family members?

Question: An employee lives with his parents who are older than 60. In his line of work, he comes in contact with 200 or so people on a daily basis. His concern is related to risk because of him being in contact with so many people and afraid of exposing his parents to COVID-19. What would he be entitled to if he were to stay home due to at-risk family members living with him?

Answer: The federal Families First Coronavirus Response Act (FFCRA) does not appear to apply to this situation, though depending on future guidance from the Department of Labor (DOL) guidance and any other aid Congress passes, this could change.

You indicated the employee wishes to stay home due to the fear that he might expose his at-risk family members to COVID-19. In this particular case, according to your company's policies and practices, you might suggest that the employee use his paid time off to cover such a leave of absence, if the employee

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has any paid time off available to him. If and when the employee runs out of paid time off, you may want to consider providing additional unpaid time off if you can afford to do so for a given period, but you may have to be prepared to do so for other similarly-situated employees.

It is important to note that if you allow this employee to use his paid time off and grant him additional unpaid time off, if other employees ask for the same time you may be obligated to grant their requests or face claims of discrimination if the employees are all similarly situated.

4. If childcare centers are only taking children of essential workers, how does that affect pre-tax childcare salary reductions for nonessential workers?

Question: At this present time, childcare centers are only able to provide care to children of essential workers. If employees are NOT essential and their children can't go to childcare, is that a change in dependent care providers so that the employees can make changes to their salary reduction if they want?

Answer: Under the cafeteria plan rules on dependent care FSAs (DFSAs), a change in childcare providers is considered a significant coverage change justifying a mid-year election change.

It should be noted that DFSAs are subject to the "use-or-lose" rule, so any amounts already paid into the DFSA will be forfeited if not used for allowable dependent care expenses by the end of the year, or the date of the midyear revocation.

Unused amounts cannot be paid in cash or any other benefit. This is true whether the DFSA is funded with salary deferrals or employer compensation in addition to normal salary.

For employers of fewer than 500 employees, an employee who can no longer work because childcare is unavailable may be eligible for Emergency Paid Sick Leave under the FFCRA

It's worth noting that this would also apply if an employee pulls their child out of daycare because the daycare is closed due to COVID-19.

5. What should an employer do if an employee is showing symptoms of COVID-19 but refuses to go home?

Question: An employee dating an EMT who is tested daily and has not exhibited any symptoms. However, the employee *is* exhibiting symptoms. He's coughing and flushed, but says he is fine and won't go home. At least one other employee has left the jobsite because of this. Does the employer have any legal grounds to force the employee to go home? If they ask him to go home, and he refuses, what are

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the employer's options?

Answer: Absent a collective bargaining agreement or other contract limiting circumstances when an employee may be sent home when ill, employers have wide discretion to send employees home when they are exhibiting signs of a contagious illness. Further, the federal Centers for Disease Control and Prevention (CDC) highly recommends that employers send employees home who are exhibiting symptoms of COVID-19 and further recommends that individuals who think they may have the disease should stay home until they have no fever for at least 3 days AND no symptoms for 7 days

Employers also have a duty under the Occupational Safety and Health Act (OSH Act) to provide a workplace that is free of known hazards, including contagions such as COVID-19. Accordingly, the employer's most prudent action when faced with an employee with potential symptoms of COVID-19 is to send the employee home.

Since the employee is resisting going home even though he has symptoms, the employer should discuss why he does not want to leave work. The employer should discuss with him the CDC recommendations, the OSHA general duty clause requiring a workplace free of known hazards, the likelihood he will infect his coworkers with COVID-19 since it is highly contagious, and his coworkers' refusal to work as a result of his actions.

If the employee has paid time off available, the employer should let him know that he may use the paid time off for this absence.

If the employee does not have any paid time off available to him, his main concern may be how he can afford the time off and the status of his health insurance. If the employer is covered by the FFCRA, the employee will be eligible for paid sick leave since the law provides up to 80 hours of paid sick leave to be used if he self-quarantines for COVID-19 or has COVID-19 related illness. The employer must provide the paid sick leave for eligible employees, but it also may receive 100% of the payment back as a federal tax credit.

If the employee refuses to go home, the employer may place him on medical leave and tell him to leave immediately, or even terminate the employee for insubordination. The first option may be the preferred one since it is likely that the employee's refusal is primarily rooted in his fear of pay loss and potential job loss if he is not physically at work. Any reassurances the employer can provide may help the employee understand the seriousness of the situation, and the seriousness of potentially exposing his coworkers to this disease, and may help the employee to make the right decision to leave now. Also, the employer should remind the employee that if he is terminated for insubordination, he likely will NOT be eligible for unemployment compensation in most states.

6. If you ask employees to self-quarantine, are they covered by FFCRA?

Question: If an employer asks employees to self-quarantine, does the FFCRA apply?

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Answer: An employer can require an employee who has been exposed to COVID-19 or possibly exposed to stay home until testing results have come back. Employers generally have the discretion to require employees who may be highly contagious with a communicable disease to stay home. This action is particularly necessary with suspected COVID-19 cases since there is no vaccine or proven treatment and the disease is highly contagious. The federal CDC currently indicates that COVID-19 symptoms may take between 2 and 14 days to appear, so it is most prudent for an employee to self-quarantine for this time period, even if the employee tests negative.

An employee who is self-quarantined for a reason related to COVID-19 and who works for an employer with fewer than 500 employees likely qualifies for paid sick leave as provided by the FFCRA.

7. If an employee is out sick with COVID-19, can an employer require a doctors' note certifying fitness for duty before that employee returns? What if employees can't get the certification?

Question: Can employers require employees with COVID-19 to have a fitness-for-duty certification before they return to work? If an employer chooses to "waive" their typical doctor's note requirement amid COVID-19, can they still impose the requirement later on when things are "back to normal?"

Answer: Employers generally are allowed to require employees to provide return to work medical certification such as a doctor's note after an employee has been out sick as long as the employer implements this requirement consistently. However, as many employers are finding, getting a doctor's note during the COVID-19 pandemic, whether after a COVID-19 related absence or for some other illness, is very difficult because of state stay at home orders and closures of medical practices for nonemergent procedures and appointments. Telemedicine may be an option in some areas, but not in all. Accordingly, if the employer is experiencing problems getting medical certification for return to work, it may be advisable that the employer suspend their current medical certification requirements during the COVID-19 pandemic and then reinstate the requirement once things are more "normal."

The CDC currently recommends that employers do not require a doctor's note or a positive COVID-19 test result. Specifically, the agency states: "Employers should not require a positive COVID-19 test result or a healthcare provider's note for employees who are sick to validate their illness, qualify for sick leave, or to return to work. Healthcare provider offices and medical facilities may be extremely busy and not able to provide such documentation in a timely manner."

The Equal Employment Opportunity Commission's (EEOC) pandemic guidance also allows employers to require medical certification for return to work but recognizes the difficulty in getting the certification and suggests alternative methods for certification. Note, however, that even the EEOC's suggestions of a standard form or generic e-mail as medical certification may be difficult to get during the pandemic.

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Based on logistical problems with getting medical certification as well as potential local restrictions, the employer's best approach likely is to suspend the medical certification during this period and then reinstate it once the pandemic is over. Any temporary relaxation of medical certification requirements taken as a result of the COVID-19 pandemic may be reinstated once the pandemic is over.

8. How do we navigate revoking offers for summer jobs?

Question: We hire a significant number of seasonal staff (100+) for which recruiting began in February and we have a significant number of candidates for which offers have already been extended and accepted. Unfortunately, with the pandemic and regulations limiting gatherings and the overall safety, we are likely going to cancel the program. As such, we may need to terminate/revoke offers for these previously hired but not just started staff (originally starting May 30th or later). We have a cancellation clause in our agreement. As this is the first time we are going through this situation, we would appreciate any guidance/resources/considerations as to how to evoke this clause, what and how to communicate to affected seasonal staff and considerations if we end up not needing to terminate all previously hired staff (i.e. retain a portion to assist with a virtual event) and how to navigate that appropriately.

Answer: Rescinding job offers or acceptance letters is unfortunate and should only happen in rare instances when there are no realistic alternatives. Whether or not an employer can rescind offers of employment in light of the COVID-19 pandemic is a matter of contract law as well as practicality.

Assuming that the offers weren't contained in a formal employment agreement or a formal letter setting out terms and conditions of the employment that has already been signed and returned by the applicant, you may rescind any offers of employment. Even if you have confirmed offers in writing and the applicants have returned signed copies of your letter, you may still be able to rescind the offers based on current circumstances, depending on the terms stated in the signed documents.

You indicated that you are in Missouri. Missouri is an employment-at-will state, so unless and until it is provided otherwise, the default employment relationship is "at will." This means that either the employer or the employee may generally revise the terms of and terminate the employment relationship at any time and for any reason unless a collective bargaining agreement, employment contract, existing law, or recognized public policy provides otherwise.

In this situation, we assume that the employer and employees are not bound by an employment contract or collective bargaining agreement. If this is not the case, we recommend consulting with a legal professional in your area, as your responsibility to the applicants/employees would depend on local law and the language used in the contract itself.

Otherwise, if no employment contract or similar agreement is present, then employment is at-will and may be terminated/rescinded, even before commencement of employment.

You further stated that there is a specific cancellation clause in the camp staff agreement outlining the "at will" nature of the employer/employee relationship. You should be cautious about invoking this clause across the board for all employees/hired staff (i.e., for those that have already started and those whose offers are being rescinded), since you need to treat similarly situated employees the same.

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There is one additional caveat to bear in mind. If an applicant has been harmed by relying on the "promise" of employment, there is a legal doctrine called "promissory estoppel" that, when applied, could require the employer to either fulfill that promise and/or repay the applicant for actual losses incurred as a result of this reliance. So, for example, if an applicant quits a previous job, relocates, turns down another job offer, or otherwise incurs cost or harm due to reasonable reliance on the new employer's "promise" of employment, then the applicant ***may*** have a legal claim to be "made whole" for those losses.

Therefore, there are situations when the total rescission of an offer may subject an employer to a breach of contract claim and potential damages. If you must revoke offers of employment, you should let the applicants/hired staff know as soon as possible. You should also carefully document the situation and the reasons the offers were rescinded. You might also consider offering some type of assistance to help those affected get back into the recruiting process, if at all possible.

If some of your employees have already started working, those employees will be subject to termination and will not just have their offers of employment rescinded. In such cases, depending on the size of your company and the nature of employment, etc. employees may be eligible for benefits, etc. You should consult with your local labor law counsel before taking any adverse action against these employees, particularly if you plan to keep some employees on staff but not all of them (so you do not open yourself up to claims of discrimination).

9. What are the best practices for using hand scanners for punching in and out?

Question: We use a hand scanner to punch in and out. There are 3 scanners for each level floor and over 100 employees. Can you offer any relevant guidance to use during this time?

Answer: Employers across the US are realizing that they need to adjust workplace policies and procedures to reopen and to help prevent the spread of COVID-19. Of particular concern certainly is how employees enter the workplace and the number of people who are in the workplace at one time. Time clocks such as hand scanner can create problems, both because lots of employees are touching them and because employees must stand in close proximity to use them. However, employers can take steps to help prevent the spread of COVID-19 even using these scanners.

The COVID-19 virus has been shown to survive on plastic and other surfaces for relatively long periods of time and so can be transmitted from the surface to a person who touches the surface and then touches his or her eyes, mouth, or nose. Note, however, this type of transmission is not as effective as when a person inhales COVID-19 particles directly and likely can be largely prevented by proper sanitary precautions such as the use of hand sanitizer and/or thorough handwashing after using the hand scanner.

According to Johns Hopkins University's "Q&A How long can the virus that causes COVID-19 live on surfaces," available online at https://hub.jhu.edu/2020/03/20/sars-cov-2-survive-on-surfaces/, COVID-19 "is viable for up to 72 hours on plastics, 48 hours on stainless steel, 24 hours on cardboard, and 4

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hours on copper. It is also detectable in the air for three hours." However, the article also points out that a person is more likely to catch the virus from droplets in the air, for example standing next to an infected person who coughs, than from a surface. The virus on a surface is much less virulent and diminishes over time.

So, while COVID-19 likely can live on the hand scanner, if employees use hand sanitizer and/or wash their hands thoroughly after using the scanner, their risk of exposure will be pretty low – likely similar to going to the grocery store and touching the checkout scanners. The hand scanners also should be sanitized frequently, as advised by the manufacturer to ensure cleaners used are appropriate for the scanner.

Alternatively, the employer could temporarily switch to a different system for maintaining time records, such as using paper time records. These records may not be as accurate but if maintained by individual employees they do eliminate some of the risk of infection created by multiple people touching the scanners.

Another concern the employer should consider for COVID-19 transmission is that employees are standing too close together in large groups while waiting to use the scanner. The CDC, in its Interim Guidance for Businesses and Employers to Plan and Respond to Coronavirus Disease 2019 (COVID-19), online at https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html, provides guidance to employers in addressing COVID-19 in the workplace. The CDC's recommendations include social distancing, wearing masks, handwashing, health checks, and deep cleaning in the workplace. In addition, Texas has provided similar guidance to employers regarding precautions to take, which include social distancing by standing six feet apart and handwashing upon entering a place of business (see https://gov.texas.gov/uploads/files/organization/opentexas/OpenTexas-Checklist-Individuals.pdf).

Accordingly, to help prevent the spread of COVID-19, the employer should consider taking such actions as requiring employees to stand six feet apart while waiting to use the hand scanner and allowing for extra time for handwashing and/or hand sanitizer use after touching the scanner. The employer should provide hand sanitizer stations throughout the workplace as well. In addition, the employer may want to screen employees for COVID-19 symptoms before they enter the workplace and require masks in the workplace (also listed on the Texas guidance provided above). Employees also should practice social distancing in the workplace as much as possible, and the employer should consider staggered work times so that there are fewer employees coming into the office at one time and allow for the extra time to get through the scanner, among other precautions.

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10. What can an employer do if a pregnant employee does not want to wear a mask because it causes her anxiety even though the state mandates that employees in this industry wear masks?

Question: An employer in Illinois that is mandated to require masks has a manager that is pregnant and does not want to wear a mask because it causes her anxiety. Pregnant or not, what are the options for this employer?

Answer: If the employee is cannot "medically tolerate" wearing a mask or cloth face-covering as required by law, she likely may be allowed to not wear the mask. The employer likely may ask her to provide a doctor's note to support her inability to medically tolerate a mask.

Illinois Executive Order 2020-32, issued April 30, 2020, requires employees and individuals in a public place including a business to cover their noses and mouth with mask or cloth face-covering when they are unable to maintain a six-foot social distance. See https://www2.illinois.gov/Pages/Executive-Orders/ExecutiveOrder2020-32.aspx. So, the pregnant employee, likely would not be required to wear a mask when she is further away than six feet from other employees, such as in a private office or workspace distanced from other employees, and may only need to wear a mask when she would be closer to other employees, such as when walking through crowded common areas or on elevators between floors.

The Illinois state order also exempts employees/individuals who have a medical condition that makes them unable to wear a mask. Illinois' order specifically exempts individuals who cannot "medically tolerate" a mask or cloth face-covering. See https://www2.illinois.gov/Pages/Executive-Orders/ExecutiveOrder2020-32.aspx. Anxiety is a medical condition that may prevent individuals from being able to tolerate wearing a mask. Note, too, pregnant women also often have difficulty breathing, often related to the growing baby pressing on the diaphragm and to increased blood flow and heart functioning, and these issues could contribute to difficulty wearing a mask. Pregnancy is not currently recognized by the CDC as increasing a woman's risk for serious illness related to COVID-19, but being pregnant during this uncertain time period certainly could increase any underlying anxiety.

So, if the pregnant employee indicates she has severe anxiety or a pregnancy-related breathing problem, she likely cannot "medically tolerate" wearing a mask and the employer does not have to, and should not, require her to wear a mask in the workplace in order to comply with the Illinois order. The employer likely also may require her to provide medical certification of the underlying medical condition that is impaired by wearing a mask as well. In these situations, the employer also should limit her exposure to other employees and customers as much as possible, both to protect her and others from potential COVID-19 exposure.

If the employee cannot provide a doctor's note to support that she cannot medically tolerate wearing a mask, then the employer may want to provide her with a leave of absence. Unfortunately, though, it is difficult to predict how long the state will require masks in public, including workplace.

The employer also should discuss the possibility whether the employee can be isolated from other employees for most of the day (for example in a private office or workspace more than six feet away from other employees) and whether the employee can wear the mask for short periods of time when

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around other employees, such as during brief meetings or in common areas. These types of commonsense approach to the mask-wearing may help alleviate the employee's problems with wearing the mask for extended periods of time and still provide some protection in the workplace.

11. If an employee's preferred childcare is unavailable and the employer provides alternative options for childcare, but the employee does not want to use them, can the employee take emergency family leave?

Question: Usually during the summer, an employee's child goes to a small in-home daycare. This year, however, that daycare is unavailable due to the pandemic. Group childcare *is* available, but the employee say she does not feel comfortable allowing her son to attend childcare that is in a setting with groups that large. If there are available day care centers open and willing to accept children, must we approve the employee's request to take leave under the FFCRA to care for him? Due to her position, she is unable to telework.

Answer: Under the FFCRA, the Emergency Family and Medical Leave Expansion Act (EFMLEA) amends the Family and Medical Leave Act (FMLA) to allow employees to take emergency family and medical leave (EFML) if the school or child care provider of the employee's son or daughter has been closed or is unavailable due to a public health emergency. See 29 U.S.C. sect. 2620. So, if the employee's normal school or summer childcare is reopened, then the employee likely does not qualify for the FFCRA EFML. As an example, for the next few weeks, if the employee's son's school is closed for the rest of the school year, then the employee at least would have the FFCRA available through that date. Similarly, if the employee had her son enrolled in a summer day care program that has been closed as a result of the pandemic, the employee could then take FFCRA leave. It is less clear, however, what happens if the employer provides options for child care and the employee does not want to use them. Arguably, if the employee had other plans that were cancelled, she could use the FFCRA leave and is not required to use the employer-provided or recommended day care.

12. If two employees live together with their children from previous relationships, can we require them to take EFML at different times since one employee will be at home to care for all the children in the home?

Question: There are two employees requesting EFML. The employees are in a relationship and live together and live in the same household. They each have their own children. Can they take time off together to care for the children? Or, can we require them to take it at different times, since one employee will be at home to care for all the children in the home?

Answer: The answer may depend on whether the employees are considered co-guardians or child care providers of their partner's children. According to the DOL Families First Coronavirus Act: Questions and Answers, online at https://www.dol.gov/agencies/whd/pandemic/ffcra-questions, #69 ,employees may

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take the EFML under the FFCRA only if they are unable to work or telework and actually need to care for their child or children. If a co-parent, co-guardian or the employee's usual child care provider is available, the employee does not need to take the FFCRA leave. Specifically, the guidance states:

> #69 Can more than one guardian take paid sick leave or expanded family and medical leave simultaneously to care for my child whose school or place of care is closed, or child care provider is unavailable, due to COVID-19 related reasons?
>
> You may take paid sick leave or expanded family and medical leave to care for your child only when you need to, and actually are, caring for your child if you are unable to work or telework as a result of providing care. Generally, you do not need to take such leave if a co-parent, co-guardian, or your usual child care provider is available to provide the care your child needs.

Note, however, that this FAQ is really geared towards a situation when another parent or legal guardian is available, whether working for a single employer or working for different employers. Arguably, if these two employees do not have a legal relationship with their partner's children, they could both take the FFCRA leave to care for their own children. Of course, the employer may be able to discuss the matter with them and see if they are willing to take time off separately so at least one of them is working at any given time. The employees may be amenable to this solution, particularly if you explain that they are only entitled to 2/3 of their regular pay for the FFCRA EFML. Note, too, if the other parent of the employee's children is available to provide the care, then the employee would not be needed for the care as required by the FFCRA.

13. How can a company request a financial hardship exemption from EFML and EPSL?

Question: Hello, how can our companies in NV with 50 or less employees request to be exempt from the EFMLA or EPSL if it is a financial hardship?

Response: In response, HR Hotline provides the following information. The FFFCRA applies to employers with 499 or fewer employees and requires them to provide up to 80 hours of emergency paid sick leave and EFML (up to a total of 12 weeks of FMLA for all reasons) to care for children who are out of school or daycare because of COVID-19. Since Nevada has extended the closure of its schools through the end of the 2019/20 school year, the EFML to care for kids may become more of an issue.

The FFCRA paid leave is only required if the employee cannot work from home, and employers with fewer than 50 employees may be exempted from some of the FFCRA requirements "when the imposition of such requirements would jeopardize the viability of the business as a going concern." The exemption is only available when paid leave is requested because the child's school or place of care is closed or child care provider is unavailable due to COVID-19 related reasons. The exemption is not available for emergency paid sick leave that must be provided for other reasons such as when related to self-quarantine or care for a person who has been advised to self-quarantine due to COVID-19.

According to the FFCRA regulations, found at 29 C.F.R. sect. 826.40(b)(1), employers may consider three factors to qualify for the exemption – the financial impact of the leave on its operating capacity, the

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employee's specialized skills, knowledge of the business, or responsibilities, or the number of employees who can provide the service of the employee requesting the leave. If the employer can show any one of the three factors are at issue, the exemption will apply.

Specifically, the regulations state:

> A small business under this section is entitled to this exemption if an authorized officer of the business has determined that:
>
> (i) The leave requested under either section 102(a)(1)(F) of the FMLA or section 5102(a)(5) of the EPSLA 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;
>
> (ii) The absence of the Employee or Employees requesting leave under either section 102(a)(1)(F) of the FMLA or section 5102(a)(5) of the EPSLA would entail a substantial risk to the financial health or operational capabilities of the business because of their specialized skills, knowledge of the business, or responsibilities; or
>
> (iii) 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 labor or services provided by the Employee or Employees requesting leave under either section 102(a)(1)(F) of the FMLA or section 5102(a)(5) of the EPSLA, and these labor or services are needed for the small business to operate at a minimal capacity.

To elect this small business exemption, the employer must document the authorized officer's determination that the business is exempt because it meets one of the above criteria. The employer should not send such documentation to the federal DOL, but rather retain the records in its files. See 29 C.F.R. sect. 826.40(b)(2).

Note, too, the DOL also encourages potentially exempt employers "to collaborate to reach the best solution for maintaining the business and ensuring employee safety." (See DOL Families First Coronavirus Response Act: Questions and Answers, #59, online at https://www.dol.gov/agencies/whd/pandemic/ffcra-questions.) Covered employers are eligible for 100% tax credits for paid leave provided under the FFCRA, so they will be effectively reimbursed for the paid leave through the tax credits.

You will find a helpful article on the FFCRA exemption from the National Law Review, online at https://www.natlawreview.com/article/small-business-exemption-to-families-first-coronavirus-response-act-ffcra-who.

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14. What regulations does an employer need to consider before implementing an employee illness policy?

Question: We are interested in implementing an employee illness policy. This was sparked as a result of COVID-19 but they're looking for something more general that they could use after the pandemic. Can an employer implement something like this? What regulations does the employer need to be aware of/consider before implementing such a policy?

Answer: Employers may implement a communicable diseases policy without violating the Americans with Disabilities Act (ADA) limitations on medical inquiries and examinations. The ADA, which applies to employers with 15 or more employees and prohibits discrimination against disabled individuals and requires reasonable accommodations, limits the types of medical inquiries and examinations a covered employer may make. Specifically, employers may not make medical inquiries or require medical examinations for current employees that would likely elicit information about an employee's disability unless these inquiries or examinations are considered job-related and consistent with business necessity. See 42 U.S.C. §12112(d)(4). However, the ADA also recognizes that employees who handle food may spread communicable diseases and so allows employers to exclude employees with certain diseases from handling food. The federal Department of Health and Human Services is responsible for issuing a list of infectious and communicable diseases which are transmitted through handling the food supply each year. See 42 U.S.C. §12113(e)(2); 29 C.F.R. §1630.16(e)(1). Accordingly, employers with employees who handle food likely may implement the type of reporting policies you provided to ensure employees do not transmit certain types of infectious diseases through food preparation.

Employers that do not have employees who handle food also may have infectious disease/communicable disease policies asking employees to identify if they have certain medical conditions that are communicable as long as they can show that they are not trying to elicit information about an employee's disability. So, for example, asking an employee if they have symptoms of seasonal flu would not be considered likely to elicit information about a disability. In addition, employers may ask about communicable diseases that are considered disabilities if the employer can show asking about these diseases is job-related and consistent with business necessity. So, for example, asking surgical nurse employees to provide information about HIV/AIDS infection may be appropriate for health care employers concerned that these nurses could transmit the disease during surgery but not appropriate for office employees who could not expose another individual to their HIV/AIDS.

Asking employees if they have common symptoms of COVID-19, such as fever, chills, cough, shortness of breath, recent loss of taste or smell, headache, etc., likely will not elicit information about a disability and is allowed in the workplace. COVID-19 also generally is not considered a disability under the ADA without significant complications. See EEOC "What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws," online at https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws. However, asking employees to identify underlying medical conditions that make them at greater risk for serious illness related to COVID-19 would not be appropriate since it could require employees to disclose that they have cancer, heart disease, or other disabilities.

Many states have similar ADA-type laws that protect employees with disabilities and prohibit medical inquiries that also should be consulted.

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Accordingly, if the employer in question is not in food service, it still may consider implementing a communicable diseases policy that ask employees to identify any communicable diseases such as COVID-19 that are easily spread in the workplace. Most employers will allow employees to continue to work if they have a communicable disease that is not spread by normal work contact and does not pose a health threat to others. You will find examples of several communicable diseases policy online at https://hr.blr.com/timesavers/HR-policies/Health-Safety/Safety-and-Health/Communicable-Diseases-Policy-105725. The policy information also includes a discussion of the different laws that affect this type of policy.

15. Can an employer keep a high-risk employee at home until the employer feels it is safe to return to work?

Question: A Vermont employer wants to know if there are any guidelines or recommendations regarding high risk employees returning to work post-COVID in the event the employee would like to return to work but the employer doesn't feel they should return given their risk. Can the employer keep the employee at home until the employer feels it's safe to return to work?

Answer: It may be difficult to prohibit employees who have a potentially higher risk of severe illness related to COVID-19 from returning to work based on a speculative risk of infection and reaction, particularly if the employees cannot work from home and do not have income beyond potential unemployment compensation. The employer could face both age and disability discrimination claims as a result of these decisions since individuals considered high risk generally are over 65 or have certain serious medical conditions that could be disabilities. A better approach may be to discuss with employees who are at higher risk what precautions will be taken in the workplace and determine if the employees could be accommodated at work to further protect them from COVID-19 or could work from home. These at-risk employees could then be given a choice to return to work or to remain at home for a longer period of time. The employer also should comply with the Vermont Governor's return to work requirements which should help limit exposure to COVID-19 in the workplace for all employees, including those who are more at risk for serious illness, and the CDC recommendations for safe workplaces.

Specific guidance on how to return at-risk employees to the workforce is difficult to find. The White House laid out its phased-in plan for employees returning to work in mid-April. The plan, available online at https://www.whitehouse.gov/openingamerica/#criteria, specifically recommends that employers "strongly consider **SPECIAL ACCOMMODATIONS** for personnel who are members of a **VULNERABLE POPULATION** [emphasis in original]." However, the White House does not suggest that employers prohibit at-risk employees from returning to work or indicate what special accommodations should be made or who is included in the vulnerable population.

The CDC has identified several groups who are at higher risk for severe illness from COVID-1, including people over 65 and people with underlying medical conditions such as those with chronic lung disease or moderate to severe asthma, serious heart conditions, diabetes, severe kidney disease, liver disease, and severe obesity and those who are immunocompromised. See

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https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-at-higher-risk.html. The CDC also provides strategies for employers who have high-risk employees. Specifically, the CDC recommends:

> Have conversations with employees if they express concerns. Some people may be at higher risk of severe illness. This includes older adults (65 years and older) and people of any age with serious underlying medical conditions. By using strategies that help prevent the spread of COVID-19 in the workplace, you will help protect all employees, including those at higher risk. These strategies include:
>
> - Implementing telework and other social distancing practices
> - Actively encouraging employees to stay home when sick
> - Promoting handwashing
> - Providing supplies and appropriate personal protective equipment (PPE) for cleaning and disinfecting workspaces
> - In workplaces where it's not possible to eliminate face-to-face contact (such as retail), consider assigning higher risk employees work tasks that allow them to maintain a 6-foot distance from others, if feasible.
>
> Employers should not require employees to provide a note from their healthcare provider when they are sick and instead allow them to inform their supervisors or employee health services when they have conditions that put them at higher risk for diseases.

The federal EEOC also has addressed providing accommodations in the workplace for disabled employees who may be at a higher risk for serious illnesses related to COVID-19. In its guidance, "What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws," online at https://www.eeoc.gov/eeoc/newsroom/wysk/wysk_ada_rehabilitaion_act_coronavirus.cfm, the EEOC states:

> **D.1. If a job may only be performed at the workplace, are there reasonable accommodations for individuals with disabilities absent undue hardship that could offer protection to an employee who, due to a preexisting disability, is at higher risk from COVID-19?** *(4/9/20)*
>
> There may be reasonable accommodations that could offer protection to an individual whose disability puts him at greater risk from COVID-19 and who therefore requests such actions to eliminate possible exposure. Even with the constraints imposed by a pandemic, some accommodations may meet an employee's needs on a temporary basis without causing undue hardship on the employer.
> Low-cost solutions achieved with materials already on hand or easily obtained may be effective. If not already implemented for all employees, accommodations for those who request reduced contact with others due to a disability may include changes to the work environment such as designating one-way aisles; using plexiglass, tables, or other barriers to ensure minimum distances between customers and coworkers whenever feasible per CDC guidance or other accommodations that reduce chances of exposure.
>
> Flexibility by employers and employees is important in determining if some accommodation is possible in the circumstances. Temporary job restructuring of marginal job duties, temporary

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transfers to a different position, or modifying a work schedule or shift assignment may also permit an individual with a disability to perform safely the essential functions of the job while reducing exposure to others in the workplace or while commuting.

Further, if the at-risk employees are currently working from home, the employer could continue to offer the telework as an accommodation for these employees. The key to help prevent discrimination claims, though, is that the employee chooses to work from home to prevent potential discrimination claims.

If the employer is covered by the FFCRA, the employer should let at-risk employees know that they may be eligible for paid leave under the Act. The FFCRA allows employees who are advised to self-quarantine by a health care provider also will be eligible for up to 80 hours of paid emergency sick leave.

Vermont employers also can help prevent COVID-19 and protect all of their employees, including those most at risk for severe illness, by following Vermont's specific guidance for employers that reopen, found in Addendum 10 to Executive Order 01-20, online at https://governor.vermont.gov/sites/scott/files/documents/ADDENDUM%2010%20TO%20EXECUTIVE%20ORDER%2001-20_0.pdf. Addendum 10 includes specific physical distancing, health, and sanitation measures such as:

a. Employees shall not report to, or be allowed to remain at, work or job site if sick or symptomatic (with fever, cough, and/or shortness of breath).
b. Employees must observe strict social distancing of 6 feet while on the job.
c. Employees must wear non-medical cloth face coverings (bandanna, scarf, or non-medical mask, etc.) over their nose and mouth when in the presence of others. In the case of retail cashiers, a translucent shield or "sneeze guard" is acceptable in lieu of a mask.
d. Employees must have easy and frequent access to soap and water or hand sanitizer during duration of work, and handwashing or hand sanitization should be required before entering, and leaving, job sites. All common spaces and equipment, including bathrooms, frequently touched surfaces and doors, tools and equipment, and vehicles must be cleaned and disinfected at the beginning, middle and end of each shift andprior to transfer from one person to another.
e. No more than 2 people shall occupy one vehicle when conducting work.

The CDC also provides general guidance for businesses to prepare their workplaces for COVID-19, online at https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html, as does the Occupational Safety and Health Administration, online at https://www.osha.gov/Publications/OSHA3990.pdf.

16. At what point do we need to do new I-9s, background checks, and drug screens when bringing back laid off employees?

Question: Assuming we have laid off associates and bring them back within the 13 week timeframe we are using based on the Affordable Care Act (ACA), do we have to redo the I-9? What about after 13 weeks? Are we required to conduct a background check? Drug screen?

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Answer: When employees have been temporarily laid off, generally this time period is considered "continuing employment," and employers do not have to complete a new Form I-9 or reverify the employee's current Form I-9. According to the U.S. Citizenship and Immigration Services (USCIS) Handbook for Employers, M-274 (available online at https://www.uscis.gov/i-9-central/70-rules-continuing-employment-and-other-special-rules, explaining employers obligations to complete and maintain the Form I-9), Section 7.0, Rules for Continuing Employment and Other Special Rules, "You must complete a new Form I-9 when a hire takes place, unless you are rehiring an employee within three years of the date of the employee's previous Form I-9. However, in certain situations, a hire is not considered to have taken place despite an interruption in employment. In case of an interruption in employment, you should determine whether the employee is continuing in his or her employment and has a reasonable expectation of employment at all times." A "temporary layoff for lack of work" is listed as one example of continuing employment, so you do not need to redo Form I-9s for these employees. The Handbook for Employers does not specify how long the temporary layoff may be to be considered continuing employment, but it is likely that as long as the employer does not terminate the employee and intends to bring employee back to work (for example, once state stay-at-home orders are lifted), the layoff likely would be considered continuing employment. Note, however, if an employee's employment authorization listed on the Form I-9 has expired, you would have to reverify his or her employment authorization as you would for any current employee. You should consult with your attorney on this matter to ensure compliance.

The ACA's reference to 13 weeks really only affects an employer's health insurance obligations and does not necessarily apply to other employment-related issues. Under the ACA, employers with 50 or more employees (referred to as applicable large employers or ALEs) must provide health insurance that provides minimum essential coverage to at least 95% of their "full-time" employees or pay a penalty. When an employer has a substantial layoff, compliance with the ACA can be challenging if the employer does not continue paying for the health insurance during the layoff. If an employer is an ALE, the employer must consider the ACA's "break in service" rule. An ALE may treat a returning employee as a new employee if he or she returns to work after at least 13 weeks during which no hours were credited (26 weeks for educational employees). The same applies if the break in service is at least 4 weeks and is longer than the employee was previously employed.

If the break in service is shorter, the employee should be returned to the measurement and stability period that would have applied had the layoff/furlough not occurred and would not be considered new employees. So, if employees are laid off for longer than 13 weeks (or 4 weeks for newer employees), then they possibly could be considered like "new employees" under the employer's health care plan. Note, however, that the ACA rule refers specifically to "termination" and "rehire," so the health care plan might not be able to impose a new waiting period in the event of a furlough or layoff that does not involve an outright termination of employment. The ACA rules have not been updated or revised to address COVID-19 layoff scenarios. You should consult with an attorney or other health care benefits expert regarding the ACA requirements.

Regarding background checks and drug tests for returning employees, absent a collective bargaining agreement or other contract specifying when the checks and drug tests are conducted, an employer has discretion to conduct the checks and tests as it determines appropriate as long as it imposes the requirements consistently to help avoid discrimination claims. Most employers likely would not conduct a background check or drug tests after a short-term layoff, particularly given the nature of the COVID-19

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stay-at-home orders severely limiting individuals' activities. However, if your organization normally conducts background checks or drug tests after layoffs, then it could do so after a COVID-19 layoff. This is a good question for your legal counsel, particularly for employees who drive on your behalf or enter customer homes. Drug tests also should comply with any state law restrictions on testing.

17. What options do we have as employers when recalling employees back to work from a furlough when employees refuse to come back to work because they make more money on unemployment?

Question: What options do we have as employers when recalling employees back to work from a furlough when employees refuse to come back to work because they make more money on unemployment?

Answer: An unfortunate outcome of the increased unemployment compensation benefits provided by the CARES Act is the perception for some employees that they may be able to make "more" money through unemployment compensation than they would if they returned to work. This is an unintended consequence of the CARES Act weekly boost of $600 added to whatever amount the employee would receive under the state's regular unemployment compensation normal benefits payout, which is generally 2/3 of what the employee makes and capped at a certain dollar amount. However, if an employee is called back to work and refuses to return to work because they think they can make more money thanks to the CARES Act $600 weekly "boost," the employee likely would not longer be eligible to receive the state unemployment compensation since he or she would not be "ready and able" to return to work as required by state law.

Every state that receives money for unemployment compensation through the CARES Act had to enter into an agreement with the federal DOL to disperse the funds, but the state's rules for receiving unemployment compensation generally still apply. According to the DOL Unemployment Insurance Guidance Letter 15-10, issued to explain the CARES Act payments and available online at https://wdr.doleta.gov/directives/attach/UIPL/UIPL_15-20.pdf, Section C.1, "For an individual to receive FPUC [Federal Pandemic Unemployment Assistance], the applicable state must have a signed agreement with the Department. **FPUC is payable to individuals who are otherwise entitled under state or federal law to receive regular UC for weeks of unemployment** [emphasis added] (including Unemployment Compensation for Federal Employees (UCFE) and Unemployment Compensation for Ex-Servicemembers (UCX)). FPUC is also payable to individuals receiving the following unemployment compensation programs: PEUC, PUA, EB, Short-Time Compensation (STC), Trade Readjustment Allowances (TRA), Disaster Unemployment Assistance (DUA), and payments under the Self-Employment Assistance (SEA) program."

Section D.2. in the guidance letter further indicates "An individual is not entitled to receive FPUC for a week in which the individual is ineligible for regular UC or the underlying benefit from another federal program." Although most states have modified their unemployment compensation requirements for COVID-19 to eliminate waiting periods and "search for work" requirements where employees must

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actively seek work in order to receive the benefits, the states also generally still require employees to be "ready and able" to return to their current employer. For example, in California, an employee generally must certify every two weeks that he or she is ready and willing to accept work immediately (though this requirement is temporarily delayed through May 9, 2020, but will be required retroactively). See California Employment Development Department, "Guide to applying for unemployment benefits," online at https://unemployment.edd.ca.gov/guide#after-you-submit.

Note, most states also will continue unemployment benefits if an employee is unable to return to work because of COVID-19, such as because they cannot travel to work as a result of the COVID-19 (for example because of a state order) or if they or a family member has symptoms of COVID-19 or has been told to self-quarantine because of COVID-19. (See, for example, the California Employment Development Department, "Guide to applying for unemployment benefits," online at https://unemployment.edd.ca.gov/guide#benefits.)

So, if an employee refuses the employer's offer to return to work and does not have a good reason for not returning to work such as a self-quarantine order, the employee likely will not be eligible for the state and federal unemployment benefits. Accordingly, if the employer is worried that employees will refuse to return to work because they think they can continue to receive the enhanced unemployment benefits, the employer should be sure to educate employees about the state unemployment compensation requirements and let them know that they will challenge their eligibility.

18. What options do we have as employers when recalling employees back to work from teleworking when employees refuse to come back to work because they feel that coming back into the office presents a risk to them?

Question: What s options do we have as employers when recalling employees back to work from teleworking when employees refuse to come back to work because they feel that coming back into the office presents a risk to them?

Answer: Even though several states have indicated they are ready to "reopen" because of decreasing rates of COVID-19, employers will face difficulties in getting employees to return to work because of legitimate fears of workplace infection since there is no known cure or vaccine for COVID-19. Employers, therefore, will have to be able to explain to employees why they have reopened, why unemployment benefits will not be available since they have reopened (as explained in the previous question), and what safety precautions they will be taking to protect employees from COVID-19. Employers also will have to consider whether they should provide leaves and other accommodations to at-risk employees under the ADA, FMLA, and the FFCRA.

Arguably, if the employer is following appropriate procedures to keep the workplace clean and free of COVID-19 and is practicing social distancing in the workplace, then most employees who do not have

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underlying health issues likely do not have a legal reason for refusing to come to work, for example by relying on the OSH Act.

Under the OSHA Act, an employee may refuse to come to work if he believes he is in "imminent danger" as defined under that law. The OSH Act defines "imminent danger" to include "any conditions or practices in any place of employment which are such that a danger exists which can reasonably be expected to cause death or serious physical harm immediately or before the imminence of such danger can be eliminated through the enforcement procedures otherwise provided by this Act." See 29 C.F.R. sect. 1908.2. To prevent any concerns about workplace safety and imminent danger from COVID-19, employers should take proactive steps, such as following general CDC social distancing, hygiene, and disinfection recommendations for all employees in the workplace, as provided in the CDC's Interim Guidance for Businesses and Employers to Plan and Respond to Coronavirus Disease 2019 (COVID-19), online at https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html. The Occupational Safety and Health Administration also has issued nonbinding guidance for businesses, Guidance on Preparing Workplaces for COVID-19, OSHA 3990-02 2020, online at https://www.osha.gov/Publications/OSHA3990.pdf. The OSHA guidance does not discuss return to work after COVID-19 but does include information on steps to take to reduce potential exposure in the workplace. An employer that takes these precautions recommended by the CDC and OSHA is unlikely to be found to have a workplace that presents an "imminent danger" to the employee. That said, if an employee can point to specific problems he or she sees in the workplace, the employers also should investigate and determine if there are legitimate concerns in the workplace that have not been addressed.

Employees who have a greater risk of having serious COVID-19 symptoms also may be able to refuse to return to the workplace under the ADA and similar state disability laws such as California's Fair Employment Housing Act. The ADA and similar state laws may require an employer to accommodate employees who are disabled and have more risk for severe COVID-19 reactions, such as those with cancer, diabetes, and heart disease. If employees with underlying health problems refuse to return to work because of these legitimate health concerns, the employer should consider whether they can accommodate them, such as by allowing them to work from home if possible, providing a leave, or reducing their exposure to other people (and potentially COVID-19) in the workplace.

Generally, an employee's disability must substantially limit a major life activity to require accommodation. Cancer in remission, for example, normally would not be considered to be substantially limiting if the employee can normally perform his or her job without an accommodation. However, there is a good possibility that the potential exposure to COVID-19, a highly contagious virus in wide circulation throughout the world with no treatment or vaccine and which affects immunocompromised individuals more severely, could make an employee meet the "substantially limited" requirement at least during this COVID-19 pandemic. So, the employee could be entitled to work at home or leave as an accommodation during the pandemic to help protect the employee from COVID-19 exposure if providing these types of accommodation would not cause the employer an undue hardship.

The federal EEOC, the federal agency that enforces the ADA, has not specifically endorsed leave as an accommodation for disabled employees who are more susceptible to COVID-19, but it has acknowledged that employers may need to accommodate these employees who cannot work at home. In its guidance, What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other

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EEO Laws, online at https://www.eeoc.gov/eeoc/newsroom/wysk/wysk_ada_rehabilitaion_act_coronavirus.cfm, the EEOC states:

> **D.1. If a job may only be performed at the workplace, are there reasonable accommodations for individuals with disabilities absent undue hardship that could offer protection to an employee who, due to a preexisting disability, is at higher risk from COVID-19?** *(4/9/20)*
>
> There may be reasonable accommodations that could offer protection to an individual whose disability puts him at greater risk from COVID-19 and who therefore requests such actions to eliminate possible exposure. Even with the constraints imposed by a pandemic, some accommodations may meet an employee's needs on a temporary basis without causing undue hardship on the employer.
> Low-cost solutions achieved with materials already on hand or easily obtained may be effective. If not already implemented for all employees, accommodations for those who request reduced contact with others due to a disability may include changes to the work environment such as designating one-way aisles; using plexiglass, tables, or other barriers to ensure minimum distances between customers and coworkers whenever feasible per CDC guidance or other accommodations that reduce chances of exposure.
>
> Flexibility by employers and employees is important in determining if some accommodation is possible in the circumstances. Temporary job restructuring of marginal job duties, temporary transfers to a different position, or modifying a work schedule or shift assignment may also permit an individual with a disability to perform safely the essential functions of the job while reducing exposure to others in the workplace or while commuting.

So, although the EEOC does not specifically mention leave in its above Q&A, a leave of absence could be a modified work schedule under the ADA and an accommodation that the employer may be required to provide if doing so does not create an undue hardship for the employer. Note that the undue hardship standard is difficult to meet and means that an accommodation would be unduly costly, extensive, substantial, or disruptive, or would fundamentally alter the nature or operation of the business. Among the factors to be considered in determining whether an accommodation is an undue hardship are the cost of the accommodation and the employer's size, financial resources, and the nature and structure of its operation.

In addition, an employee who has an underlying serious health condition that puts the employee at greater risk for COVID-19 may qualify for leave under the federal FMLA (and similar state laws such as the California Family Rights Act). The FMLA allows eligible employees to take up to 12 weeks of job-protected leave for their own serious health condition or to care for a family member who has a serious health condition. A serious health condition is defined as an illness, injury, impairment, or physical or mental condition that involves either an overnight stay in a medical care facility or continuing treatment by a health care provider for a condition that either prevents the employee from performing the functions of the employee's job or prevents the qualified family member from participating in school, work, or other daily activities. See 29 U.S.C. §2611(11). If an employee is experiencing a serious health condition related to an underlying medical problem such as cancer or diabetes, an employee potentially could take FMLA leave to avoid exposure to COVID-19.

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However, if an employee is not experiencing any active serious health conditions related to their cancers, the employee likely is not eligible for FMLA leave. Employees who do not currently have serious health conditions are not specifically covered by the FMLA if they are trying to avoid exposure to COVID-19. According to the DOL COVID-19 and the FMLA Questions and Answers, online at https://www.dol.gov/agencies/whd/fmla/pandemic:

> Can an employee stay home under FMLA leave to avoid getting pandemic influenza?
>
> The FMLA protects eligible employees who are incapacitated by a serious health condition, as may be the case with the flu where complications arise, or who are needed to care for covered family members who are incapacitated by a serious health condition. Leave taken by an employee for the purpose of avoiding exposure to the flu would not be protected under the FMLA. Employers should encourage employees who are ill with pandemic influenza or are exposed to ill family members to stay home and should consider flexible leave policies for their employees in these circumstances.

However, if for example an employee can provide medical certification showing the employee has a serious health condition currently because of cancer, diabetes, or other medical issue and has a potential for serious medical problems related to COVID-19, the employer likely should provide the employee with FMLA leave.

And, for employers with fewer than 500 employees, employees would be entitled to take up to 80 hours of emergency paid sick leave under the FFCRA if they need leave if they are advised by a health care provider to self-quarantine because of COVID-19.

19. What guidance is there around HIPAA and PHI to the extent employers can conduct on-site testing, take temperatures, ask for medical certifications, etc.?

Question: What guidance is there around Health Insurance Portability and Accountability Act (HIPAA) and protected health information (PHI) to the extent employers can conduct on-site testing, take temperatures, ask for medical certifications, etc.?

Answer: If the employer wants to conduct any on-site medical testing and make medical inquiries to help identify employees with potential COVID-19, it likely may do so, but it must be aware of restrictions on medical testing and inquiries imposed by the federal ADA.

Note that HIPAA does not really apply to the medical testing and inquiries in this question. HIPAA contains privacy provisions that require “covered entities” including employers that provide group health plans to ensure that consumer PHI is not misused or improperly disclosed. PHI, however, does not include employment records held by an entity in its role as employer. See 45 C.F.R. §160.103. Employment records excluded from PHI coverage generally include any medical information needed by an employer to carry out its obligations under the ADA, the FMLA, and similar laws. In addition, the

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exemption includes files and records related to occupational injury, disability insurance eligibility, sick leave requests, drug screening results, and fitness-for-duty certifications.

Normally, the ADA limits employers from making medical inquiries or requiring medical examinations of current employees unless they are job-related and consistent with business necessity. See 42 U.S.C. §12112(b)(6); 42 U.S.C. §12112(d)(4); 29 C.F.R. §1630.14(c). For the employer to meet this standard and ask for employee medical information, typically an employee must be requesting an accommodation for a disability, have trouble performing the job related to potential medical issues, or suffer an injury or becomes ill and the employee's ability to perform the essential job functions. The ADA also allows employers to conduct voluntary medical examinations as part of an employee health or wellness program. See 42 U.S.C. §12112(d)(4)(B) and 29 C.F.R. §1630.14(d).

The federal EEOC, the agency that implements the ADA, has indicated that employers currently may screen for COVID-19 without violating the ADA and has updated its guidances to address COVID-19. Specifically, the EEOC's "Pandemic Preparedness in the Workplace and the Americans with Disabilities Act" indicates that employers may take temperatures in the workplace without violating the ADA. The guidance (available online at https://www.eeoc.gov/facts/pandemic_flu.html) states in FAQ #7:

> 7. During a pandemic, may an ADA-covered employer take its employees' temperatures to determine whether they have a fever?
>
> Generally, measuring an employee's body temperature is a medical examination. If pandemic influenza symptoms become more severe than the seasonal flu or the H1N1 virus in the spring/summer of 2009, or if pandemic influenza becomes widespread in the community as assessed by state or local health authorities or the CDC, then employers may measure employees' body temperature.
>
> However, employers should be aware that some people with influenza, including the 2009 H1N1 virus **or COVID-19,** do not have a fever.
>
> **Because the CDC and state/local health authorities have acknowledged community spread of COVID-19 and issued attendant precautions as of March 2020, employers may measure employees' body temperature. As with all medical information, the fact that an employee had a fever or other symptoms would be subject to ADA confidentiality requirements.**

FAQ #5 in the pandemic guidance also indicates that an employer may send employees home who exhibit symptoms of COVID-19. Specifically, it states:

> 5. May an ADA-covered employer send employees home if they display influenza-like symptoms during a pandemic?
>
> Yes. The CDC [Centers for Disease Control and Prevention] states that employees who become ill with symptoms of influenza-like illness at work during a pandemic should leave the workplace. Advising such workers to go home is not a disability-related action if the illness is akin to seasonal influenza or the 2009 spring/summer H1N1 virus. Additionally, the action would be permitted under the ADA if the illness were serious enough to pose a direct threat. **Applying**

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this principle to current CDC guidance on COVID-19, this means an employer can send home an employee with COVID-19 or symptoms associated with it.

Regarding COVID-19 testing, the EEOC updated other pandemic guidance just last week indicating that employers may test for COVID-19 in the workplace. According to the EEOC's "What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws," online at https://www.eeoc.gov/eeoc/newsroom/wysk/wysk_ada_rehabilitaion_act_coronavirus.cfm, Q&A #6:

> **A.6. May an employer administer a COVID-19 test (a test to detect the presence of the COVID-19 virus) before permitting employees to enter the workplace?** *4/23/20*
>
> The ADA requires that any mandatory medical test of employees be "job related and consistent with business necessity." Applying this standard to the current circumstances of the COVID-19 pandemic, employers may take steps to determine if employees entering the workplace have COVID-19 because an individual with the virus will pose a direct threat to the health of others. Therefore an employer may choose to administer COVID-19 testing to employees before they enter the workplace to determine if they have the virus.
>
> Consistent with the ADA standard, employers should ensure that the tests are accurate and reliable. For example, employers may review guidance from the U.S. Food and Drug Administration about what may or may not be considered safe and accurate testing, as well as guidance from CDC or other public health authorities, and check for updates. Employers may wish to consider the incidence of false-positives or false-negatives associated with a particular test. Finally, note 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.
>
> Based on guidance from medical and public health authorities, employers should still require - to the greatest extent possible - that employees observe infection control practices (such as social distancing, regular handwashing, and other measures) in the workplace to prevent transmission of COVID-19.

Accordingly, employers should proceed with caution if they administer COVID-19 tests in the workplace since they may not be accurate and, even if accurate, only indicate if the employee has COVID-19 at the particular time of testing. Further, depending on the availability of COVID-19 tests, COVID-19 testing may be impractical for all returning employees.

Regarding medical certification, employers generally are allowed to require employees to provide return to work medical certification such as a doctor's note after an employee has been out sick as long as the employer implements this requirement consistently since this is one of the situations considered job-related and consistent with business necessity under the ADA. It also appears that the EEOC will permit employers to require all employees who have been out of the workplace during the COVID-19 pandemic even if not sick with COVID-19 to provide medical certification to return to work.

However, as many employers are finding, getting a doctor's note during the COVID-19 pandemic, whether after a COVID-19 related absence or for some other illness, is very difficult because of state stay at home orders and closures of medical practices for nonemergent procedures and appointments.

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Telemedicine may be an option in some areas, but not in all. Accordingly, it may be more practical to not require medical certification for return to work during the COVID-19 pandemic.

The CDC, in its Interim Guidance for Businesses and Employers to Plan and Respond to Coronavirus Disease 2019 (COVID-19) currently recommends that employers do not require a doctor's note or a positive COVID-19 test result. Specifically, the agency states (online at https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html):

> Employers should not require a positive COVID-19 test result or a healthcare provider's note for employees who are sick to validate their illness, qualify for sick leave, or to return to work. Healthcare provider offices and medical facilities may be extremely busy and not able to provide such documentation in a timely manner.

The EEOC's "Pandemic Preparedness in the Workplace and the Americans with Disabilities Act" also allows employers to require medical certification for return to work but recognizes the difficulty in getting the certification and suggests alternative methods for certification. Specifically, in Q&A #20 (online at https://www.eeoc.gov/facts/pandemic_flu.html), the agency states:

> 20. May an ADA-covered employer require employees who have been away from the workplace during a pandemic to provide a doctor's note certifying fitness to return to work?
>
> 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.

Note, too, that even the EEOC's suggestions of a standard form or generic e-mail as medical certification may be difficult to get during the pandemic. So, employers may be better advised to not require the medical certification because of the logistical problem employees may have getting the certification.

Employers also must be sure to keep any medical information that they receive as a result of the COVID-19 testing or inquiries confidential. The ADA requires covered employers to keep medical information in confidential medical files that are separate from regular employee personnel files. See 42 U.S.C. §12112(d)(3) and (4).

20. Is intermittent EFML tracked in the same manner as standard FMLA?

Question: Is intermittent EFML tracked in the same manner as standard FMLA? For example, an employee works 8 hours a day, 5 days a week and wants to take leave under the FFCRA's EFML. The first 2 weeks she uses FFCRA's emergency paid sick leave (EPSL). For weeks 3 through 10, she wants to take

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intermittent leave; she would have 400 hours of FMLA+ available: (5 days x 10 weeks) x 8 hours. If she uses just 16 hours of EFML per week, it seems her EFML would not be exhausted for 25 weeks. (400 hours / 16 hours per week = 25 weeks). Is this correct?

Answer: Yes, intermittent EFML is tracked in the same way as regular FMLA intermittent leave. Employees should be charged for intermittent leave based on the actual number of hours of leave that they take, and part-time employees are only allowed a proportionate about of leave.

Note, too, employers and employees must agree to the intermittent leave schedule. Employers are not required to grant intermittent leave but may choose to do so. According to the DOL, Families First Coronavirus Response Act: Questions and Answers, online at https://www.dol.gov/agencies/whd/pandemic/ffcra-questions, #20:

> **#20 May I take my paid sick leave or expanded family and medical leave intermittently while teleworking?**
> Yes, if your employer allows it and if you are unable to telework your normal schedule of hours due to one of the qualifying reasons in the Emergency Paid Sick Leave Act. In that situation, you and your employer may agree that you may take paid sick leave intermittently while teleworking. Similarly, if you are prevented from teleworking your normal schedule of hours because you need to care for your child whose school or place of care is closed, or child care provider is unavailable, because of COVID-19 related reasons, you and your employer may agree that you can take expanded family medical leave intermittently while teleworking.
>
> You may take intermittent leave in any increment, provided that you and your employer agree. For example, if you agree on a 90-minute increment, you could telework from 1:00 PM to 2:30 PM, take leave from 2:30 PM to 4:00 PM, and then return to teleworking.
>
> The Department encourages employers and employees to collaborate to achieve flexibility and meet mutual needs, and the Department is supportive of such voluntary arrangements that combine telework and intermittent leave.

Disclaimer: *Because of the complex issues related to COVID-19, you should discuss your reopening plan with an attorney.*

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