Reopening the Workplace Virtual Conference: Navigating the New Reality of COVID-19

Leave Issues: Staying Compliant with the Families First Coronavirus Response Act, the FMLA, ADA and Other Leave Laws and Policies

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Presented By

Teresa Shulda, J.D., is vice-chair of Foulston Siefkin's Employment and Labor Law Team and has been litigating employment disputes and advising on workplace law matters for more nearly 20 years. Based in the firm's Wichita office, much of Shulda's practice is focused on employer-side issues. She represents businesses that range from some of the city's largest corporations with thousands of workers around the globe to small, closely held businesses with fewer than 10 employees.

Known for her deep understanding of federal regulations as well as Kansas employment laws, Shulda is a powerful advocate for her clients – both in and out of the courtroom. She regularly defends employers against discrimination claims, including those involving age, race, religion, national origin, gender, or disability allegations. In addition, Shulda handles disputes related to wrongful termination, breach of contract, civil rights, and whistleblower retaliation claims. She is particularly well-versed in federal statues such as the Family and Medical Leave Act (FMLA), Americans with Disabilities Act (ADA), Title VII, the Age Discrimination in Employment Act (ADEA), and Pregnancy Discrimination Act, as well as the Kansas Wage Payment Act.

Much of Shulda's practice includes advising clients on compliance-related issues and litigation-avoidance tactics. Working hand-in-hand with human relations departments, company owners, and in-house legal counsel, she crafts strategies that meet the company's goals and fulfill federal and state requirements. Because much of her early career was focused on employee representation, she applies her understanding of the workforce perspective when counseling employers.

Shulda is often asked to share her insights with human resources professionals and legal colleagues at seminars and meetings across the region. She serves as the co-editor of BLR's *Kansas Employment Law Letter* and frequently publishes articles and client alerts on timely topics and legal rulings.

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Leave Laws and Policies

- FFCRA
  - Emergency Paid Sick Leave
  - Emergency FMLA
- FMLA
- ADA
- State laws
- Company policies

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Families First Coronavirus Response Act

Effective April 1, 2020
Ends December 31, 2020

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Two New Types of Paid Leave

- Emergency Paid Sick Leave: Up to two weeks of paid sick leave for isolation, illness, care of others, or childcare responsibilities due to COVID-19
- Emergency FMLA Leave: FMLA childcare leave to care for a child who cannot go to school or daycare because of COVID-19

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Emergency Paid Sick Leave if Employee Cannot Work or Telework Because:

1. Employee is subject to a federal, state, or local quarantine or isolation order;
2. Employee is advised by a healthcare provider to self-quarantine due to concerns related to COVID-19;
3. Employee is experiencing symptoms of COVID-19 and is seeking a medical diagnosis;
4. Employee is caring for an individual who is subject to a quarantine order or direction to self-quarantine;
5. Employee is caring for son/daughter if the child's school or childcare provider is closed due to COVID-19; or
6. Employee is experiencing any substantially similar condition specified by the Secretary of Health and Human Services

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Emergency Paid Sick Leave

- Amount of paid leave: Up to two weeks
  - 80 hours for full-time employees
- Payment amount:
  - For rationales 1-3 (employee quarantine/illness), employee's regular rate, capped at $511/day and $5,110 total
  - For rationales 4-6 (caring for children or others), two-thirds of employee's regular rate, capped at $200/day and $2,000 total
- May not require employees to use other paid leave first or concurrently (but can supplement if employer and employee agree)
- All employees are eligible, regardless of length of employment.

Emergency Family & Medical Leave Act

- EFMLA only if employee cannot work or telework due to need for leave to care for son/daughter if school/daycare closed or other childcare giver interruption because of COVID-19.
- Must have been employed for at least 30 calendar days.
- No EFMLA for quarantine/illness.
- 12 workweeks of FMLA total, **including EFMLA**

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Emergency Family & Medical Leave Act

- First two weeks of FMLA childcare leave may be unpaid
  - Employee may substitute existing paid leave
  - Employee may use EPSL
  - Employee can elect or employer can require use of pre-existing PTO (unless employee using EPSL)
  - No tax subsidy for payment of pre-existing PTO
- After week 2 of EFMLA, paid leave of:
  - 2/3 employee's regular pay for hours otherwise normally scheduled to work
  - Up to $200/day and $10,000/twelve-week period
  - Employee can elect or employer can require use of pre-existing PTO to make up final 1/3 of wages.
  - No tax subsidy for payment of pre-existing PTO
- If employee's schedule has been reduced due to pandemic, only pay for reduced schedule.

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How to Calculate Employee Hours:

- Full-time: if employee is normally scheduled to work at least 40 hours/workweek then 80 hours of EPSL
- Part-time: normal weekly schedule over two-week period, if employee works a regular schedule
- Variable schedule:
  1. use a six-month average to calculate average daily hours
  2. if not employed for six months,
     - use the number of hours you and employee agreed upon at hiring, or
     - average hours per day the employee was scheduled to work over the entire term of employment

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How to Calculate Pay

- Pay greater of:
  - Regular rate of pay;
  - Federal minimum wage in effect under FLSA; or
  - Applicable state/local minimum wage
- Up to applicable daily and aggregate caps
- Regular rate of pay = average of regular rate of pay over a period of 6 months prior to the date you take leave
  - If employee has not worked for 6 months, average of pay for all of the weeks employed
- Tips, commissions, and piece rates are included into that calculation to same extent they are included in calculation of regular rate under FLSA

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Required Documentation

- An employee is required to provide:
  a. The employee's name,
  b. The date(s) for which leave is requested,
  c. Qualifying reason for requesting leave, and
  d. Statement that the employee is unable to work, including telework, because of the qualifying reason

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Required Documentation

- Reason 1 (employee quarantine): Name of the government entity ordering quarantine
- Reason 2 (employee quarantine): Name of the healthcare provider advising quarantine
- Reason 3 (employee COVID-19 illness): Name of healthcare provider diagnosing/treating COVID-19 symptoms
- Reason 4: Leave to care for another individual
  - Individual's name
  - Relationship to the employee
  - Name of government entity/healthcare provider ordering/advising to quarantine

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Required Documentation

- Reason 5 or EFMLA: Leave based on the need to care for a child
  a. The name and age of the child
  b. The name of the school, place of care, or provider that is unavailable
  c. A representation that no other suitable person will be providing care for the child during the need period
  d. If leave is for a child older than fourteen, and leave is requested during daylight hours, a statement that special circumstances exist requiring the employee to provide care

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Recordkeeping

- Maintain documents for at least four years after tax becomes due or is paid, whichever is later
- Also maintain:
  - Documentation to show how the employer determined the amount of qualified sick and family leave wages paid to employees that are eligible for the credit, including records of work, telework and qualified sick leave and qualified family leave.
  - Documentation to show how the employer determined the amount of qualified health plan expenses that the employer allocated to wages.
  - Copies of any completed Forms 7200, Advance of Employer Credits Due To COVID-19, that the employer submitted to the IRS.
  - Copies of the completed Forms 941, Employer's Quarterly Federal Tax Return, that the employer submitted to the IRS (or, for employers that use third party payers to meet their employment tax obligations, records of information provided to the third party payer regarding the employer's entitlement to the credit claimed on Form 941).

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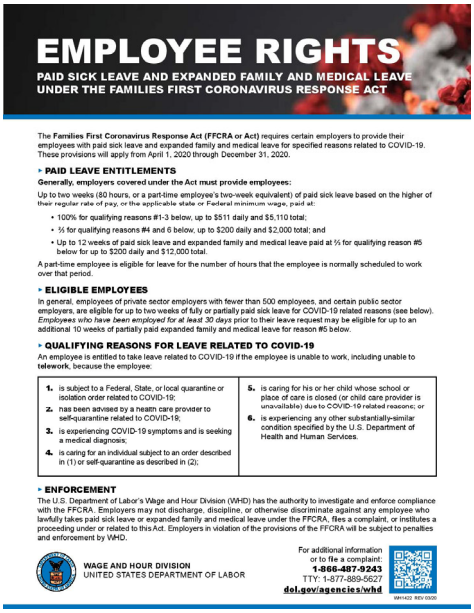
Required Notices

- Employer:
  - Must post notice in a conspicuous place on its premises
  - Must mail or email if employees are working remotely
- Employee:
  - Notice may not be required in advance
  - Notice may only be required after the first workday for which the employee takes FFCRA leave
  - After the work workday, it is reasonable for employers to require notice as soon as practicable under the circumstances



EMPLOYEE RIGHTS

PAID SICK LEAVE AND EXPANDED FAMILY AND MEDICAL LEAVE UNDER THE FAMILIES FIRST CORONAVIRUS RESPONSE ACT

The **Families First Coronavirus Response Act (FFCRA or Act)** requires certain employers to provide their employees with paid sick leave and expanded family and medical leave for specified reasons related to COVID-19. These provisions will apply from April 1, 2020 through December 31, 2020.

PAID LEAVE ENTITLEMENTS

Generally, employers covered under the Act must provide employees:

Up to two weeks (80 hours, or a part-time employee's two-week equivalent) of paid sick leave based on the higher of their regular rate of pay, or the applicable state or Federal minimum wage, paid at:

- 100% for qualifying reasons #1-3 below, up to $511 daily and $5,110 total;
- ⅔ for qualifying reasons #4 and 6 below, up to $200 daily and $2,000 total; and
- Up to 12 weeks of paid sick leave and expanded family and medical leave paid at ⅔ for qualifying reason #5 below for up to $200 daily and $12,000 total.

A part-time employee is eligible for leave for the number of hours that the employee is normally scheduled to work over that period.

ELIGIBLE EMPLOYEES

In general, employees of private sector employers with fewer than 500 employees, and certain public sector employers, are eligible for up to two weeks of fully or partially paid sick leave for COVID-19 related reasons (see below). *Employees who have been employed for at least 30 days* prior to their leave request may be eligible for up to an additional 10 weeks of partially paid expanded family and medical leave for reason #5 below.

QUALIFYING REASONS FOR LEAVE RELATED TO COVID-19

An employee is entitled to take leave related to COVID-19 if the employee is unable to work, including unable to telework, because the employee:

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

ENFORCEMENT

The U.S. Department of Labor's Wage and Hour Division (WHD) has the authority to investigate and enforce compliance with the FFCRA. Employers may not discharge, discipline, or otherwise discriminate against any employee who lawfully takes paid sick leave or expanded family and medical leave under the FFCRA, files a complaint, or institutes a proceeding under or related to this Act. Employers in violation of the provisions of the FFCRA will be subject to penalties and enforcement by WHD.

WAGE AND HOUR DIVISION
UNITED STATES DEPARTMENT OF LABOR

For additional information or to file a complaint:
1-866-487-9243
TTY: 1-877-889-5627
dol.gov/agencies/whd

WH1420 REV 03/20

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How to Count to 500 Employees:

- At the time your employee's leave is to be taken, you must determine whether you employ fewer than 500 full-time and part-time employees within the US
  - Include employees on leave, temporary employees who are jointly employed, day laborers supplied by a temporary agency
  - Independent contractors do not count
- Joint employers (FLSA test) – all common employees must be counted together (e.g., temp agency employees)
- Integrated employers (FMLA test)
  - Common management
  - Interrelation between operations
  - Centralized control of labor relations
  - Degree of common ownership or financial control

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Healthcare Employers

- Which employees are considered "healthcare providers" who can be denied EPSL/EFMLA?
  - **Any** employee of any doctor's office, hospital, health care center, clinic, post-secondary educational institution offering health care instruction, medical school, local health department or agency, nursing facility, retirement facility, nursing home, home health care provider, any facility that performs laboratory or medical testing, pharmacy, or anything similar
  - Any entity that contracts with one of the above
  - Also emergency responders necessary for transport, comfort, nutrition of COVID-19 patients

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Restoration Rights Following Emergency FMLA Leave:

- Generally – Employees are to be restored to the same or equivalent position
- For employers with fewer than 25 employees, no restoration requirement if:
  - A. The employee's position no longer exists due to economic conditions or other changes in operating conditions that:
    - i. Affect employment
    - ii. Are caused by public health emergency
  - B. The employer makes reasonable efforts to restore the employee to an equivalent position
  - C. If reasonable efforts fail to find an equivalent position, the employer contacts the employee if an equivalent position becomes available within one year

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Small Business Exemption

1. Fewer than 50 employees;
2. The leave is requested because a child's school or daycare is closed
3. An authorized officer has determined that:
   - A. result in expenses exceeding revenues causing the business to cease operations at a minimal capacity,
   - B. the absence of employees requesting leave would entail substantial risk to financial health of the business due to the employee's specialized skill, knowledge, or responsibilities,
   - C. there are not sufficient workers able, willing, and qualified to perform labor/services required to operate at a minimal capacity

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Tax Credits

- Eligible employers can retain an amount of payroll taxes equal to the amount of qualifying paid leave
  - Amount of credit allowable for any quarter cannot exceed Social Security Taxes owed, but any credit in excess is treated as an overpayment and the employer is eligible for a refund
- Any paid leave provided in excess of the maximum requirement is not creditable

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Retaliation Provisions

- Employers may not discharge, discipline, or otherwise discriminate against any employee who takes paid sick leave under the FFCRA and files a complaint or institutes a proceeding under or related to the FFCRA.

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Penalties

- Penalty based on Paid Sick Leave – FLSA
- Penalty based on childcare FMLA Leave – FMLA

- Liquidated damages (double damages)
- Attorney fees
- Collective actions

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What do Supervisors Need to Know?

- Don't trivialize the pandemic or requests for leaves that may qualify for FFCRA leave.
- Don't insist on doctor's notes if FFCRA leave is applicable.
- Funnel COVID-19-related leave questions to HR immediately.
- FFCRA paid leave laws are consistent with language in the FLSA and FMLA – which allow for individual liability.

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Leave Issues With Return to Work

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Does My Employer Need a New Policy in the Handbook?

- Not required by law.
- Best practice to implement temporary policy:
  - If existing PTO policies are temporarily altered in light of pandemic related absences
  - Healthcare provider employer who opts to deny FFCRA leave, or only allow in certain circumstances
  - Small businesses who have taken the position that they are exempt from EFMLA provisions

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Can Employee Take EPSL or EFMLA Intermittently/Reduced Schedule?

- While teleworking:
  - By agreement, if employees are unable to telework their normal schedule of hours for a qualifying reason
  - If you are prevented from teleworking for childcare related reasons, emergency FMLA leave can be taken while teleworking
- While working at usual worksite:
  - It depends on why the employee is taking leave
  - Childcare leave – can only be taken intermittently with employer's permission
  - Other reasons related to COVID-19 symptoms - No

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Can Employees Use PTO at the Same Time as FFCRA Paid Leave?

- Employer cannot mandate use of PTO prior to using or concurrent with EPSL
- DOL clarified regulations on April 10, 2020 regarding use of PTO while taking EFMLA:
  - Employee can choose, or employer can require use of PTO (vacation but not sick leave) during first two weeks of unpaid EFMLA
  - Employee can choose, or employer can require use of PTO (vacation but not sick leave) to supplement 2/3 wages during paid portion of EFMLA
  - No tax subsidy for any portion of EFMLA that is covered by pre-existing PTO

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Can Employee Use FFCRA Paid Leave if Business Closes or if Employee Is Furloughed?

- Employer closes or employee furloughed before April 1 – no FFCRA leave
- Employer closes or employee furloughed after April 1, but before employee goes out on leave – no FFCRA leave
- Employee furloughed while on FFCRA leave – FFCRA paid leave up to closure/furlough

- Bottom line: FFCRA paid leave is not intended to pay employee when there is no work/insufficient work; only for COVID-19 related leave from work.

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What if Employee Runs Out of EPSL but Needs More Leave?

- Remember FMLA and ADA obligations
  - Traditional FMLA and ADA reasonable accommodation requests permit employers to ask for additional documentation from employee
    - Medical certifications
    - Identify estimated length of leave
    - Re-certifications under FMLA
    - Periodic check-ins

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Should Employers Require RTW Doctor's Notes After COVID-19 Quarantine or Illness?

- EEOC Guidance – yes, you can…
- CDC Guidance – but should you?
- From the EEOC:

"As a practical matter,…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."

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My State/Local Law Mandates Paid Sick/Family Leave. Does it Run Concurrently with FFCRA Paid Leave?

- FFCRA does not preempt any state or local paid or other family leave laws
- EPSL is "in addition to other leave provided under federal, state, or local law, and any applicable collective bargaining agreement."
  - EPSL leave is on top of any other leave available
  - EFMLA leave is a type of FMLA leave – 12 weeks total for all types of FMLA (except military caregiver leave)
- Some states/cities have implemented COVID-19-related leave laws that are different than FFCRA
  - New York
  - California cities (LA, San Francisco, San Jose)
  - Colorado
  - Washington D.C.

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What About Employees who Are Scared to Return to Work (e.g., Those with High-risk Conditions/High-risk Family Members)?

- FMLA leave options?
  - Medical certification that
    - Employee cannot work due to serious health condition
    - Employee required to care for spouse, child, parent with serious health condition
  - What triggers employer notice obligations (FMLA packet)?
- ADA leave options?
  - Other reasonable accommodations under the ADA
    - Continued telework?
    - PPE/installing physical barriers
    - Staggered work schedules to allow social distancing
    - Heightened sanitizing
    - Modified workstations to incorporate social distancing
- Leave options under employer's policies?

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What About Employers with 500+ Employees?

- Same principles apply
  - FMLA leave options
  - ADA leave or other reasonable accommodation options
  - Other state and local leave laws
  - Company leave policies

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Thank you! Questions?

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