

# Responding to the COVID-19 Pandemic

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# Agenda

1. Families First Coronavirus Response Act (First Families Act).
2. COVID-19 and the ADA.
3. COVID-19 and workers' compensation.
4. OSHA safety guidance.



# Important Notes

- Information in this presentation is general in nature.
- It should not and cannot replace consultation with legal counsel.
- Furthermore, the law on this subject is changing daily and we currently lack regulations.
- This presentation should not be considered rendering legal advice.

# 1. Families First Act



# Families First Act has Two Relevant Parts

1. Emergency Paid Sick Leave Act (Division E)
2. FMLA Expansion Act (Division C)

Both laws only apply to private businesses with **fewer than 500 employees**.

Both laws apply to all state and local governments, regardless of number of employees. Limited application to federal government.

# Emergency Paid Sick Leave Act

- Provides some measure of paid leave.
- Money fronted by employer and later reimbursed through payroll tax credits.
- Economic effect on employers could be substantial (lessened by IRS guidance).
- Applies to all governmental employers and all private employers with fewer than 500 employees.
- No length of service requirement for employees. Brand new hires will be entitled to the leave immediately.
- Already amended with certain minor changes specified in Coronavirus Aid, Relief, and Economic Security Act (CARES Act) passed last Friday, March 27.

# Six Qualifying Reasons for Leave

1. The employee is subject to a Federal, State, or local quarantine or isolation order related to COVID-19.
2. The employee has been advised by a healthcare provider to self-quarantine due to concerns related to COVID-19.
3. The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis.

# Cap Applicable to Triggers 1,2 & 3

- No more than \$511 a day.
- Nor \$5,110 in aggregate over 2 weeks.
  - CARES Act (Sec. 3602) clarifies that these limits are per employee.
- Applies to employees who are—
  - Subject to a quarantine or isolation order.
  - Advised by a healthcare provider to self-quarantine.
  - Experiencing symptoms of COVID-19 and seeking a medical diagnosis.
    - *How long does this apply? What if you just have the flu?*



# Six Qualifying Reasons for Leave (cont.)

4. The employee is caring for an individual who is subject to an order as described in paragraph 1 or has been advised as described in paragraph 2.
5. The employee is caring for a son or daughter of such employee if the school or place of care of the son or daughter has been closed, or the childcare provider of such son or daughter is unavailable, due to COVID-19 precautions.
6. The employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services in consultation with the Secretary of the Treasury and the Secretary of Labor.

# Cap Applicable to Triggers 4, 5 & 6

- No more than \$200 a day.
- Nor more than \$2,000 in aggregate over 2 weeks.
  - CARES Act (Sec. 3602) clarifies that these limits are per employee.
- Applies to employees who are—
  - Caring for an individual who is subject to a quarantine or isolation order.
    - *No definition of “individual” – broader than the FMLA?*
  - Caring for a child whose school or place of care has been closed or whose provider is unavailable due to precautions.
    - *No definition of “place of care”*
  - Experiencing “any other substantially similar condition specified by the Secretary of Health and Human Services in consultation with the Secretary of the Treasury and the Secretary of Labor.”
    - *Regulations not yet released*

# Who is “son” or “daughter”?

- Section 5110(4) of Families First Act says that “son or daughter” is defined the same way as the FMLA defines “son or daughter,” which defined at 29 U.S.C. § 2611(12).
- 29 U.S.C.A. § 2611(12): The term “son or daughter” means a biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing in loco parentis, who is—
  - (A) under **18** years of age; or
  - (B) 18 years of age or older and incapable of self-care because of a mental or physical disability.

# Ineligible employees

- **Teleworking** employees.
  - DOL interprets “telework” very liberally as an arrangement “when your employer permits or allows you to perform work while you are at home or a location other than your normal workplace.”
  - Telework is work for which normal wages must be paid; therefore, no FFCRA leave is available.
  - According to DOL guidance, note that if the employee is simply **unable** to telework “because of one of the qualifying reasons” (such as because of the need to care for a child), the employee is entitled to leave **EVEN THOUGH** they have the technical capability to telework.
  - By contrast, if an employee is “able” to telework while caring for a child, they get no leave. This appears to be a wholly **subjective analysis**.
  - *But what happens if they contract COVID-19? Statute does not provide answer. Common sense suggests they are not eligible for telework.*

# Ineligible Employees (cont.)

- Healthcare providers and emergency responders are subject to being exempted.
  - *Exemption is left up to employer – not an industry-wide exemption.*
- DOL defines emergency responder to include:
  - military or national guard,
  - law enforcement officers,
  - correctional institution personnel,
  - fire fighters, emergency medical services personnel, paramedics & EMTs
  - physicians, nurses, public health personnel,
  - emergency management personnel
  - 911 operators
  - public works personnel
  - persons with skills or training in operating specialized equipment or other skills needed to provide aid in a declared emergency as well as individuals who work for such facilities employing these individuals and whose work is necessary to maintain the operation of the facility.
  - Includes any individual that the highest official of a state or territory, including the District of Columbia, determines is an emergency responder necessary for that state's or territory's or the District of Columbia's response to COVID-19.



# Ineligible Employees (cont.)

- Health care providers are also subject to being excluded in discretion of employer.
- Section 5110(4) of Families First Act says that “health care provider” is defined the same way as the FMLA defines “health care provider,” which defined at 29 U.S.C. § 2611(6).
- However, DOL guidance is **broader**.
  - DOL states that it would include anyone who is employed at 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 any similar institution, employer, or entity.

# Healthcare provider defined

- 29 U.S.C.A. § 2611(6): The term “health care provider” means—
  - (A) a doctor of medicine or osteopathy who is authorized to practice medicine or surgery (as appropriate) by the State in which the doctor practices; or
  - (B) any other person determined by the Secretary to be capable of providing health care services.

# 29 C.F.R. § 825.102

- Under FMLA regulations, health care provider means—
  - Doctor of medicine or osteopathy.
  - Podiatrists, dentists, clinical psychologists, optometrists, and chiropractors.
  - Nurse practitioners, nurse-midwives, clinical social workers and physician assistants.
  - Christian Science Practitioners listed with the First Church of Christ, Scientist in Boston, Massachusetts.
  - Any healthcare provider from whom an employer or the employer's group health plan's benefits manager will accept certification of the existence of a serious health condition to substantiate a claim for benefits.



# Additional Categories of Health Care Provider

- DOL guidance states that the definition “includes any individual employed by an entity that contracts with any of the above institutions, employers, or entities institutions to provide services or to maintain the operation of the facility.”
- Furthermore, DOL encourages employers to “be judicious” in applying this exemption.

# Ineligible employees (cont.)

- **Both** FMLA and Paid Sick Leave Acts provide that the Secretary of Labor has the “authority to issue regulations for good cause” to
  - Exclude certain health care providers and emergency responders from the definition of eligible employee;
  - Exempt small businesses with fewer than 50 employees if from the Emergency Paid FMLA leave requirement “when the imposition of such requirements would **jeopardize the viability of the business as a going concern.**”
- DOL states that businesses who wish to claim the small business exemption should “document why your business with fewer than 50 employees meets the criteria set forth by the Department, which will be addressed in more detail in forthcoming regulations.”
- However, DOL states that “you should not send any materials to the Department of Labor when seeking a small business exemption.”

# Small Business Exemption

- DOL has announced the small business exemption is **PARTIAL** - it only exempts small businesses from the child care provisions of the FFCRA.
- DOL guidance hinges the eligibility for the small business exemption on 3 questions.
- Answering **YES** to any of these questions will earn the business an exemption:
  - The provision of paid sick leave or expanded family and medical leave would result in the small business's expenses and financial obligations exceeding available business revenues and cause the small business to cease operating at a minimal capacity;
  - The absence of the employee or employees requesting paid sick leave or expanded family and medical leave would entail a substantial risk to the financial health or operational capabilities of the small business because of their specialized skills, knowledge of the business, or responsibilities; or
  - 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 paid sick leave or expanded family and medical leave, and these labor or services are needed for the small business to operate at a minimal capacity.

# How Do We Count to 50?

- DOL has given no guidance on how we determine if a business has fewer than 50 employees.
- Most federal employment laws determine employer size on a time-continuum rather than in a freeze-frame.
  - Original FMLA states that an employer does not have 50 or more employees unless it maintains that many on its payroll for 20 or more calendar weeks in the current or preceding calendar year.
  - Title VII and the Americans with Disabilities Act are similar.
  - Emergency Paid Leave Act is amendment to FLSA, which has no similar rule.
  - Notably, DOL has stated that for purposes of determining whether an employer has 500+ employees, employer should assess its total number of employees **at the moment** that an individual employee's leave is to be taken.
    - Includes employees on leave and joint employees. Very broad definition of joint employer.
    - Suggests that perhaps a “freeze-frame” approach will be adopted.

# General rule with exceptions

- Get 2 weeks of paid sick leave—provided triggers are met.
- Paid at regular rate as defined by Fair Labor Standards Act (FLSA).
  - Hourly rate.
  - Equivalent hourly rate for salaried employees.
- Special rules for calculating pay for part-time employees.

# Cap 3 for those taking care of family member

- No more than \$200 a day.
- No more than \$2000 in aggregate.
- **Two-thirds of regular pay.**



# Calculating pay for full-time employee

- Assume regular rate of pay is \$20 an hour.
- Assume employee works 40 hours a week.
- Normal 2-week pay would therefore be \$1,600:  
 $80 \times \$20$ .
- Suppose employee is diagnosed with COVID-19 and must be quarantined (Qualifying Reason #1).
- Paid sick leave must be at rate of \$20 an hour.
- Therefore, employee must be paid \$1,600.

# Full-time calculation

- But check Cap 1 requirement.
  - Is daily pay more than \$511? No.  $8 \text{ hours} \times \$20 = \$160$ .
  - Is aggregate compensation more than \$5,110? No.
  - Total compensation of \$1,600 for 2 weeks is therefore correct.



# Calculating pay for part-time employees

- Language of statute: hours of paid sick leave = “a number of hours equal to the number of hours that such [part-time] employee works, on average, over a 2-week period.”
- Assume regular rate of pay is \$10 an hour.
- Assume employee works 20 hours a week—which means 40 hours for a 2-week period.
- Normal 2-week pay would therefore be \$400.

# Part-time calculation (cont.)

- Suppose that employee needs to leave to care for child.
- Apply cap - limits pay to 2/3 of regular pay:  $\$10 \times \frac{2}{3} = \$6.67$  an hour.
- Statute is confusing as to whether payment less than minimum wage can be made.
- DOL states that "employees taking leave are entitled to pay at 2/3 their regular rate **or 2/3 the applicable minimum wage**, whichever is higher, up to \$200 per day and \$2,000 in the aggregate (over a 2-week period)."
- Apparently, a subminimum wage is possible.

# Part-time calculation (cont.)

- Now calculate pay for 2-week period:  $40 \text{ hours} \times \$6.67 = \$266.80$ .
  - Note that HOURS are not reduced to  $2/3$  – only the wage rate.
- Check other caps:
  - Is rate of pay no more than \$200 a day? Yes.  $8 \text{ hours} \times \$6.67 = \$53.36$ .
  - Is rate of pay for entire 2 weeks no more than \$2,000?
  - Rate of pay is therefore correct.
- But be careful if part-time employee's time wildly fluctuates from week to week.

# What if employee typically works overtime?

- Is that part of calculations for 2 weeks of paid sick leave?
  - *No.*
- Section 207(e)(6) says regular rate doesn't include premium rate paid for—
  - Working more than 8 hours in a day.
  - Working more than 40 hours in a workweek.

# Calculating for salaried employee

- Simply divide salary into hourly equivalent and apply daily and aggregate caps.
- Assume 40 hours per week.

# Other considerations for calculations

- How do deductions for health insurance, dental insurance, 401(k) plans, etc. affect the calculations?
- Presumably, paid leave can be reduced by these items. In general, FLSA would permit an employee's pay to fall below the minimum wage because of the employee elected to spend some of their pay on optional benefits.
- We have no regulations yet on this point but DOL does say that benefits should continue.

# Other considerations for calculations

- Pay will not include any premium the employee would ordinarily receive for overtime hours.
- However, employees will be paid for the number of hours the employee would have been normally scheduled to work, subject to the daily and aggregate caps.
- Under Emergency Paid Sick Leave Act, an employee who normally works overtime could receive 45 hours in Week 1 and 35 hours in Week 2, but no overtime premium.

# Notice of Need for Leave

- DOL preliminary guidance states that where the leave is foreseeable, the employer can request the employee to provide such notice “as is practicable.”
  - Notably, the foreseeable leave notice obligation only appears in the Expanded FMLA, but on its website, DOL seems to take the view that the notice obligation exists under BOTH laws.



# Interaction with Accrued Paid Leave

- Employees may use Emergency Paid Sick Leave under without first utilizing or exhausting any accrued paid leave.
  - *Employer may not force them to exhaust accrued leave first.*
- Employees may also use Emergency Paid Sick Leave to fund their first 10 days of Emergency Expanded FMLA leave (which are otherwise unpaid).

# Finding Alternative Workers

- Emergency Paid Sick Leave Act specifically provides that employees shall not be required, as a condition of Emergency Sick Leave usage, to search for or find a replacement employee to cover the hours during which the employee is using paid sick time.



# Intermittent Leave

- Intermittent leave under the Expanded FMLA and Emergency Paid Sick Leave Act are ONLY available **if the employer agrees AND:**
  - ***If employee is teleworking:*** Intermittent leave potentially available for any qualifying reason.
  - ***If employee is still coming to workplace:*** Intermittent leave is only available for **child care** leave. Once employee begins taking Emergency Paid Sick Leave for any *other* qualifying reasons, they **MUST** continue to take the sick leave until there is no leave left or they no longer have a qualifying reason.
- If employee no longer has a qualifying reason but still has available leave, DOL states that it can be used later (until December 31, 2020) if another qualifying reason occurs.

# Can't take it with you

- DOL guidance states that employees are not entitled to reimbursement for unused leave upon termination, resignation, retirement, or other separation from employment.
- Emergency Paid Sick Leave does not carry over from one year to the next.
- Must be used up this year.
- Law expires December 31, 2020.

# Documentation of request for leave

- Employer needs to have paper trail.
- Send requesting employee a letter indicating—
  - Amount of leave employee entitled to.
  - Verification requirements—paperwork that indicates that one of the triggers is met.
    - Unless request is obvious.
  - Caps and such so there is no misunderstanding.

# Documentation (cont.)

- In FAQ guidance issued on DOL's website on March 27, 2020, DOL stated that employees "must provide to [their] employer documentation in support of the reasons for [their] paid sick leave."
- Documents may include a copy of a local quarantine or isolation order or written documentation from a healthcare provider.
- Similarly, employees must provide documentation in support of a contention that a school or place of care is closed or child care provider is unavailable.
- DOL guidance reminds employers that all existing certification requirements under the FMLA remain in place if employee is taking leave for one of the existing qualifying reasons for leave (e.g., medical certifications for unpaid FMLA leave justified by serious medical condition related to COVID-19).

# Documentation (cont.)

- DOL states that employer MUST maintain all documentation in order to claim the payroll tax credit available under the Families First Act.
- If you intend to claim a tax credit under the FFCRA for your payment of the sick leave wages, you should retain this documentation in your records. You should consult Internal Revenue Service (IRS) applicable forms, instructions, and information for the procedures that must be followed to claim a tax credit, including any needed substantiation to be retained to support the credit.



# Leave is “Immediately” Available

- Nothing in law provides for employer’s discretion in scheduling leave.
- Note that the Emergency Paid Sick Leave Act imposes a **new** leave requirement on employers that is effective beginning on April 1, 2020 – **that’s today!**.
- There is no credit given for paid leave already provided to your employees or for paid leave you have allowed employees to accrue.



# Don't delay leave

- Congress seems to contemplate that leave should be provided immediately.
  - We suggest not holding up leave for any substantial time period while awaiting verification documentation.
  - If it is an obvious qualifying reason like a closed school, you should feel pretty comfortable that you can get the documentation later.
  - Normal FMLA rules would permit 15 days for a doctor's certification, during which leave is provisionally applied. No certification form here (yet), but a similar concept should apply.

# Documentation (cont.)

- Lanier Ford has developed form letters for this process.
- If you can establish that employee lied about this, discipline is appropriate.
- But be careful . . . .

# Law has teeth

- Violation of Emergency Paid Sick Leave Act constitutes a violation of the FLSA.
- Double damages.
- Attorneys' fees.
- Can't discriminate against those who exercise their rights under act.
- Can't retaliate against them either.

# Furloughs and Layoffs

- DOL guidance states that if your employer furloughs you because it does not have enough work or business for you, you are not entitled to then take paid sick leave or expanded family and medical leave.
- DOL guidance further provides that if your employer closes your worksite, even for a short period of time, you are not entitled to take paid sick leave or expanded family and medical leave during that time.
- Finally, DOL states that if your employer reduces your work hours because it does not have work for you to perform, you may not use paid sick leave or expanded family and medical leave for the hours that you are no longer scheduled to work.
  - This is because you are not prevented from working those hours due to a COVID-19 qualifying reason, even if your reduction in hours was somehow related to COVID-19.

# Unemployment + Paid Leave?

- DOL guidance states that if your employer provides you paid sick leave or expanded family and medical leave, you are not eligible for unemployment insurance.
- However, check with your local unemployment office, as different states have different rules.



# Continuation of Benefits

- If employer provides group health coverage that employee has elected, employee is entitled to continued group health coverage during leave
- Employee still has obligation to pay for coverage.
- Not a good idea to cancel coverage; try to recover premiums separately from coverage cancellation remedy.

# Emergency FMLA Expansion Act

- Expands Family Medical Leave Act on a **temporary** basis.
- This leave is *in addition* to that provided by Sick Leave Act.
- Employees may be eligible for leave under **both** Expanded FMLA and the Emergency Paid Sick Leave Act, but only for a **combined maximum of 12 weeks of paid leave**, and only if they meet the eligibility requirements and present qualifying reasons for each type of leave.

# ONE New Category of FMLA Leave

- FMLA *already* allows for leave to take care of—
  - Birth of child.
  - Serious health condition of employee.
  - Series health condition of close family members.
  - And so forth.
- New category is “qualifying need related to a public health emergency.”
- PHE = emergency with respect to COVID-19 declared by Federal, State, or local authority.



# Qualifying Reasons for New PHE Leave

- Employee unable to work **or telework**.
- Because of need to take care of child under 18 due to —
  - Closure of child's school or daycare.
  - Normal childcare provider is unavailable.
  - Place of care is closed.
    - In *all* cases, the closure or unavailability must be **due to** the public health emergency, not for some other reason.

# New leave only applies to—

- Parents affected by school closure or loss of childcare who are not able to telework.
  - As noted above, “ability” to telework is apparently subjective, and even parents who are given network access at home may be able to claim inability to work while caring for child.
- Mandatory quarantine or COVID-19 infection is not enough to trigger this provision of law—
  - But other FMLA leave is potentially available assuming the COVID infection qualifies as a “serious health condition.”
  - Other questions about applicability remain.

# Applicability of FMLA Expansion Act

- Expanded FMLA applies to all government employers, which are—
  - Federal Government agencies.
  - State governments.
  - County governments and municipalities.
- Regardless of number of government employees.



# Applicability (cont.)

- Applies to all private employers with fewer than 500 employees.
  - “Regular FMLA” doesn’t apply to employers with fewer than 50 employees within 75 miles of worksite.
  - No guidance as to how this rule interacts with Emergency FMLA. This is a tantalizing question. For now, assume this limitation does not pertain.
- FMLA waiting period (12-month of service rule) is suspended, and replaced with a **30 day length of service requirement**.
- FMLA hours of service requirement (1,250 hours within 12 months preceding leave) also suspended.
- These suspended rules **ONLY** apply to the Emergency Paid FMLA
- Unpaid FMLA continues to be available to eligible employees.

# 30 Day Length of Service Rule

- Emergency FMLA only available to those who have been employed for 30 calendar days.
- Test is whether employer had employee on its payroll for the 30 calendar days immediately prior to the day the proposed leave would begin.
- CARES Act (Section 3605) modifies this requirement:
  - Eligible employees **include** those laid off not earlier than March 1, 2020, if they had worked for the employer for not less than 30 of the last 60 calendar days prior to the layoff, if they are later re-hired during 2020.

# Carve-out for small businesses

- Covered above.
- DOL apparently views the exemption as limited to one type of leave: **childcare leave.**
- Assuming the small business has less than 50, the test for exemption is still ***stringent***.
  - Officer of company will have to state that providing the leave would:
    - cause expenses to exceed revenue;
    - absence of specific employee would “entail a substantial risk to the financial health or operational capabilities of of the small business”;  
or
    - there are insufficient workers to fill the gap created by the employee taking leave and the gap created will make it impossible for business to operate at a “minimal capacity.”

# Reinstatement Obligations

- Covered employers have a duty to reinstate in accordance with normal FMLA rules.
- Reinstatement obligations are limited where the employer has fewer than 25 employees:
  - Such employers have to provide leave, but—
  - Employer does not have to reinstate the employee if the job is eliminated during the closure
    - So long as the employer reaches out to employee for one-year period in the event a position becomes available.

# Emergency FMLA Leave is PAID

- First 10 days of leave are UNPAID.
  - However, employees can **choose** to substitute accrued paid leave.
  - Employees are also **entitled** to fill the 10-day gap with Emergency Paid Sick Leave, if applicable.
  - Employee could in theory have 10 days of self-quarantine followed by 10 weeks of a child care need. Aggregate caps on pay would apply.
- Emergency FMLA Act does not state the maximum time off, so we default to the existing FMLA, which provides for a maximum of 12 weeks.



# Is Paid FMLA Available Where Employees Have Already Exhausted Annual FMLA Entitlement?

- Not if employer was already covered by the FMLA and the employee utilized some of their leave.
- DOL states: “If your employer was covered by the FMLA prior to April 1, 2020, your eligibility for expanded FMLA depends on how much leave you have already taken during the 12-month period that your employer uses for FMLA leave. You may take a **total** of 12 workweeks of FMLA or expanded FMLA during a 12-month period.”
- Note that Emergency Paid Sick Leave does NOT count against the 12-week FMLA entitlement.
- Statutory basis:
  - A new category of leave is created **after** this language: “an eligible employee shall be entitled to a total of 12 workweeks of leave during any 12-month period for one or more of the following:”
    - Section 102(a)(1) of FMLA

# Caps and Maximums

- Pay limited to 2/3 of “regular rate” of pay for number of hours employee normally works.
  - Presumably 40 hours for salaried employees.
- Capped at—
  - \$200 a day.
  - \$10,000 in aggregate.
  - The aggregate is actually \$12,000 if including Emergency Paid Sick Leave used for child care.

# Employer reimbursed

- Employers to receive 100% reimbursement for paid leave pursuant to Act.
  - Act states that reimbursement comes in the form of a payroll tax credit in the quarter following the payments.
  - IRS has now proposed immediate dollar-for-dollar offset against payroll taxes if the credits are claimed when running payroll. Additional refunds will be sent as soon as possible
  - IRS guidance has now been **codified** in Section 3606 of CARES Act.
- Health insurance costs are included in credit.
- No payroll tax liability.
- Self-employed will receive equivalent credit

# Employer reimbursed (cont.)

- For more information:

<https://www.irs.gov/newsroom/treasury-irs-and-labor-announce-plan-to-implement-coronavirus-related-paid-leave-for-workers-and-tax-credits-for-small-and-midsize-businesses-to-swiftly-recover-the-cost-of-providing-coronavirus>

# Employer reimbursed (cont.)

- Most companies make payroll deposits at least twice a month.
- Deposits consist of three items
  - employer's share of payroll taxes (7.65% of comp, at least until the taxable wage base has been met)
  - employee's share of payroll taxes (same as employer's share), and
  - federal income taxes withheld (e.g., 20% of compensation on average).
- IRS appears to be planning to allow the company to keep and not deposit those three amounts (lumping together the deposits for all employees for that payroll period) to the extent of any COVID-19 paid time off compensation paid during that payroll period.
- This applies to Expanded FMLA **and** Emergency Paid Sick Leave

# Bad news for government employers

- No tax credits.
- No expected reimbursement.



# Potential exemptions

- Secretary of Labor can exclude—
  - Healthcare providers.
  - Emergency responders.



# How enforced against employer

- Same as with other violations of FMLA.
- Lawsuits by—
  - U.S. Department of Labor.
  - Affected employees.
- Damages can include back pay and attorneys' fees.
- Law does have anti-interference and anti-retaliation provisions.



# Good news for self-employed

- Tax credit available as if person worked for a covered employer.
- Amount = value of qualified sick-leave entitlement and qualified FMLA sick-leave entitlement.

# Big takeaway

- Most employees will be entitled to 80 hours of paid sick leave.
- Some parents will receive up to approximately 10 weeks of additional partially paid sick leave (at two-thirds of regular wages).
- Employers should begin planning because law goes into effect **TODAY**.
- Employers who have not selected an FMLA leave year could be caught in difficult situation.

## **2. COVID-19 & the ADA**



# Generally ADA prohibits—

- Medical examinations.
- Medical inquiries.



# Permitted inquiries during pandemic

- Can ask whether employee is experiencing flu-like symptoms: fever, respiratory difficulties, etc.
- If pandemic becomes a direct threat to other employees, can—
  - Ask about disabilities or underlying risk factors.
  - Take temperatures of employees.

# Best approach

- Inquire about symptoms.
- Require sick employees to stay at home until they can provide medical certification before returning to work.
- Share information with other employees to permit contact tracing.
- Get Health Department involved.

# If employee needs reasonable accommodation . . .

- Employer must engage in interactive process (discussion with employee) as required in any other request for reasonable accommodation.
- For example, suppose employee has compromised immune system.
  - Employer should determine whether teleworking, time off, or something else would be a reasonable accommodation.

# Time Off

- Yes, time off can be a reasonable accommodation.
- Because of Families First Act, employers need to give this serious consideration.
- Ask employee to provide request in writing.
- Will employee be able to continue to perform essential functions of job?



# Keep medical info confidential

- Must be kept confidential.
- Maintain this information separately from employee's regular personnel file.
- Possible loosening of rules during this crisis, but be careful as we have limited guidance.

# 3. COVID-19 & Workers' Comp



# Law not settled

- COVID-19 will probably be treated as any other disease under workers' compensation law.
  - Probably shouldn't be considered any different from flu.
- Alabama Workers' Compensation Act says an **injury** does **not** include a disease in any form—
  - Except an occupational disease or where it results naturally and unavoidably from accident.

# Thoroughly document work-related COVID-19 illness

- Mention COVID-19 in the description of the illness so that it is easily recognizable by the carrier and any other entity which would need to implement specific COVID-19 protocols.
- Determine whether the employee had any contact with a person known to be COVID-19 positive, and if so, document when, where, and how that contact occurred.
- Confirm the onset of symptoms and whether the illness has been confirmed with a positive COVID-19 test.

# Thoroughly document (cont.)

- Document whether the employee or any member of his or her immediate family has traveled to an area of high risk, and if so, whether or not that travel was work related.
- Determine whether any immediate family members are showing symptoms.
- Determine any other employees who have had close contact (within 6 feet per current CDC guidelines) with the employee.

# Other ways pandemic become involved in workers' compensation

- Current injured workers' may not be able to complete approved workers' compensation medical treatment.
- Work with carriers.
- Consider telehealth services.
  - Virtual physical therapy.
  - To determine whether worker can return to work.

# 4. OSHA Safety Guidance



# OSHA has published booklet

- Download “Guidelines on Preparing Workplaces for COVID-19” here:

<https://www.osha.gov/Publications/OSHA3990.pdf>

- Booklet does not create any additional legal obligations for employers.
- May help employers reduce absenteeism.



# Questions?

- Check out our blog: [www.thirdshiftblog.com](http://www.thirdshiftblog.com)
- Lanier Ford COVID-19 Task Force page:  
<https://lanierford.com/services/covid-19-task-force>
- Call me: 256-535-1100
- Email me: [djc@lanierford.com](mailto:djc@lanierford.com)
- Look me up:  
<https://lanierford.com/services/david-j-canupp>