

TEN PEARLS OF HR LAW WISDOM TO TREASURE IN THE COVID-19 ERA

By Michael Patrick O'Brien

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DISCLAIMER: The information provided here is for general informational purposes only and should not be construed as legal advice or legal opinion. You are encouraged to consult with your employment counsel concerning any specific legal questions you may have.

Remember March 12, 2020?

NBA

Rudy Gobert tests positive for coronavirus; NBA season suspended



It's not all about COVID-19.

10. What other employment laws have developed since Rudy Gobert's positive COVID test?

On June 15, 2020, the United States Supreme Court issued a landmark decision—*Bostock v. Clayton County Georgia*—that sexual orientation and transgender status now are protected classes.



Bostock v. Clayton County Georgia



Writing for the 6-3 majority, Justice Gorsuch held:

- *“an employer who intentionally treats a person worse because of sex—such as by firing the person for actions or attributes it would tolerate in an individual of another sex—discriminates against that person in violation of Title VII.”*
- *“...it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex.”*

Nothing new for Utah...

- Utah law already included a prohibition on workplace discrimination based on sexual orientation or gender identity.
- Same is true in about half of the U.S. states.

9. Does COVID-19 have wage and hour implications?

8. Wage and Hour Issues

- ❖ Wage and hour laws do not go away in the middle of a pandemic, or just because employees are working from home.
- ❖ But the laws may apply a bit differently, or cause unique problems.
- ❖ Key laws: Fair Labor Standards Act (FLSA); state wage laws.
- ❖ What are the key issues?



Nonexempt pay when working at home. . . Pay for all hours worked

❖ Examples of common problems:

1. When does the work day start/end?
2. How to deal with all those distractions working at home?
3. What about employees responding to work emails at night after dinner?
4. What about pay for employee time spent onsite, in lines, waiting to pass COVID-19 temperature checks/screenings (note that courts require pay for security screenings)?



How do you handle nonexempt employee overtime when worked at home?

- ❖ Same basic way as onsite work.
- ❖ Track daily hours, require authorization in advance.
- ❖ If worked w/o approval – depending on the facts – usually best to pay it but can discipline.



Exempt employees working at home but not working full time

- ❖ Remember the rule of payment by salary for exempt employees.
- ❖ Only make pay deductions from salary as authorized by the FLSA regulations.
- ❖ Deductions from leave banks can be done in a manner preferred by the employer as long as salary pay is not docked.



Who pays for all the stuff needed to work at home?

- ❖ Some states (e.g. California) say the employer must do so; Utah does not have this express rule.
- ❖ Probably fair for the employer to pay a reasonable share of required new equipment (contrast an employee's car, needed to work at the office but not paid for by the employer, with an employer mandate that a worker have certain types of remote work technology available).
- ❖ FLSA says deductions from pay cannot bring an employee below minimum wage.
- ❖ Utah state law requires pay deductions be authorized in advance in writing by an employee.



8. May an employer (and its managers) be sued if an employee contracts COVID-19 at work?

CAN YOUR EMPLOYEES SUE THE COMPANY FOR CATCHING COVID-19?

- ❖ Probably not—at least not in the form of a lawsuit filed in court.
- ❖ Exclusive remedy: Utah Occupational Disease Act and Workers' Compensation Act.
- ❖ Exception: Intentional harm



WHAT ABOUT COVID-19 WORKERS' COMPENSATION CLAIMS?

- ❖ Illness must “arise out of employment.”
- ❖ An employee must show that he/she contracted COVID-19 at work.
- ❖ This could prove quite difficult during a pandemic, when the virus is everywhere.



OSHA – COVID-19 Guidance

- ❖ COVID-19 is a recordable illness (i.e., must investigate) if “work related”
- ❖ Factors for work-relatedness:
 - ❖ Several cases develop among workers who work closely together
 - ❖ Employee contracted COVID-19 shortly after lengthy, close exposure to someone at work who has a confirmed case
 - ❖ Job duties include having frequent, close exposure to the general public in a locality with ongoing community transmission
 - ❖ Employee is the only worker to contract COVID-19 in the vicinity and the job duties do not include having frequent contact with the general public
 - ❖ Employee closely and frequently associates with a non-coworker outside of work who has COVID-19 and exposes the employee while infectious
 - ❖ Alternative explanations



Utah's Approach

House Bill 3007—health care workers presumption

- ❖ HB 3007 amended the Workers Compensation Act to establish a rebuttable presumption that a “first responder” who contracts COVID-19 contracted it during the course and scope of performing the first responder’s job duties.
- ❖ First responder is defined as:
 - ✓ An emergency responder; or
 - ✓ A health care provider.
- ❖ Signed into law by Governor Herbert on April 22, 2020.

<https://le.utah.gov/~2020S3/bills/static/HB3007.html>



Utah's Approach

Senate Bill 3007—COVID immunity

- ❖ On May 4, 2020, Governor Herbert signed into law SB 3007—“Immunity related to COVID-19” (Utah Code as 78B-4-517).
- ❖ Under this new law, businesses (and other property owners) cannot be sued by persons who contract COVID-19 on their premises.
- ❖ Exception: a business can be sued if it acted willfully, recklessly, or intentionally to get someone sick.
- ❖ The law *does not* impact the Workers Compensation Act or Utah Occupational Disease Act, thus workers' comp claims still viable.

<https://le.utah.gov/~2020S3/bills/static/SB3007.html>

We've already seen one COVID-19 employee lawsuit

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IN THE FOURTH JUDICIAL DISTRICT COURT
IN AND FOR UTAH COUNTY, STATE OF UTAH

JUANA VICTORIA FLORES, individually
and on behalf of ANDREA SANCHEZ;
and GRISELDA ESCOBAR, an
individual.

Plaintiff,

vs.

BUILT BRANDS, LLC DBA BUILT BAR
and; BUILT BRANDS MANAGEMENT,
LLC, and DOES 1-10.

Defendants.

FIRST AMENDED COMPLAINT

Case No. 200400681
Judge: Christine Johnson

TIER: 3

Utah woman sues employer she claims
'recklessly' exposed her to coronavirus



(Rick Egan | The Salt Lake Tribune) Employee entrance to the Built Bar, in American Fork, Thursday, May 14, 2020.

<https://www.sltrib.com/news/2020/05/15/utah-woman-sues-employer/>

WHAT CAN AN EMPLOYER DO TO MITIGATE LIABILITY?

- ❖ First of all . . . don't *intentionally infect your employees*
- ❖ Second, don't become a COVID-19 **HOT SPOT**.
- ❖ Make it as *unlikely as possible* that your employees will catch COVID-19 in the course of their employment.



7. What safety guidance have employers received to manage the risk of COVID-19 spread at work?

What safety measures should company's implement?

OSHA

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

CDC

<https://www.cdc.gov/coronavirus/2019-ncov/downloads/community/workplace-decision-tree.pdf>

Utah Labor Commission

<https://laborcommission.utah.gov/wp-content/uploads/2020/05/High-Risk-Recommendations.pdf>

State of Utah

https://coronavirus-download.utah.gov/Health/Phased_Health_Guidelines_V4.5.3_05262020.pdf



OSHA

Guidance on Preparing Workplaces for COVID-19

U.S. Department of Labor
Occupational Safety and Health Administration

OSHA 3990-03 2020



U.S. Department of Labor

MESSAGE FROM OSHA:

- ❖ Plan ahead: consider your particular exposure risks, and develop infection prevention measures.
- ❖ Implement, communicate, and monitor your infection prevention measures.



**There are lots of
resources available . . .**



CDC—decision trees

WORKPLACES DURING THE COVID-19 PANDEMIC



The purpose of this tool is to assist employers in making (re)opening decisions during the COVID-19 pandemic, especially to protect vulnerable workers. It is important to check with state and local health officials and other partners to determine the most appropriate actions while adjusting to meet the unique needs and circumstances of the local community.

Should you consider opening?

- ✓ Will reopening be consistent with applicable state and local orders?
- ✓ Are you ready to protect employees at higher risk for severe illness?

ANY
NO



ALL
YES

Are recommended health and safety actions in place?

- ✓ Promote healthy hygiene practices such as hand washing and employees wearing a cloth face covering, as feasible
- ✓ Intensify cleaning, disinfection, and ventilation
- ✓ Encourage social distancing and enhance spacing between employees, including through physical barriers, changing layout of workspaces, encouraging telework, closing or limiting access to communal spaces, staggering shifts and breaks, and limiting large events, when and where feasible
- ✓ Consider modifying travel and commuting practices. Promote telework for employees who do not live in the local area, if feasible.
- ✓ Train all employees on health and safety protocols

ANY
NO



ALL
YES

Is ongoing monitoring in place?

- ✓ Develop and implement procedures to check for signs and symptoms of employees daily upon arrival, as feasible
- ✓ Encourage anyone who is sick to stay home
- ✓ Plan for if an employee gets sick
- ✓ Regularly communicate and monitor developments with local authorities and employees
- ✓ Monitor employee absences and have flexible leave policies and practices
- ✓ Be ready to consult with the local health authorities if there are cases in the facility or an increase in cases in the local area

ANY
NO



ALL
YES

OPEN AND
MONITOR



Utah Labor Commission



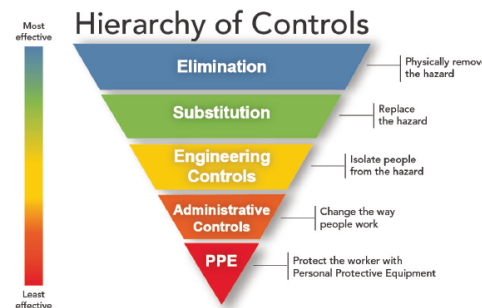
Protecting High-Risk Individuals

Recommendations for the Workplace

For the purposes of these recommendations, high-risk individuals would include all people in the workforce who meet any of the following criteria as outlined in CDC guidelines and the Utah Leads Together 2.0 Plan. If you have questions about these risk factors or other conditions, please consult with your personal doctor.

High-Risk Individuals:

- ✓ People aged 65 years and older.
- ✓ People who live in a nursing home or long-term care facility.
- ✓ People with chronic lung disease or moderate to severe asthma.
- ✓ People who have serious heart conditions.
- ✓ People who are immunocompromised including cancer treatment, smoking, bone marrow or organ transplantation, immune deficiencies, poorly controlled HIV or AIDS, and prolonged use of corticosteroids and other immune weakening medications.
- ✓ People of any age with severe obesity (body mass index [BMI] >40) or certain underlying medical conditions, particularly if not well controlled, such as those with diabetes, renal failure, or liver disease.
- ✓ People who are pregnant should be monitored since they are known to be at risk with severe viral illness, however, to date data on COVID-19 has not shown increased risk.



When controlling exposure to health and safety risks, best practice emphasizes the Hierarchy of Controls as outlined by the National Institute for Occupational Safety and Health (NIOSH). Note that personal protective equipment (PPE) is at the bottom of the hierarchy. This means that all other methods of controlling exposure to safety and health hazards should be considered before relying on PPE.

According to the hierarchy of controls, the best possible protection for all, including high-risk individuals, is to eliminate the hazard. In the case of COVID-19 and high-risk individuals, the hazard is very difficult to completely remove. The best protection for high-risk individuals may be to exclude them from exposure to the hazard.

¹ Center for Disease Control and Prevention (CDC) (<https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-at-higher-risk.html>)

² Utah Leads Together 2.0 ([https://coronavirus-download.utah.gov/Governor/UtahLeads%20April2020%20v20%20\(2\).pdf](https://coronavirus-download.utah.gov/Governor/UtahLeads%20April2020%20v20%20(2).pdf))

³ Hierarchy of Controls, National Institute for Occupational Safety and Health (NIOSH), Center for Disease Control and Prevention, (<https://www.cdc.gov/niosh/topics/hierarchy/default.html>)



The EEOC on TESTING

May we take temperatures, make health inquiries,
and *TEST* our employees for COVID-19?

- ❖ Yes. In its pandemic guidance, the EEOC expressly states that an employer may screen employees for COVID-19 through medical exams (including taking temperatures) and by asking health related inquiries.
- ❖ But note, employers may only screen job applicants for COVID-19 after making a conditional job offer.

EEOC: Pandemic Preparedness in the Workplace and the ADA.

<https://www.eeoc.gov/laws/guidance/pandemic-preparedness-workplace-and-americans-disabilities-act>



Guidance from the CDC

When should you think about testing an employee?

- ❖ Employees showing symptoms (e.g., fever)
- ❖ Employees who have been exposed to the virus.
Immediately quarantine, and test several days after exposure.
- ❖ Mass testing: Test everyone (especially where there is high transmission).
- ❖ Once-infected employees (before they return to work).
- ❖ Testing to evaluate protective measures or find hot spots.



One more note about health inquiries...

- ❖ Do not ask an employee if anyone in the employee's family has COVID-19. Doing so likely violates the federal Genetic Information Nondisclosure ACT (GINA).
- ❖ Instead, ask if your employee has been exposed to anyone who has COVID-19.



6. If we provide remote work now, will that set a precedent for the future?

FAQ: We've provided telework to our employees in response to COVID-19. Will that set a precedent for the future when an employee seeks telework as an ADA accommodation?

It depends! Has telework worked?

If your recent experience shows that remote work has been effective—that teleworkers have been able to productively accomplish all essential job duties—this evidence likely will be used in the future to show that telework should be provided for an employee when necessary to accommodate a disability.



What if we provided telework to our employees purely out of pandemic-necessity and at the sacrifice of some essential job duties?

In that case, the mere provision of telework now should not foreclose an employer from denying a remote work accommodation request by asserting that **onsite work is essential** and that **telework imposes an undue hardship**.



*If you believe that onsite work is essential,
here are three things you can do now to position yourself to
require onsite work in the future*

1. When providing telework in response to pandemic concerns, write to your employees that telework is provided “only in response to the pandemic” and that the company “understands that its employees will not be able to perform all of the essential functions of their job while working remotely.”



Positioning yourself (cont.)

2. When you return employees to onsite work, write to your employees that you look forward to the resumption of all of their all essential job functions.
3. Review and revise your job descriptions for onsite employees. If onsite work is essential to a particular job, explain that in the job description.



Halfway there (10-6), need more info?



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email update about
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Two for the price of one...

5. Are disabled workers entitled to accommodations arising from COVID-19?

4. Are non-disabled workers entitled to accommodations arising from COVID-19?

Return to Work – Disability Accommodations

Return to Work – Accommodations for non-disabled –

❖ Q: Is COVID-19 a disability/condition you must accommodate/assist?

A: Classic lawyer response: It depends!



Applicable law

- ❖ Americans with Disabilities Act (ADA): requires a case-by-case analysis:
 - ❖ Some have only minor or no reaction to COVID-19, likely not a disability.
 - ❖ Some are disabled by COVID-19, likely covered by the ADA, use traditional interactive process to comply with ADA
- ❖ Family and Medical Leave Act (FMLA): applies to serious health conditions:
 - ❖ See factors above re: whether COVID-19 is serious enough to trigger FMLA.
- ❖ Families First Coronavirus Response Act FFCRA): covered later.
- ❖ Other applicable state law



❖Q: Must you give COVID-19 accommodations or assistance to those w/o the virus but with some other underlying health conditions?

A: Again, the classic lawyer response: It depends!



- ❖ ADA requires that you accommodate persons with disabilities regarding workplace terms/conditions. FMLA requires leave when medically necessary.
- ❖ This may include accommodation/assistance for those whose ability to work is impacted by the fact there is a pandemic swirling about us.
- ❖ Consider following a set of steps to help you work through these issues.



STEP BY STEP (FOR DEALING WITH HEALTH-BASED CONCERNS ABOUT COVID-19)

Generally:

1. An employee indicates he/she does not want to return to work due to concerns about COVID-19.
2. Ask why.
3. If the answer involves the employee's own health condition, ask how you can help. If there is an easy and inexpensive solution to the problem that would accommodate/assist the employee and allow him/her to perform essential job functions, provide it.



STEP BY STEP (cont.)

4. If there is no such easy and inexpensive solution, you should analyze the issue under:
- ADA and related Utah State law
 - FMLA
 - FFCRA, if applicable.



STEP BY STEP (cont.)

5. ADA steps:

- a. Go through the interactive process with the employees and (unless obvious) request medical documentation of the nature of the condition, how it limits performance of the job, and the requested accommodations,
- b. Assess the requested accommodations and determine if they are reasonable or if they do not pose an undue hardship, and if so, provide them;



STEP BY STEP (cont.)

5. ADA steps (cont.):

- c. assess the requested accommodations and determine if they are unreasonable or if they do pose an undue hardship, and if so, interact further with the employee to determine if there are other reasonable accommodations that would not do so;
- d. If there is an effective reasonable alternative accommodation available that the employee does not want, offer to provide it, knowing that this will satisfy your ADA obligation;
- e. If the requested accommodations are unreasonable or if they do pose an undue hardship, and thus as a result you cannot keep the employee in the existing job, consider whether there are other vacant positions for which the employee is qualified and which could accommodate the disability, and if so, give this job to the employee;



STEP BY STEP (cont.)

Special ADA questions – what about an employee seeking accommodations because of a fear he/she may be exposed to COVID-19 at work?

- If an employee does not have COVID-19 or a different underlying disability, he/she is not entitled to ADA accommodations.
- A health care provider may certify it is medically necessary for an employee to stay away from work due to a non-disability, e.g. perhaps the employee's serious health condition that does not rise to the level of a covered-disability. This may trigger FMLA (to be discussed in a moment).
- To preserve good employee relations, you may want to find other ways to assist the employee with these types of concerns.



STEP BY STEP (cont.)

Special ADA questions – what about an employee seeking an ADA accommodation because of a fear he/she may bring COVID-19 from work to a vulnerable person in his/her home?

- If an employee does not have COVID-19 or a different underlying disability, he/she is not entitled to ADA accommodations.
- ADA does not require accommodations for a non-employee family member or friend of an employee.
- A health care provider may certify that an employee must stay away from work to care for a family member (child, parent, spouse) with a serious health condition. This may trigger FMLA (to be discussed in a moment).
- To preserve good employee relations, you may want to find other ways to assist the employee with these types of concerns.

STEP BY STEP (cont.)

5. ADA steps (cont.):

- f. Carefully document all the steps outlined above, keep these records confidential, and get legal counsel as needed and appropriate; and
- g. Ensure that no one retaliates against an employee seeking or receiving an ADA accommodation.



STEP BY STEP (cont.)

6. FMLA steps:

- a. Determine if the employee is eligible for FMLA leave and fill out the DOL notice of eligibility/non-eligibility form and give it to the employee;
- b. If the employee is eligible, send form(s) to the employee to obtain medical certification of the FMLA need;



STEP BY STEP (cont.)

6. FMLA steps (cont.):

- c. If the employee provides medical certification, review it and if appropriate, fill out the DOL form designating acceptance/rejection of the leave;
- d. If the employee provides medical certification, obtain appropriate clarification/authentication if needed, and if there is reason to doubt its validity, obtain clarification or second opinions as needed and/or appropriate and then fill out the DOL form designating acceptance/rejection of the leave;



STEP BY STEP (cont.)

Special FMLA questions – what about an employee seeking FMLA because of a fear he/she may be exposed to COVID-19 at work?

- If an employee does not have COVID-19, he/she cannot claim it as a serious health condition.
- A health care provider may certify it is medically necessary for an employee to stay away from work to due to another serious health condition, or that leave is treatment for another serious health condition. This may trigger FMLA.
- Example: FMLA regulations (29 CFR 825.15) give the example of an employee with chronic asthma told by a doctor to stay home when pollen counts are high.



STEP BY STEP (cont.)

Special FMLA questions – what about an employee seeking FMLA because of a fear he/she may bring COVID-19 from work to a vulnerable person in his/her home?

- If an employee does not have COVID-19, he/she cannot claim it as a serious health condition.
- A health care provider may certify that an employee must stay away from work to care for a family member (child, parent, spouse) with a serious health condition. This may trigger FMLA.
- Key issues: How is the employee caring for the other? Does staying away from COVID-19 constitute caring for another?



STEP BY STEP (cont.)

6. FMLA steps (cont.):

- e. If the leave is allowed, monitor leave usage;
- f. Carefully document all the steps outlined above, keep these records confidential, and get legal counsel as needed and appropriate; and
- g. Ensure that no one retaliates against an employee seeking or receiving FMLA leave.



3. How can COVID-related issues lead to retaliation and whistleblower claims?

An acronym festival of Whistleblower Statutory Protections for COVID-19 Claims

- OSHA
- NLRA
- FMLA
- ADA
- FFCRA (Families First Coronavirus Relief Act)



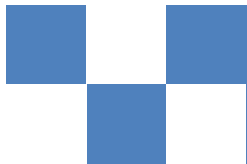
OSHA

- ❖ REMINDER FROM OSHA: “It is illegal to retaliate against workers because they report unsafe and unhealthful working conditions during the coronavirus pandemic.”
 - ❖ Acts of retaliation can include terminations, demotions, denials of overtime or promotion, or reductions in pay or hours.
- ❖ INVITATION FROM OSHA: “Employees have the right to safe and healthy workplaces. Any worker who believes that their employer is retaliating against them for reporting unsafe working conditions should contact OSHA immediately.”
 - ❖ As of the end of summer, the Department of Labor had received close to 3,000 complaints related to COVID-19.



NLRA

- ❖ NLRA guarantees to all employees the right to engage in protected concerted activities (PCA).
- ❖ PCA: Action taken by more than one employee for their mutual aid and/or common protection.
- ❖ For example, a request to work from home due to COVID-19 could constitute PCA.
- ❖ *See* Larry Peel Co., Case No. 16-CA-259403
- ❖ REMEMBER: NLRA protects almost all private-sector employees, regardless of whether they are union-represented or not.



- ❖ Cannot discharge or otherwise discriminate against an employee that has requested leave or another accommodation
- ❖ That doesn't mean you have to grant the request...
- ❖ But you can't take any adverse employment action against the employee because of the request



2. Is the FFCRA still a thing?

YES! But the FFCRA sunsets on Dec. 31, 2020

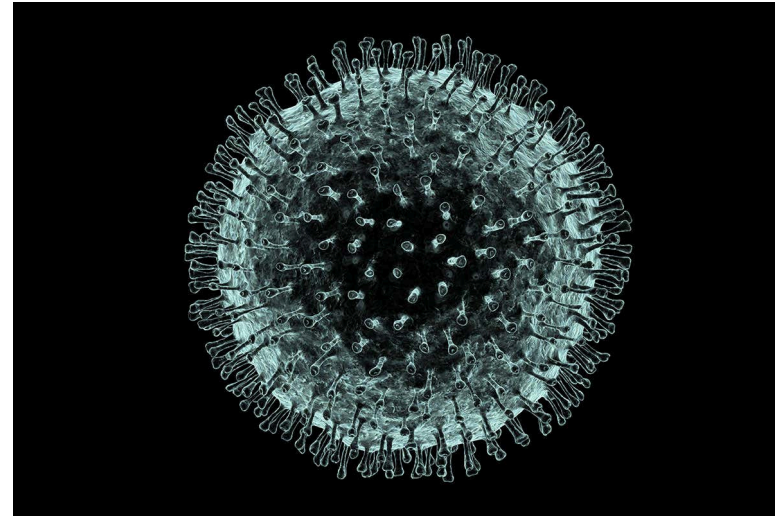
Two Paid Leave Components of the FFCRA Apply to Employers with Fewer than 500 Employees



- Emergency Paid Sick Leave
- FMLA Expansion
(Child Care Leave)
- All paid for with a dollar-for-dollar tax credit.

Emergency Paid Sick Leave

- Available to all employees, even on the first day on the job.
- Provides up to 80 hours of paid leave.
- Either full pay or 2/3 pay depending on the reason for leave



Personal reasons for emergency paid sick leave: full pay up to \$511/day.

The employee cannot work or telework because...

1. Employee is under COVID-19 government quarantine order.
2. Employee is advised by a medical provider to self quarantine because of COVID-19.
3. Employee has COVID-19 symptoms and is seeking a diagnosis.

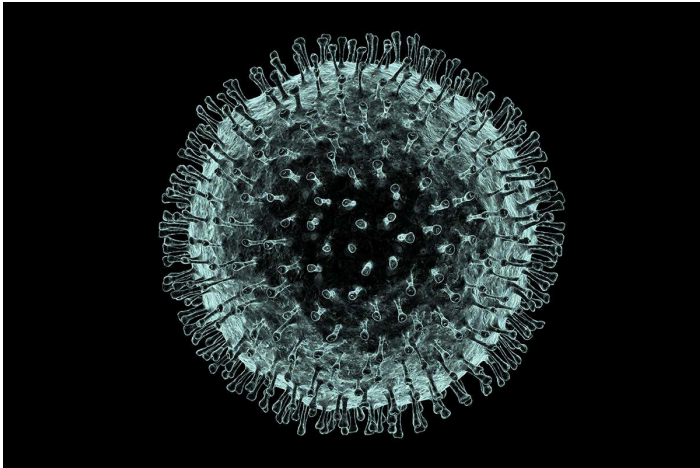
Caregiver reasons for emergency paid sick leave—two thirds pay up to \$200/day.

The employee cannot work or telework because...

4. The employee is caring for an individual who is quarantined (government or doctor's orders).
5. The employee is caring for a child whose school or daycare is closed because of COVID 19.

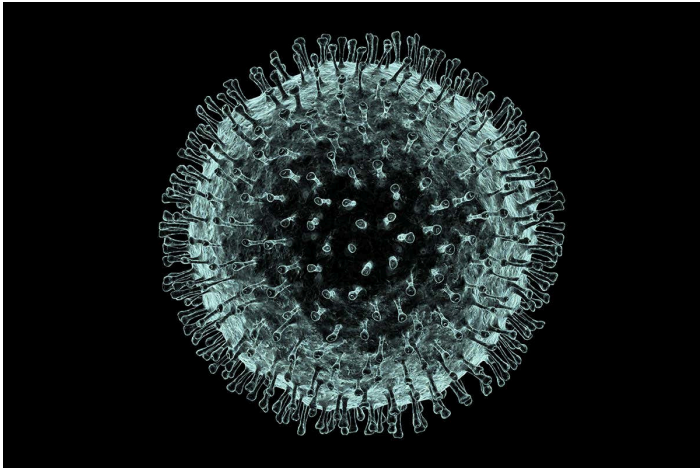
Emergency Paid Sick Leave

How much?



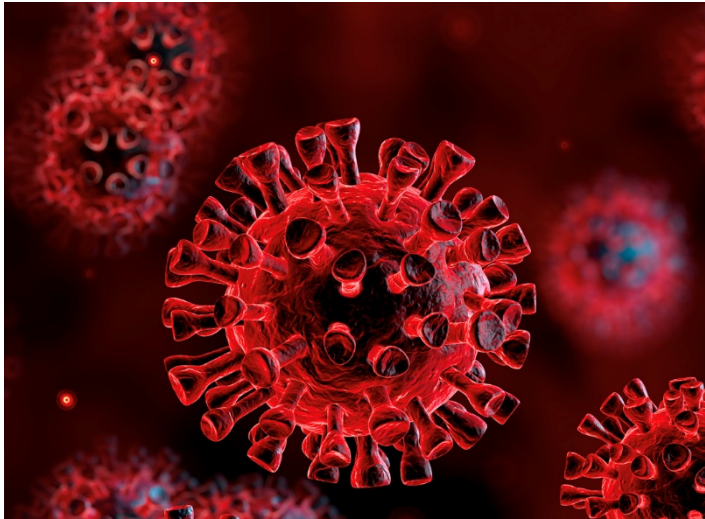
- Full-time employees are entitled to up to 80 hours of leave.
- Part-time employees get the average number of hours worked for a two-week period.

Emergency Paid Sick Leave *What about PTO?*



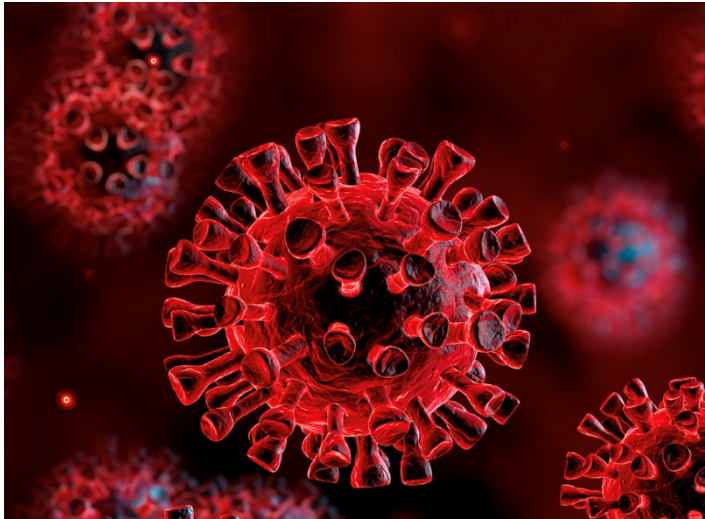
- Employers cannot require employees to use PTO in place of emergency paid leave.
- Employers cannot count leave already provided prior to April 1, 2020 against the 10-day allotment.

Expanded FMLA



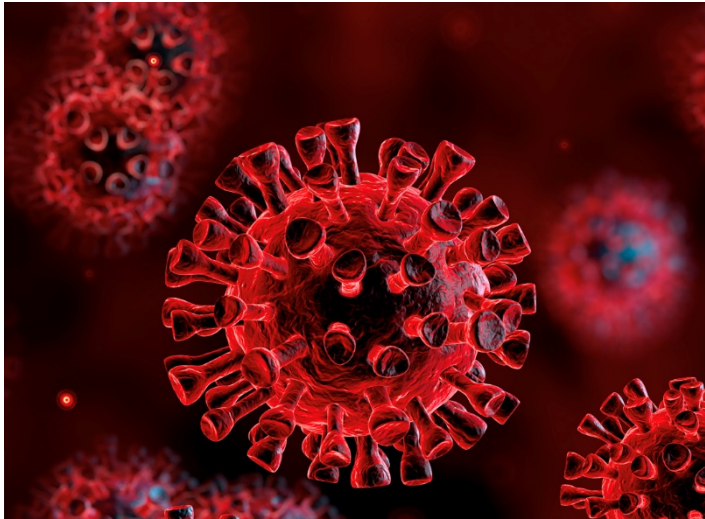
Only one qualifying reason: the employee cannot work or telework because the employee is caring for a child whose school or daycare is closed because of COVID 19.

Expanded FMLA Who is covered?



- Unlike the EPSLA, the E-FMLA does not cover all employees.
- Employees are eligible for childcare leave under the E-FMLA only if they have been on payroll for 30 calendar days.

Expanded FMLA



Provides 12 total weeks of job protected leave—the last 10 weeks is paid at two thirds of the employee's regular pay rate, capped at \$200 per day (the first 2 weeks is paid under EPSLA).

Note: this leave is not in addition to standard FMLA leave. Employees who use 12 weeks of caregiver leave are not eligible for 12 more weeks later in the year for a serious health condition.

Department of Labor COVID-19 Resources

Check out the DOL's coronavirus materials, including a robust set of Q&As, available at:

www.dol.gov/agencies/whd/pandemic/ffcra-questions

Or read the DOL's FFCRA regulations available at:

www.dol.gov/agencies/whd/pandemic/ffcra

JONES
J WALDO

Attorneys

Est. 1875

Documenting FFCRA Leave

The employee seeking FFCRA needs to provide a **signed** statement that includes the following information:

1. The employee's name.
2. The date(s) that the employee is seeking leave.
3. The qualifying reason;
4. A statement that the employee is unable to work because of that reason; and
5. (a) the name of the government entity issuing the quarantine order;
(b) the name of the healthcare provider who issued the quarantine order; or
(c) the name of the child, the child's school/daycare, and a statement that "no other suitable person is available to care for the child."

Note: if the need for EPSLA leave extends beyond two weeks, FMLA-covered employers should follow standard FMLA procedures for all eligible employees.

For kids 14 years old and older

On April 28, 2020, the IRS added one more requirement for documentation of childcare leave. If childcare leave is taken to care for a child who is ***14 years or older*** “during daylight hours,” the employee must also state “that special circumstances exist requiring the employee to provide care.”

https://www.irs.gov/newsroom/covid-19-related-tax-credits-how-to-substantiate-eligibility-and-periods-of-time-for-which-credits-are-available-faqs#substantiate_eligibility

1. Does COVID-19 give rise to FMLA leave rights?

Qualifying FMLA Leave

- ❖ FMLA-eligible employees of a FMLA-covered employer may take up to 12 weeks of leave for the following qualifying reasons:
 - ❖ **Birth** of a child.
 - ❖ **Adoption** or **foster care** of a child.
 - ❖ A **serious health condition** of the employee or the employee's spouse, child, or parent.
 - ❖ A **military exigency** arising from the employee's spouse, child, or parent's call to active duty military status.



COVID-19 may be a serious health condition

- ❖ Inpatient treatment (conditions requiring an overnight hospital stay).
- ❖ Conditions that incapacitate (e.g., unable to work, go to school, etc.) for three or more consecutive days with ongoing medical treatment (e.g., a doctor's visit coupled with follow up medical care like prescription medicine).
- ❖ Other chronic conditions (e.g., asthma or diabetes)



1-10, done! Want more?



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