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HR BOOT CAMP SERIES

**COVID Laws and Regulations
for Employers**



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COVID-19 LAWS AND REGULATIONS FOR EMPLOYERS

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Chamber of Commerce

Southern NJ

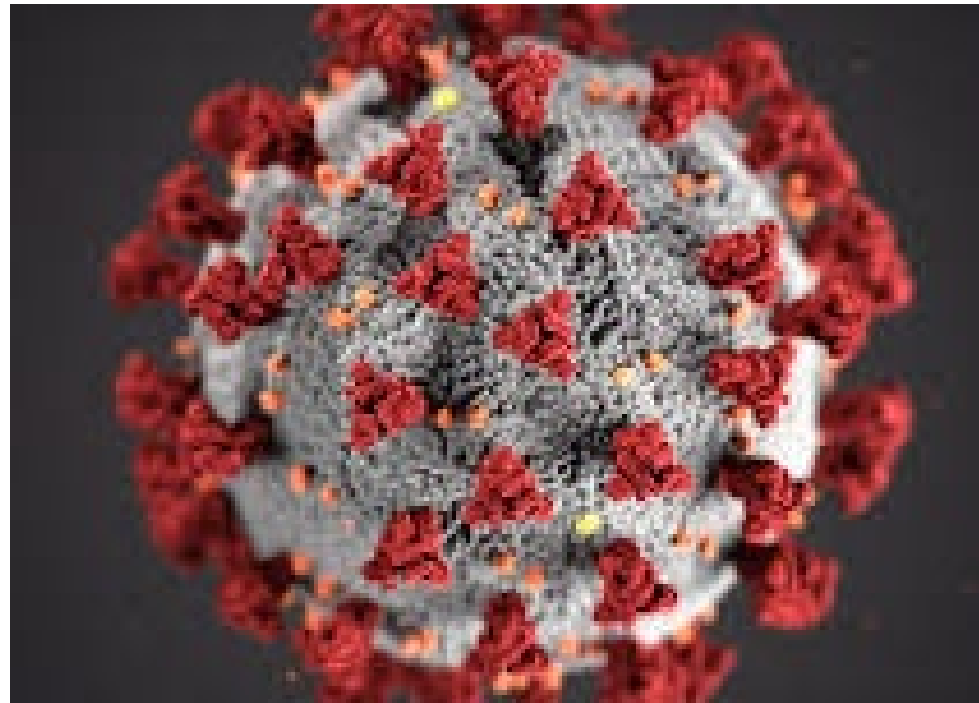
HR Boot Camp Series

October 28, 2020



COVID-19 Laws

- Coronavirus Aid, Relief and Economic Security Act (“CARES Act”)
- Families First Coronavirus Response Act (“FFCRA”)
- NJ Leave Laws (as amended)



CARES Act

- Signed into law on March 27, 2020
- Over \$2 trillion in economic relief to individuals and businesses affected
 - Paycheck Protection Program – Closed August 8, 2020
 - Supplemental unemployment compensation
 - Payroll tax credit



Paycheck Protection Program

- \$349 billion available in loans for small businesses (less than 500 employees)
- Original funding exhausted fast
- April 23 – relief package providing \$250 billion more in PPP funding
- Important Points:
 - Companies are eligible for loans up to the lesser of 2.5 times their average monthly payroll cost (or \$10 million)
 - Must maintain headcount and payroll levels
 - Loan must be used over 24 week period or December 31, 2020, whichever is earlier
 - Loan may be forgiven if used for allowable purposes



Eligibility

- Small Businesses, defined as a business with fewer than 500 employees, are eligible
 - “Affiliates” will share/count the other’s employees
- Recipient must make good faith certification that:
 - The uncertainty of current economic conditions makes the loan necessary to support ongoing operations;
 - Funds will be used to retain workers and maintain payroll, or make mortgage payments, lease payment, and utility payments; and
 - No application pending for duplicative loan and no other applications made for the same loan for the remainder of 2020



Requirements: Headcount

- Must Maintain Headcount and Payroll Levels
- For purposes of loan forgiveness, the CARES Act uses the standard of full-time equivalent employees to determine the extent to which the loan forgiveness amount will be reduced in the event of workforce reduction
 - Headcount: The amount of loan forgiveness may be reduced if there is a reduction in full time equivalent employees
 - BUT! A reduction in headcount will not affect loan forgiveness amount if:
 - Reduction in full-time equivalent employees as compared to headcount on February 15, 2020;
 - The reduction took place between February 15, 2020 and April 26, 2020; and
 - The reduction is eliminated by the borrower by December 31, 2020

Payroll Levels



- Payroll Levels: For employees making less than \$100,000 in 2019 who receive a reduction in pay during the 24 week period of more than 25% of the total salary or wages of the employee, loan forgiveness amount will be reduced on a dollar for dollar basis
 - Per-employee basis, not in the aggregate
- BUT! Such reductions will not affect the loan forgiveness amount if:
 - There is a reduction in salary or wages of 1 or more employees (who were not paid over \$100,000 in 2019) as compared to February 15, 2020;
 - The reduction takes place between February 15, 2020 and April 26, 2020; and
 - No later than December 31, 2020, the reduction is eliminated below 75%
 - Employer demonstrates that it was unable to return to the same level of business activity it had at or before 2/15/20 due to compliance with safety requirements related to Covid-19
 - Secretary of Health and Human Services
 - Director of the CDC
 - OSHA

FTE Reduction Exemptions

- Reductions in the following cases will not reduce loan forgiveness:
 - Employer made a good-faith, written offer to rehire an employee, which was rejected by the employee
 - Employee was fired for cause
 - Employee voluntarily resigned
 - Employee voluntarily requested and received a reduction of their hours
 - Employer made a good faith, written offer to restore any reduction in hours at the same salary or wages, but employee rejected
 - Employer was unable to hire similarly qualified employees for unfilled positions by December 31, 2020

Payroll Costs

- At least 60% of the loan's proceeds must be dedicated to "Payroll Costs" including
 - Salary, wage, commission, or "similar compensation";
 - Cash tip or equivalent;
 - Payment for vacation, parental, family, medical or sick leave;
 - Severance;
 - Health care benefit payments;
 - Retirement benefit payments; and
 - Payment of state or local tax on employee compensation
- Remaining 40% can be used for mortgage interest, rent, utilities

Repayment

- For loans received prior to June 5, 2020: Any amount not forgiven is due within 2 years with 1% interest (unless otherwise agreed between borrower and lender)
- For loans received after June 5, 2020: Any amount not forgiven is due within 5 years with 1% interest

CARES Act: Unemployment Compensation Supplement

- For unemployment or inability to work caused by COVID-19, the CARES Act provides Pandemic Unemployment Assistance benefits to covered individuals who are ineligible for regular compensation or extended benefits, including those individuals who have exhausted all rights to other unemployment compensation or extended benefits.
- Covered individuals may receive both:
 - Pandemic Unemployment Assistance benefits for full or partial weeks of unemployment or inability to work caused by COVID-19 starting retroactively on January 27, 2020 and ending on December 31, 2020, generally up to a maximum of 39 weeks.
 - Previous Benefit -Pandemic Unemployment Compensation: an additional \$600 weekly benefit **ended July 31, 2020**.
- The amount of PUA benefits is typically the weekly unemployment benefit amount the covered individual is entitled to under federal or state law. In NJ, the maximum weekly benefit is \$713. The maximum of 39 weeks includes any weeks for which the covered individual received regular unemployment benefits under federal or state law.

Covered Individuals

- Covered individuals must provide self-certification that they are otherwise able to work and available to work within the meaning of applicable state law, except that they are fully or partially unemployed, or unable to work, because they:
 - Have been diagnosed with COVID-19 or a household member diagnosed with COVID-19.
 - Are experiencing COVID-19 symptoms and seeking a medical diagnosis.
 - Are providing care for their family or household member who has been diagnosed with COVID-19.
 - Have primary caregiving responsibility for a child or other person in the household who is unable to attend school or another facility that is closed as a direct result of COVID-19, and the school or facility care is required for the individual to work.
 - Are unable to reach their place of employment because of a quarantine imposed as a direct result of the COVID-19 public health emergency.
 - Are unable to reach their place of employment because they have been advised by a health care worker to self-quarantine due to COVID-19 related concerns.

(Cont.)

Covered Individuals (cont.)

- Have their place of employment closed as a direct result of COVID-19 public health emergency.
- Were scheduled to begin work but no longer have a job or are unable to reach the job as a direct result of COVID-19.
- Have become the breadwinner or major support for a household because the head of household has died as a direct result of COVID-19.
- Are forced to quit their job as a direct result of COVID-19.
- Covered individuals include those who meet the above criteria and who are not otherwise eligible for state unemployment benefits, such as self-employed workers, independent contractors, part-time employees,
- Individuals ineligible to receive PUC benefits include those who are receiving paid sick leave or other paid leave benefits; or are able to telework with pay.

Payroll Tax Credit



- Refundable tax credit of up to 50% of wages paid to employees who continue to be paid during a period for which the employer's business is fully or partially suspended by government orders or those > 50% revenue loss
 - Certain health plan expenses can be allocated and treated as wages when computing the credit
- Deferral of employment tax provisions
- <100 employees: all wages eligible (and scaled down after that)
- Cannot get PPP and tax credit
- Cannot get FFCRA credit for qualified leave wages and tax credit
- Not available to state or local governments or self-employed individuals as to their self-employment services and earnings

Federal Leave Law Developments

- **Families First Coronavirus Response Act**
 - Congress' second stimulus – passed on 3/18/2020
 - The Act includes the first federal requirement of paid leave
 - The Act became effective on 4/1/2020 and remains effective until **12/31/2020**



FFCRA-Covered Employers

- Applies to ALL employers with 500 or less employees
- Applies to ALL state and local government employers (regardless of size)
- Exceptions:
 - Employers of health care providers or emergency responders can opt out (*but only for employees meeting definition*)
 - Small business exception – very limited
 - 50 or less employees
 - May apply for exemption from U.S. D.O.L.
 - Must show that providing paid leave would “jeopardize the viability of the business” –difficult to show because the paid leave is fully refundable. However, employers with cash flow issues may meet the standard.

Two New Paid Leave Requirements

EMERGENCY
PAID SICK
LEAVE
(EPSL)



EXPANDED
FMLA
PAID, JOB
PROTECTED
FAMILY LEAVE
(EFMLA)



EMERGENCY PAID SICK LEAVE

Employees may take EPSL for any of the following reasons:

1. Their own quarantine or isolation order under federal, state or local law;
2. To self-quarantine, as advised by a health care provider;
3. Because they are experiencing symptoms and seeking a medical diagnosis;
4. To care for another individual subject to a quarantine or isolation order or advised to self-quarantine (not limited to family members);
5. To care for a child as the result of the child's school closing or the closing or unavailability of the childcare provider; or
6. Because the employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services, in consultation with the Secretaries of Labor and Treasury.

PAID SICK LEAVE

- Employee is entitled to 10 days of paid sick leave.
 - Full-time employees: equivalent to 80 hours over a two-week period.
 - Part-time employees: the number of hours is equivalent to the average number of hours worked over a typical two work-week period.
- The amount of compensation owed to the employee during this leave varies depending on the reason for their leave.
- All Employees of covered employers get this 10 days, regardless of prior use of employer sick time or FMLA time. (No minimum work requirement)
- Cannot require use of other paid time off before/during EPSL usage.

Paid Sick Leave Compensation

Amount of pay depends on reason for leave.

Care for Self

100% of their regular rate up to a maximum payment of \$511 per day (and \$5,110 in the aggregate for the 10 days) for leave taken:

Reasons 1, 2, and 3

1. For their own quarantine or isolation order under federal, state or local law;
2. To self-quarantine, as advised by a health care provider;
3. Because they are experiencing symptoms and seeking a medical diagnosis;

Care of Another

Two-thirds (2/3) of the employee's full pay up to a maximum payment of \$200 per day (and \$2,000 in the aggregate for the 10 days) for leave taken to:

Reasons 4, 5 and 6

4. To care for another individual subject to a quarantine or isolation order or advised to self-quarantine (not limited to family members);
5. To care for employee's son/daughter as the result of the child's school closing or the closing or unavailability of the childcare provider; or
6. Because the employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services, in consultation with the Secretaries of Labor and Treasury.

Expanded Family Leave Act

- EFMLA expands the reasons for taking existing 12 weeks of FMLA (and covers employees not normally eligible for FMLA)
- EFMLA covers all employees who have worked for the employer more than 30 calendar days at the time of the leave. (Regular FMLA covers employees with at least 12 months of employment).
- NO requirement of 1250 hours actual work in past 12 months for EFMLA.
- Employees may only take EFMLA leave for: need to care for son/daughter as the result of the child's school closing or the closing or unavailability of the childcare provider due to COVID-19.
- Employees taking leave are entitled to up to 12 weeks of job-protected paid emergency family leave

Expanded Family Leave Act

- First Ten Days is unpaid – unless EPSL is running concurrently.
 - EPSL used for same reason runs concurrently with, and counts toward, the 12 weeks available for emergency paid family leave, so the first ten days of EFMLA is unpaid to coincide with the 10 days of EPSL afforded to employees.
- After first 10 days – remaining 10 weeks of EFMLA – Two-thirds (2/3) of employees regular pay, up to maximum payment of \$200 per day and an aggregate maximum amount of \$10,000 for the full period of leave
- NOTE! The Emergency Paid Family Leave is an AMENDMENT to the FMLA
- **Employees who have exhausted their FMLA leave, or do not have their full 12 weeks, are only entitled for the weeks they have remaining. Does not add MORE FMLA to normal 12 week allotment.**

Reimbursement

Employers are entitled to a **fully refundable tax credit** equal to the amount of FFCRA leave paid, plus qualified health plan expenses and the employer's share of Medicare tax imposed on those wages, taken immediately rather than depositing taxes with the IRS.



Documentation

- Proper documentation
 - Prevents Abuse
 - Ensures reimbursement
- Employee's request for leave should include, at a minimum:
 - Employee's name;
 - Date of the requested leave;
 - Statement of the reason for the leave; and
 - Statement from the employee that they cannot work or telework during the leave period.

Documentation

- For leave taken for an employee's own quarantine or isolation order under federal, state or local law, the employee should include the government entity ordering the quarantine or isolation, or the name of the healthcare professional recommending the quarantine or isolation
- For leave taken to care for a child as the result of the child's school closing or the closing or unavailability of the childcare provider, the documentation should include:
 - Name and age of the child needing care;
 - Name of the school or place of care;
 - A representation that no other person will be caring for the child; and
 - If the child is older than 14, a statement describing special circumstances making it necessary to be absent to care for the child.

POSTING REQUIREMENT

EMPLOYEE RIGHTS

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

The Family First Coronavirus Response Act (FFCRA) of July requires certain employers to provide their employees additional paid 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 REQUIREMENTS

Generally, employers covered under the Act must provide employees:

- Up to two weeks (10 days) of a paid sick employee's full annual compensation (based on their base salary or the regular rate of pay) in the approximate federal minimum wage, paid at:
 - 50% for qualifying reasons in Illinois, with 70% for up to 10 days
 - 100% for qualifying reasons in and below, up to 500 days and \$1,000 total, and
 - Up to 10 weeks of paid sick leave and expanded family and medical leave and at their qualifying reason for leave for up to 500 days and \$1,000 total.

A separate provision is added to leave for the federal officers that the employer is currently performing and over that period.

ELIGIBLE EMPLOYERS

Employers covered by the Act include employers with federal contracts and certain state and local employers. Employers are not covered if they are a contractor or subcontractor for a federal contract. Contractors who have been employed for at least 20 days prior to the start of the FFCRA are eligible for up to 10 weeks of paid sick leave and expanded family and medical leave for each of those.

QUALIFYING REASONS FOR LEAVE RELATED TO COVID-19

An employer's covered employees are eligible to receive FFCRA leave if they are unable to work, including under the following circumstances for employees:

- | | |
|---|---|
| <ul style="list-style-type: none"> 1. is subject to Federal Quarantine or Isolation under a health order related to COVID-19 2. has been diagnosed with COVID-19 or is experiencing COVID-19 symptoms 3. is experiencing COVID-19 symptoms and seeking medical diagnosis 4. is being cared for by a child or other individual in (1) or (2) or experiencing symptoms in (2) | <ul style="list-style-type: none"> 5. is being cared for or has been quarantined or isolated due to COVID-19 and another individual in (1) or (2) or COVID-19 symptoms, or 6. is experiencing any other health condition or condition specified by the U.S. Department of Health and Human Services |
|---|---|

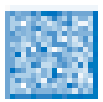
ENFORCEMENT

The U.S. Department of Labor's Wage and Hour Division (WHD) has the authority to investigate and enforce compliance with the FFCRA. Employees may file charges, complaints, or informers administratively against any contractor who denies leave and that is not covered under the FFCRA. The Department of Labor is authorized to conduct an investigation and issue a subpoena in order to enforce 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
visit the Department of Labor website
Toll-free 1-866-488-6362
dhs.gov/ffcra/whd



- Employers are required to post a notice of the FFCRA's requirements in a conspicuous place on its premises
- If employees are working off-site, an employer may satisfy this requirement by emailing or mailing the notice to employees, or posting this notice on an employee information internal or external website
- The DOL has issued a poster that employers may use, accessible on their website at:
- https://www.dol.gov/sites/dolgov/files/WHD/posters/FFCRA_Poster_WH1422_Non-Federal.pdf

New Jersey Leave

- **March 25, 2020:** Governor Murphy signed S.2304 amending the Earned Sick Leave, Family Leave, and Temporary Disability Laws.
 - **Earned Sick Leave (ESL).** Employees may now use ESL if they or a family member cared for by the employee have been ordered to isolate or quarantine by a public health official because their presence would jeopardize the health of others.
 - **Temporary Disability Insurance (TDI) / Family Leave Insurance (FLI).** The definition of "serious health condition" was expanded to include illness, isolation, and quarantine due to a communicable disease epidemic. Employees may now access TDI or FLI benefits if they or a family member cared for by the employee are diagnosed with or exposed to a communicable disease, or the worker or family member is ordered to isolate or quarantine by a public health official. The seven-day waiting period was also eliminated.
 - **Family Leave Act (FLA).** The definition of "serious health condition" was expanded to allow employees to take unpaid, job-protected family leave to care for a family member who has been ordered by a health care provider or public health authority to isolate or quarantine because their presence would jeopardize the health of others. The amendment also restricts an employer's ability to deny leave to employees who must care for a family member who has been isolated or quarantined or whose "place of care" (e.g., school or child care facility) has been closed during a communicable disease epidemic.

New Jersey Leave

- **April 14, 2020:** Governor Murphy signs legislation to expand NJFLA protections during COVID-19 outbreak. Removed some of the prior modification made on March 25, 2020, and expanded them.
- Prior to COVID-19, NJFLA provided up to 12 weeks (in any 24 month period) of unpaid, job protected leave to care for a family member with a serious health condition, or to care for a newborn or newly adopted child.
- The bill, S 2374, amends the NJFLA to provide NJFLA leave for certain declared health emergencies involving communicable diseases which:
 - requires in-home care or treatment of a child due to the closure of the school or place of care of the child of the employee, by order of a public official due to the epidemic or other public health emergency;
 - prompts the issuance by a public health authority of a determination, including by mandatory quarantine, requiring or imposing responsive or prophylactic measures as a result of illness caused by an epidemic of a communicable disease or known or suspected exposure to the communicable disease because the presence in the community of a family member in need of care by the employee, would jeopardize the health of others; or
 - results in the recommendation of a health care provider or public health authority, that a family member in need of care by the employee voluntarily undergo self-quarantine as a result of suspected exposure to a communicable disease because the presence in the community of that family member in need of care by the employee, would jeopardize the health of others.

New Jersey Leave

NJFLA Certification of Need from Employee for Pandemic Related Leaves

- For leave taken to care for child whose place of care closed due official order due to public health emergency:
 - the date on which the closure of the school or place of care of the child of the employee commenced **and** the reason for such closure.
- For leave taken due to a public health authority's issuance of quarantine/isolation order that the presence in the community of a family member in need of care by the employee would jeopardize the health of others:
 - the date of issuance of the determination **and** the probable duration of the determination.
- for leave taken because a health care provider or public health authority recommends that a family member in need of care by the employee voluntarily undergo self-quarantine:
 - the date of the recommendation **and** the probable duration of the condition **and** the medical or other facts within the health care provider or public health authority's knowledge regarding the condition.

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COVID Lawsuits and Safety



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COVID-19 LAWSUITS AND SAFETY

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SJ CHAMBER HR BOOT CAMP SERIES

DAY 1

October 28, 2020





TOP CASES TO WATCH



Cases to Watch - FFCRA

- The implementation of new laws often necessitates some kind of action, as was the case with the implementation of the FFCRA, imposing obligations on employers to comply with the new grant of employees' leave entitlements.
- As is the case with any violation of the law, an employer's failure to comply has consequences.



Cases to Watch - FFCRA

- The following cases alleging violations of the FFCRA have recently been filed. The factual summaries are taken directly from the allegations in the Complaint for each action, and are not intended to be interpreted as undisputed facts.



Cases to Watch - FFCRA

- *Wanda Castillo v. The Bagnall Shaw Limited Liability Company and Aaron Alder*
 - Filed in the United States District Court for the Eastern District of Pennsylvania
 - After testing positive for Covid-19, Plaintiff informed her employer that she must quarantine for 14 days.
 - Employer told her that she was required to work at home unless she was hospitalized and if she could not work, she would be placed on an unpaid leave
 - Plaintiff informed Defendant that she could not work because of her symptoms, and requested paid sick leave pursuant to FFCRA
 - Plaintiff was terminated the next day for performance deficiencies
 - Plaintiff sued under the FFCRA 29 C.F.R. § 826.150(b)(1) and (b)(2), explaining that violations of these subsections subject the employer to violations set forth in FLSA
 - FLSA's enforcement provisions mandates payment for all owed wages AND provides for an equal amount as liquidated damages



Cases to Watch - FFCRA

- *O'Bryan v. Joe Taylor Restoration*
 - Filed in the United States District Court for the Southern District of Florida
 - March 30: Plaintiff didn't feel well, left work and completed forms for leave
 - Quarantined for the next 14 days April 1-April 15
 - When Plaintiff asked to return as the 14th day approached, Defendant told Plaintiff he could not return without a doctor's note
 - April 14: Plaintiff provided a note, but Defendant would not accept it, stating that he needed a note indicating he was not specifically contagious for Covid-19
 - Plaintiff confirmed he would get the note
 - April 16: Plaintiff informed Defendant that he was getting tested the next day on Friday April 17
 - April 20: Defendant terminated Plaintiff
 - Plaintiff filed suit under the FFCRA alleging interference of benefits and retaliation



Cases to Watch - FFCRA

- *Reyna v. Cascade Health Services. LLC*
 - Filed in the United States District Court for the Southern District of Texas
 - May 14: Defendant informed Plaintiff if she wanted to self quarantine, she would not be paid for it because the company's policies did not permit for paid leave to self-quarantine.
 - Plaintiff alleged violation of FFCRA and FLSA: wrongful termination, unpaid wages, retaliation
- *McIntyre v. Midwest Geriatrics, Inc.*
 - District Court of Douglas County Nebraska
 - After Plaintiff tested positive for Covid-19 and requested leave, she was terminated because Defendant told her there was footage of her not wearing a mask during patient care, and she had exposed all the residents of the assisted living facility to the virus.
 - Plaintiff alleged violations of FMLA and FFCRA for interference and retaliation



Cases to Watch - FFCRA

- *Andrews v. Andrews Hydra Platforms, Inc.*
 - Filed in the South Carolina Court of Common Pleas
 - On April 1, Plaintiff requested paid leave to care for her minor children who were at home
 - On April 3, Defendant terminated Plaintiff with a letter backdated to March 30 stating that they were terminating her effective April 6, and would consider rehiring her on April 20
 - Plaintiff filed a lawsuit claiming violations of the FFCRA's paid sick leave provisions and state law's wage act



Cases to Watch – Other Laws

- In addition to lawsuits alleging violations of FFCRA, employers should be aware that other federal and state laws may be implicated for their interactions and decisions made with respect to their employees during this pandemic, exposing them to additional liability
- *Drayone Bland and Jennifer Deluca v. Visiting Nurse Assoc. of Greater Philadelphia*
 - Filed in the Pennsylvania Court of Common Pleas, Philadelphia County
 - Termination in violation of public policy and state whistleblower law



Cases to Watch – Other Laws

- *Perrella v. R.R. Group, LLC*
 - Filed in the Superior Court of New Jersey, Burlington County
 - Violation of state discrimination statute; state whistleblower statute; tortious interference with prospective economic advantage and contractual relations for unemployment benefits
- *Elijah v. Port Authority Trans-Hudson Corporation*
 - Filed in the Superior Court of New Jersey, Hudson County
 - Plaintiff is decedent employee's wife and administer of estate
 - Alleging wrongful death under Federal Employers' Liability Act and claims for survival and pain and suffering



Cases to Watch – Other Laws

- Lawsuits against employers for “unsafe” working environment are illusive to find
- Employee (or customer) must prove the exposure to COVID happened at employer workplace and was due to the negligence of employer
 - Two significant legal hurdles
 - Unemployment compensation carriers are vigorously fighting any connection between positive COVID case and workplace, on causation grounds



Overview: Safe Workplace Issues

- Employers do have ability to screen employees for COVID-19
- Traditionally, employers reluctant to “ask too much” about medical conditions
- But, special rules apply during a pandemic, and governments are recognizing this
- NOTE: laws keep changing, so try and keep on top of it!!



Accommodations & COVID-19

- Must continue to provide reasonable accommodations, even during a pandemic
- Same accommodations at a telework site
- Example: Employee had a screen reader and needs one at home
- EEOC recognizes may be delays because of pandemic so advises to use “interim solutions” as practical



Medical Inquiries & COVID 19

- ADA limits disability related questions and medical exams
- Direct Threat Defense:
 - Substantial risk of significant harm to the health and safety of others in workplace
AND
 - Cannot be eliminated through a reasonable accommodation



COVID-19: Medical Exams and Privacy Issues

- Normally, ability to ask medical questions of employees or require medical tests is VERY limited, unless “direct threat” to themselves/others
- Common “direct threat” examples:
 - Test forklift driver who appears impaired
 - Send incapacitated e’ee home
- BUT -- EEOC has advised that COVID-19 symptoms or suspicion constitutes a direct threat
 - Based on same EEOC guidance used during H1N1 outbreak



COVID-19: Medical Exams and Privacy Issues

- During pandemic, employers may ask e'ees if experiencing COVID-19 symptoms
- Symptoms:
 - Dry cough
 - Shortness of breath
 - Fever above 100.4
 - Acute respiratory disorder



COVID-19: Medical Exams and Privacy Issues

- Guidance constantly changing
- CDC Symptoms of COVID:
 - Chills
 - Repeated shaking with chills
 - Muscle pain
 - Headache
 - Sore Throat
 - New loss of taste or smell
- Question: any/all of these?



COVID-19: Medical Exams and Privacy Issues

- Emergency Warning Signs of COVID-19: Seek medical attention immediately
 - Trouble breathing (but not difficulty?)
 - Persistent pain or pressure in chest
 - New confusion or inability to arouse
 - Bluish lips or face



Can You Take Temperatures of Employees?

- EEOC says Yes
- Because of pandemic declaration, community spread, and CDC precautions
- But note fever does not necessarily mean COVID-19



COVID-19: Medical Exams and Privacy Issues

- Employees exhibiting fever above 100.4 or other symptoms should be sent home, per CDC
- Allowed to return to work once symptom-free for 24 hours-plus, w/o use of fever suppressants
- Fitness for duty certifications can be requested to return to work
 - EEOC advises caution due to difficulty in getting medical visit during crisis
- Employers may also ask re travel and visits to areas under CDC advisory



COVID-19: Obligations to Employees

- IF employee has COVID-19, employer likely has obligation to notify co-workers
 - No direct obligation to order quarantine
 -BUT, employers cautioned to do so
- OSHA and EEOC require a safe workplace
- Co-workers to be notified varies depending on level of contact



COVID-19: Obligations to Employees

- MUST advise:
 - Other employees coughed/sneezed/etc
 - Employees working closely and frequently
- What is “closely” / “close contact”?
 - w/i 6 feet (generally)
- How frequent?
 - Unclear and conflicting until recently
 - Newest CDC guidance defines it, but raises more questions



COVID-19: Obligations to Employees (Heath Care)

- Close contact: w/i 6 feet
- Frequency (Old Rules):
 - New Jersey DOH: 10 minutes or more
 - CDC: not defined directly, but 15 consecutive minutes or mote
- Frequency examples given by CDC:
 - Caring for or visiting the patient
 - Sitting within 6 feet of patient in waiting area/room
- OR close contact is direct contact with infectious secretions from patient
 - Coughed on or touching used tissues



COVID-19: Obligations to Employees (Heath Care)

- Frequency (New Rule):
 - CDC Guidance issued October 22, 2020
 - Within six feet of confirmed COVID-19 case for total accumulated period of 15 minutes within 24-hours
 - So, now aggregate of all time within six feet
 - If greater than 15 total minutes in shift (or day), then considered “close contact”
 - Only adds to difficulty in deciding who was in “close contact”



COVID-19: Obligations to Employees (Health Care)

- CDC segregates who can work by whether high risk, medium risk or low risk
 - But all for patients with COVID-19
 - High risk: prolonged close contact w/o PPE
 - Medium risk: prolonged close contact with face covering or mask but nose and mouth exposed
 - Low risk: prolonged close contact w/PPE
- High/medium risk: active monitor for 14 days and self-quarantine if symptoms
- Low risk: self monitor and self-quarantine if symptoms



COVID-19: Obligations to Employees (Not Health Care)

- No firm CDC guidance but use health care as outer guide
- Best advice is Close contact:
 - w/i 6 feet (generally)
- How frequent?
 - 10 minutes or more a day
- **NEED** advise: same work area/workstation
- **NEED NOT** advise:
 - In same building



Duty To Provide Safe Workplace in COVID Era

- OSHA issued guidance (3/20) for all workplaces to deal with COVID-19
- Has similar, overlap with CDC close contact guidance for health care workers
- Excellent guide to employers for essential employers and for employers when businesses reopen



OSHA COVID-19 Guidance: All Employers

- Employers all advised to:
 - Develop an Infectious Disease Preparedness and Response Plan;
 - Prepare to Implement Basic Infection Prevention Measures- such as Handwashing and Routine Cleaning;
 - Develop Policies and Procedures for Prompt Identification and Isolation of Sick People, if Appropriate; and
 - Develop, Implement, and Communicate about Workplace Flexibilities and Protections



OSHA COVID-19 Guidance

- Employer's additional duty(s) depends on nature of workplace
- Four categories of job classifications:
 - Lower
 - Moderate
 - High
 - Very High



OSHA COVID-19 Guidance: Lower Risk

- Employees not in contact with known/suspected COVID-19 individuals AND not w/i 6 feet of general public
 - Most employees in USA
- Actions: same as for all employers



OSHA COVID-19 Guidance: Moderate Risk

- Employees in close contact with people who may be infected but are not known/suspected COVID-19 patients
 - Around travelers, schools, high population-density work environments
 - Is just around general public enough?
- Actions to consider: use of PPE (including customers); limit public access to worksite; limit face to face contact with public



OSHA COVID-19 Guidance: High Risk

- Employees:
 - Health care delivery and support staff
 - Medical transport workers
 - Mortuary workers of known/suspected COVID-19 individuals



OSHA COVID-19 Guidance: Very High Risk

- Employees:
 - Health care delivery and support staff performing intubation, etc.
 - Health care/lab workers handling specimens from known/suspected COVID-19 individuals
 - Morgue workers doing autopsies of known/suspected COVID-19 individuals



OSHA COVID-19 Guidance: High & Very High Risk

- Actions:
 - Appropriate air handling system
 - Isolate patients and isolation rooms
 - Additional medical precautions



Can You Exclude Employees with Symptoms From Workplace

- EEOC says Yes
- Can request medical exam and testing per EEOC
- Can exclude co-workers exposed to infected person



Can You Require Medical Exam at End of Quarantine?

- Before returning to work?
- EEOC says maybe, but cautions against it due to limited medical resources during pandemic
 - Exposing healthy worker to illness
- But seems defensible to require



Can Employees Refuse to Report to Work?

- Does the workplace present “imminent danger” ---OSHA rule
 - Reasonably expected to cause death or serious physical harm
 - Must be immediate—occur in a short time
- Working in medical setting without PPE?



Can Employees Refuse to Report to Work?

- Employees w/o symptoms and w/o diagnosis cannot refuse to work solely out of fear of COVID
 - Even if co-worker tests positive
- Traditional: employee fired for no-call/no-show
- COVID-19: legal risk due to State and Federal laws



Can Employees Refuse to Report to Work?

- Legal risks are State laws protecting employees from COVID-19 retaliation
 - Not nec'y covered by laws, but laws could be broadly interpreted
- Also whistleblower risks
- AND some States allow fear of COVID as valid reason to take mandated paid leave
- Best advice: Unpaid leave



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