



The Ever-Changing Absence & Accommodation Landscape in the Era of COVID-19



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Welcome

Featured Johnson Financial Group Speakers

Jeff Marquardt, EVP Employee Benefits

Deb Meulemans, VP Employee Benefits



Featured Speaker



Marjory Robertson,
AVP & Senior Counsel

This content is not to be considered legal advice. We recommend Clients speak with legal counsel specializing in labor and employment law to ensure your organization meets requirements.

Agenda

- COVID-19 Leaves of Absence
 - New Federal Coronavirus Response Act (paid sick and family leave)
 - Family & Medical Leave Act
 - Worker's Compensation
- COVID-19 Accommodation issues
 - Overview of key legal issues: OSHA, ADA and more
- Overview of federal, state and local Reopening Requirements/Recommendations: *
 - Temperature checks
 - Other screening measures
 - Personal protective equipment
 - Workplace safety measures
 - What to do if an employee has COVID-19 symptoms at work
- Accommodating disabilities and employee fears
- Responding to complaints about workplace safety

*On www.sunlife.com/coronavirus: Summaries of individual federal, state and local orders/recommendations

Families First Coronavirus Response Act (FFCRA)

FFCRA: Emergency Paid Sick Leave: Hours & Pay

- Applies **only** to ERs with fewer than 500 EEs & certain public ERs (any size)
- ER must provide to all EEs the following number of hours of Paid Sick Time (PST) for uses set forth on next slide:
 - **Full-time EEs:** 80 hours
 - **Part-time EEs:** Average number of hours worked over 2-week period
- **Rate of Pay for EE's own illness/circumstances:** The greater of EE's regular rate of pay under FLSA, federal minimum wage, or applicable state minimum wage:
 - **Cap:** \$511 per day and \$5,110 in aggregate
- **Rate of Pay for caregiving:** Two-thirds of EE's regular rate of pay under FLSA
 - **Cap:** \$200 per day and \$2,000 in aggregate

ERs can exceed rate of pay BUT tax credits only applies up to Caps

FFCRA: Emergency Paid Sick Leave Uses

Applicable Paid Sick Leave Uses:

- To the extent EE is **unable to work (or telework)** due to need for leave because:
 1. **EE** is subject to federal, state or local quarantine or isolation order related to COVID-19.
 2. **EE** has been advised by healthcare provider (HCP) to self-quarantine due to COVID-19.
 3. **EE** is experiencing symptoms of COVID-19 **and is seeking medical diagnosis**.
 - EE can take paid sick leave to “self-quarantine” only if seeking a diagnosis
 4. EE **is caring for** individual who is subject to federal, state or local quarantine or isolation order related to COVID-19 or has been advised by HCP to self-quarantine.
 5. EE **is caring for** son or daughter of EE if school or place of care is closed or is unavailable due to COVID-19 precautions.
 6. EE is experiencing any other substantially similar condition specified by Federal Government.

FFCRA: Emergency Paid FMLA

- Applies **only** to ERs w/fewer than 500 EEs and certain public ERs (any size)
- ER must provide up to 12 weeks of FMLA
 - ✓ First two weeks unpaid (but could be covered by 80 hours of PST)
 - ✓ 10 weeks paid
- **EE eligibility:** EE must have worked for ER for at least 30 consecutive calendar days before leave commences
 - ✓ Includes time worked for ER as temporary EE through agency if then hired by ER
 - ✓ If terminated after 3/1/20 and rehired prior to 12/31/20 includes 30 days worked in 60 days prior to layoff
- **Rate of pay:** Two-thirds of EE's regular rate of pay under FLSA
 - ✓ **Cap:** \$200 per day and \$10,000 in aggregate (ER can exceed but tax credit capped)
- Emergency Paid FMLA **is part of overall FMLA 12-week allotment**
 - ✓ **Not** in addition to
 - ✓ If an EE has exhausted 12 weeks of FMLA, EE is still eligible for 80 hours of emergency paid sick leave

FFCRA: Emergency Paid FMLA: Only one covered reason

- **Qualifying need related to a Public Health Emergency (PHE) declared by government related to COVID-19**
 - EE is *unable to work (or telework)* due to need for leave:
 - ✓ **The Law says:** To care for *son or daughter under 18* years of age of EE if school or place of care has been closed or is unavailable due to PHE
 - ✓ **DOL Guidance says:** Son or daughter includes adult son or daughter who (1) has a mental or physical disability and (2) is incapable of self-care because of that disability

Both the Emergency Paid Sick Leave and Emergency FMLA expire on 12/31/20

COVID-19: New State and Local Paid Leave

- State of California **plus**
 - City and County of Los Angeles
 - Long Beach
 - Oakland
 - San Francisco
 - San Jose
- New York
- New Jersey
- Colorado
- District of Columbia
- Many states and cities are expanding their existing paid sick leave laws to include school closures or stay-at-home orders related to COVID-19

Family & Medical Leave Act (FMLA)

Family & Medical Leave Act (FMLA)



- Eligible EEs can take up to 12 weeks of unpaid job protected leave per year for, among other reasons:
 - if they are unable to work because of serious health condition (SHC) or
 - if they need to care for parent, child or spouse with a SHC.

Key COVID-19 Issue:

Does an EE – or family member – have a SHC?

- FMLA defines SHC as illness, injury, impairment or physical or mental condition that involves either
 - Inpatient care (e.g. one overnight hospital stay); or
 - Continuing treatment by a healthcare provider.
- Examples include the following:
 - Continuing treatment by healthcare provider (HCP) that results in incapacity of more than 3 consecutive calendar days with 2 or more in-person visits to the healthcare provider within 30 days of the date of incapacity; OR
 - One in-person visit to the HCP with regimen of continuing treatment (e.g., prescription medication, physical therapy).
- Courts have held that common cold or flu are not SHCs unless there are complications.

FMLA & COVID-19

- If EE is incapacitated for 3 or more consecutive days, and receives treatment as set forth in regulations, EE would be eligible for FMLA leave for their own SHC for days when they are unable to work because of symptoms related to actual or suspected COVID-19.
- Similarly, if they have parent, child or spouse who meets same definitional threshold, EE would be eligible to take FMLA to care for impacted parent, child or spouse for reasons related to actual or suspected COVID-19.



- **CDC has indicated that many people who contract COVID-19 may have little to no symptoms.**
 - Because individuals can be contagious even if they have no symptoms, CDC has advised that anyone who has been exposed to COVID-19 should be isolated from others to prevent the spread.
 - Many EEs who are required to be out of office because of COVID-19 may not be able to meet definition of SHC.
- **Another issue that may arise is whether individual can be properly diagnosed or even seen by HCP as required under FMLA regulations.**

Overview of key legal issues

Occupational Safety & Health Act (OSHA)

- OSHA imposes *a general duty of care* that requires employers (ERs) to provide *a safe and healthy working environment*
- OSHA can require:
 - Cleaning and sanitation
 - Screening of employees (EEs) and on-site visitors
 - Social distancing
 - Appropriate personal protective equipment
 - Safety measures if someone at work displays COVID-19 symptoms
- OSHA also issued updated guidance on when ERs must record and report COVID-19 cases contracted by employees

Americans with Disabilities Act (ADA)

- ADA permits some medical inquiries because COVID-19 has been declared a *pandemic*
 - EEOC permits ERs to *follow guidance from the CDC* and other reputable medical sources in responding to this direct threat to safety
 - Must focus on *exposure* and *symptoms*
- *Medical information* obtained from EEs must be *kept confidential*
- EEs with disabilities may be entitled to *reasonable accommodations*
 - *Including:* leave; remote work; reassignment of duties; job transfers and more
 - *Duty to accommodate* applies to EEs who are *working on-site* and EEs who are *telecommuting* because of COVID-19

Worker's Compensation



- Worker's compensation statutes provide EE is entitled to benefits for **occupational diseases** but typically exclude **ordinary diseases of life** to which general public is equally exposed.
- But, if EE can establish **direct causal connection to workplace**, worker's compensation coverage may apply.
- ERs can help avoid worker's compensation claims related to COVID-19 by having **appropriate preventative steps in the workplace**.

Federal, State and Local COVID-19 Orders



- Many states, counties and cities are issuing orders pertaining to COVID-19 workplace safety requirements
- Before you start to bring EEs back into the workplace, make sure you are fully aware of *federal, state and local orders and requirements* that may impact your work location and/or industry
 - Are you allowed to reopen?
 - If so, what are the rules?

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Wisconsin

Wisconsin Badger Bounce Back

- Governor Evers issued [Badger Bounce Back](#) guidelines and [Emergency Order No. 28](#) (“Safer-at-Home Order”).
- Emergency Order No. 28 was declared unlawful and unenforceable by the Wisconsin Supreme Court on 5/13/20.
- Court order does not impact local city and county orders, including, for example:
 - [Madison & Dane County](#)
 - Milwaukee County: [Face Masks](#) and [Reopening Requirements](#)
 - City of Milwaukee: [Face Masks](#) and [Reopening Requirements](#)
- Wisconsin Department of Health has issued [general guidance for businesses](#) who are open while COVID is active:
 - Permit higher risk EEs to remain at home and/or provide accommodations
 - Use strategies to prevent the spread of COVID-19
 - Implement telework and social distancing
 - Require EEs to stay home when sick
 - Promote handwashing
 - Provide appropriate personal protective equipment and supplies for cleaning and disinfecting
 - Educate workers and customers
 - Post signage
 - Provide regular updates
 - Develop training materials

Wisconsin Badger Bounce Back

- More on the Wisconsin Department of Health [general guidance for businesses](#) :
 - Put policies in place
 - Maintain social distance
 - Discourage handshaking
 - Consider options to increase physical space
 - Implement touchless options
 - Downsize operations
 - Delivery products through curbside pick-up or delivery
 - Discourage workers from sharing phones, desks, offices and equipment
 - Make changes regarding meetings
 - Implement flexible meeting and travel options
 - Deliver services remotely via phone, video or web
 - Hold meetings in open, well-ventilated spaces
 - Consider supporting work from home where feasible
 - Consider alternating work teams where possible to reduce worker exposure
 - PPE and cloth face coverings
 - Train EEs on how to use PPE
 - EEs with frequent close contact with customers and other workers may need a combination of face mask, shield and/or goggles
 - Gloves can be source of contamination
 - Cloth face coverings are not PPE and are intended to protect others from spread of virus by wearer

Wisconsin Badger Bounce Back

- More on the Wisconsin Department of Health [general guidance for businesses](#) :
 - Temperature checks and symptom screening
 - Screening and temperature checks may be appropriate
 - Follow CDC guidelines
 - Establish policies to encourage EEs to self-monitor symptoms and for isolating ill EEs
 - Establish return to work policies following exposure or illness
 - Sanitation
 - Before opening, clean and disinfect and replace all HVA filters and consider ventilation changes
 - Ensure that all water systems and features are safe to use
 - Frequently disinfect common and high-traffic areas
 - Train EEs on hazards of cleaning materials
 - Provide soap and water and schedule handwashing breaks
 - Use hand sanitizer that contains at least 60% alcohol
 - Place hand sanitizer in multiple locations
 - Provide tissues and no-touch trash receptacles
 - Business travel
 - Consider stopping or postponing all nonessential travel
 - Other best practices
 - Assess leave practices and consider expanding leave
 - Do not require sick EEs to provide COVID-19 test or health care provider's note
 - Monitor COVID-19 procedures and outcomes
 - Protect vulnerable EEs
 - Inform and educate EEs and customers
 - Identify and isolate newly ill persons

Temperature checks

Temperature checks are permitted

- *EEOC Pandemic Guidance* permits temperature checks
- Communicate the process in writing:
 - *Be aware of local legal requirements*: *Some state and local orders require you to do screening which may include temperature checks*
 - *California law* requires advance written notice advising EE that you will collect body temperature and purposes for which information will be used
- Establish *threshold temperature* over which an EE or other person will not be admitted entrance
 - *CDC: 100.4 degrees Fahrenheit, or higher*

How to take temperatures and/or screen

- Testing should be the *least invasive way possible*:
 - Touchless devices are best
- A *trained, qualified individual* must *administer* the temperature checks
- You may have to provide adequate *personal protective equipment for individual administering the checks*
 - Masks, gloves, sanitizer, access to soap and water
- You must ensure that the *equipment is sanitized*

Prepare the temperature-taking/screening location

- Plan for *social distancing* at temperature-taking/screening location
- Take temperatures and conduct screening in *private location* so that results are *confidential* and can be *discussed discreetly* with the EE or visitor
- Think about how to have *EE or visitor whose temperature exceeds the threshold or who does not pass screening* leave the worksite to *minimize both potential exposure and embarrassment*

Additional temperature-taking considerations

- Consent *is not* required.
 - Make clear in writing that having a temperature taken is required for admission to the building
- If you decide to *keep the results, you must store results* in *confidential* and *secure* manner
- *Consider paying your nonexempt EEs* as they wait for and go through the temperature-taking process
 - In some states (e.g., CA), you may have to pay a minimum amount of time if EE is not admitted to the building because of elevated temperature

Self-administered temperature checks

- ERs can require EEs and others to self-administer temperature checks on a daily basis and to verify in writing results of those tests before entering worksite each day
- *May be less reliable, though less costly*
- Consider requiring home self-administered tests *even if* you take temperatures at worksite in order to reduce exposure/surprise at workplace
- If you challenge veracity of self-reported results, be mindful of potential for discrimination claims

Other screening measures

What questions are okay?

- You *may ask* EEs and visitors:
 - Symptoms
 - Diagnosis
 - Exposure
- *You must keep medical information confidential*
 - Medical information must be *stored separately* from other personnel information



Symptoms are evolving:
follow CDC guidelines

What questions are not okay?

- *Do not ask* age
- *Do not ask* about underlying health conditions
- *Do not ask* about pregnancy
- *Do not* make return-to-workplace decision based on *age* or your *belief/perception about underlying medical conditions*
 - EEs may ask for accommodations because of these conditions but do not presume

Testing as a screening device

- Tests are being developed to evaluate:
 - Whether a person *has COVID-19* or
 - Has *previously had COVID-19* and now has *antibodies* that could protect the EE from COVID-19
 - Has been exposed to COVID-19 (*contact tracing*)
 - There may be privacy limitations on asking for *non-workplace contacts*
- EEOC has advised that ERs may conduct COVID-19 tests before allowing EEs to enter worksite
 - But EEOC says ERs may not test for antibodies (based on CDC guidance)
 - EEOC Technical Assistance
- If a *vaccine* is developed, ER may be able to require EEs to become vaccinated
 - ERs will have to evaluate accommodations for religious beliefs and/or disabilities

Personal protective equipment

OSHA & personal protective equipment (PPE)

- When a hazard exists:
 - ERs can mandate that EEs use PPE *and*
 - EEs have the right to demand PPE
- *Examples:* Face masks, gloves, goggles, face shields, respiratory protection
- What rules govern PPE? ER must:
 - Perform a hazard assessment
 - Consider other alternative options to protect EEs
 - Identify and provide appropriate PPE
 - Train EEs in use, care, cleaning, and replacement of PPE
 - Prepare a plan that is periodically reviewed

When is PPE required for EEs with regard to COVID-19?

- *Originally*, CDC was *only* recommending the use of PPE for *health care workers who have greater exposure*
- But, there is more and more evidence of asymptomatic spread
- CDC *revised its guidance*:
 - CDC now recommends that even non-health care personnel should wear *a cloth face covering*, which can be home-made from household items
 - These cloth coverings must be *kept clean through washing*
 - *Main purpose* of cloth face covering is to prevent spread of COVID-19 from wearer to others

Orders requiring or recommending face coverings

- Many states and local governments have adopted orders regarding face coverings
- *Variations:*
 - Some are *mandatory* and some are *recommendations*
 - Some apply to *all individuals in public*/outside of residence
 - Some apply to *only “essential” businesses*
 - Some apply only to *public-facing businesses*, e.g., retail stores, pharmacies, food service enterprises, public transit, etc.
 - Some *require ERs to pay for* the face coverings
 - Some also require that EEs be provided with *disposable gloves*
 - Some contain *other requirements* (e.g., mandatory breaks to wash hands)

Are *cloth face coverings* considered *PPE* under OSHA?

- OSHA guidance:
 - No
 - **Commentators:** If ER mandates face covering, is it deemed PPE?
- Cloth face coverings provide little protection to EE wearing mask
- Who pays for cloth face coverings?
 - OSHA requires ERs to provide PPE free of charge
 - OSHA does not require ER to pay for:
 - Everyday clothing
 - Normal work boots
 - Weather protection, e.g., winter coats, jackets, gloves, raincoats, ordinary sunglasses, sunscreen
 - ERs cannot require EEs to use their own PPE (must be voluntary)
 - Many new state and local mandates require ERs to pay for face coverings

Accommodating disabilities & employee fears

Accommodations related to COVID-19 safety measures



- Non-latex gloves for EEs with latex allergies
- Alternatives to cloth face coverings for those with respiratory conditions
- Sign language assistance and/or clear face masks for hearing impaired who rely on lip reading
- Some state/local orders say you cannot ask for documentation of medical condition
- *Can you send someone home who cannot wear a face covering because of medical condition?*
 - Not if there is reasonable alternative accommodation such as social distancing and/or clear face masks

Accommodations for high-risk EEs

- Under ADA *if EE has disability*, ER needs to evaluate reasonable accommodations and engage in the interactive process
- In some states, ERs must also make *accommodations for pregnant EEs*
- Accommodations *must be granted unless* accommodation would:
 - Create an undue burden
 - Relieve an EE from performing an essential job function
 - Create a direct threat to safety of EE or others
- **EEOC:** Encourages accommodations for high risk individuals
 - Underlying health conditions that make someone high risk may be a disability

Accommodating fear of COVID-19

- No legal duty to accommodate generalized fear that is not based on evidence of hazards in workplace
- However, if EE has underlying disability that contributes to fear, you may have to accommodate under ADA
 - It is possible that psychological impairment may qualify as disability that needs accommodation
- Be mindful of OSHA issues
 - *Are you taking appropriate steps to keep your workplace safe?*

What to do if an employee shows signs of COVID-19 at work

CDC Guidance if EE shows symptoms at work



- If EE *becomes sick* during the day:
 - EE should be isolated and sent home immediately
 - Surfaces in their workspace need to be cleaned and disinfected
 - Immediately?
 - Wait 24 hours
- ER should compile information on persons who had contact with ill EE during the time the employee had symptoms and 2 days prior to that and notify those individuals of exposure (but maintain confidentiality)

CDC guidance on entry to work for **Critical Infrastructure Workers** exposed to COVID-19

- Permits EEs to *continue to work on-site even if exposed* to COVID-19 if asymptomatic *and* ER takes additional precautions to protect them and the community at large
- Potential exposure is: *household contact or close contact within 6 feet of any individual with confirmed or suspected COVID-19*
 - Some states say w/in 6 feet for at least 10-15 minutes
- The period of time *includes the 48-hour period before* individual became *symptomatic*

Additional CDC guidance on Exposed Employees

- Additional requirements to permit EEs who have had exposure but remain asymptomatic to work on-site:
 - ER must screen EEs by measuring temperature and assessing symptoms
 - EE should self-monitor under supervision of ER's occupational health program
 - EE must wear face covering at all times for 14 days after last exposure
 - EE should maintain social distance of at least 6 feet
 - ER should clean and disinfect frequently and routinely

CDC guidance on return to workplace after having COVID-19

- At least 3 days (72 hours) have passed since recovery which includes:
 - Resolution of fever without fever-reducing medications *and*
 - Improvement of respiratory symptoms (e.g. cough, shortness of breath) *and*
 - At least 10 days have passed since symptoms first appeared
- **Test-based approach:**
 - Resolution of fever without the use of fever-reducing medications *and*
 - Improvement in respiratory symptoms (e.g., cough, shortness of breath) *and*
 - Negative results of an FDA Emergency Use Authorized Molecular Assay for COVID-19 from at least 2 consecutive nasopharyngeal swab specimens collected ≥ 24 hours apart*** (total of 2 negative specimens)

***All test results should be final before isolation is ended. Testing guidance is based upon limited information and is subject to change as more information becomes available.

Responding to employee concerns about workplace safety

Take employee concerns seriously and address



- Under *OSHA*, ERs can be held liable:
 - If they do not properly and promptly address and alleviate dangerous conditions
 - If they retaliate against an EE for raising a concern about workplace safety
- The *National Labor Relations Act (NLRA)* protects concerted activity to address workplace safety
 - ER can be held liable for retaliating against an EE engaged in protected concerted activity
 - Union activity is also protected
- State *Whistleblower* laws
- Federal and state *Discrimination* laws

OSHA – Refusal to work

- EEs may refuse to do work if *all of the following conditions* are met:
 1. Where possible, EE asked ER to eliminate danger and ER failed to do so; *and*
 2. EE refused to work in “good faith” (i.e., EE genuinely believed that an imminent danger exists); *and*
 3. A reasonable person would agree that there a real danger of death or serious injury; *and*
 4. There isn’t enough time due to urgency of hazard to get it corrected through regular enforcement channels such as an OSHA inspection

COVID-19: Immunity from liability

Alabama	Arkansas	Georgia	Iowa	Kansas
Louisiana	North Carolina	Oklahoma	Utah	Wyoming

- 10 states listed above have adopted some form of immunity for individuals and businesses from lawsuits for injury or death caused by COVID-19 related reasons
- None of them eliminate an EE's right to assert a claim for worker's compensation benefits
- None of them eliminate obligations under leave laws or disability or other discrimination laws
- Most exclude willful, reckless or intentional actions
- Some are limited to business such as health care providers or providers of personal protective equipment
- U.S. Congress has been discussing immunity

Worker's Compensation & COVID-19

- Worker's compensation rules vary by state
- Generally, worker's compensation provides immunity from lawsuits in exchange for administrative system of compensation for workplace injuries
- In some states ERs do not have immunity for willful, reckless and/or wanton misconduct
- ***No immunity for customers, visitors, contractors, or family members of employee***

Questions?

- Visit us at johnsonfinancialgroup.com/business-covid-19-coronavirus/
- You can also visit sunlife.com/coronavirus for information that highlights federal, state and local requirements on Reopening Workplaces
- CE for live webinar attendees:
 - **HR CE Credit (1 hour)**
 - **SHRM: 20-9MHZD**
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