

# HR in the Age of COVID-19

Maine State Library

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# How far we have come since March 16, 2020!

- Lockdown
- Layoff/Furlough
- Unemployment
  - Fraud
  - Impact of the \$600 Pandemic pay (if any?)
- FFCRA (a/k/a Alphabet Soup)
  - EPSLA
  - EFMLA
- Reopening guidance
- COVID policies
- Restart
- Face mask mandates
- Cleaning protocols
- Travel restrictions
- Sick leave banks
- Zoom overload
- Oh my!

## Where we are today....

- FFCRA Revisited
- Unemployment/Furlough
- EEOC
- ADA
- Employees with COVID symptoms/positive test
- Liability
- Common Issues

# Families First Coronavirus Response Act:

## Emergency Paid Sick Leave Act

- Set to expire December 31, 2020
- Leave is paid out now by employer, ~~recouped in full by tax credits against employer's portion of social security taxes and/or refunds.~~
- Employers with less than 500 employees must provide **two weeks** of paid sick leave to all employees.
  - Full time employees 80 hours, for part-time, the average number of hours for 2 weeks.
- Employees may take Paid Sick Leave if:
  - The employee is subject to a federal, state, or local isolation or quarantine order related to COVID-19 (i.e., **shelter in place**)
  - A **healthcare provider** instructs the employee to self-quarantine;
  - Employee has **symptoms** consistent with COVID-19 and is seeking a medical diagnosis;
  - The employee is **caring for an individual** who is subject to a federal, state, or local isolation or quarantine order (**2/3 regular rate of pay**);
  - The employee is caring for a child for whom the **school or childcare has been closed** or is unavailable due to COVID-19 precautions (**2/3 regular rate of pay**); or
  - A similar reason to be specified later by the Department of Health and Human Services Secretary (**2/3 regular rate of pay**).
- Exclusion for healthcare provider employers or emergency responders.

# Families First Coronavirus Response Act: Emergency Family & Medical Leave Expansion Act

- Leave is paid out now by employer, ~~recouped in full by tax credits against employer's portion of social security taxes and/or refunds.~~
- Employers with less than 500 employees must provide paid leave to employees caring for children under 18 whose school or childcare is closed.
  - Full time employees 80 hours, for part-time, the average number of hours for 2 weeks.
- Healthcare provider and emergency responder employers may elect not to provide this leave.

# Supplemental Leave

- For employees who are only entitled to 2/3 their pay under either the Emergency Paid Sick Leave or the Emergency FMLA, you may permit the employee to supplement to in order to make them “whole”
- May utilize existing accruals (PTO/Sick/Vacation/Personal)
- You will not receive the credit for the supplemental amount
- May apply or decide to amend your existing policies regarding use of PTO/Vacation/Sick
- Do not have to permit employees to supplement
- Sick Leave/COVID Leave Bank: Be careful of the tax implications!

# Intermittent Leave

- Is permitted if employer and employee agree
- Intermittent telework applies to both Emergency FMLA and Emergency Paid Sick Leave
- Intermittent work at **worksites** is only permitted due to school or childcare closure due to COVID-19
- If you permit intermittent leave, be sure to apply any policies equitably
- **“The Department encourages employers and employees to collaborate to achieve maximum flexibility.”**

# FFCRA in limbo: Federal Court Litigation

- New York Federal District Court Judge struck down key provisions of the FFCRA
- Work Availability Requirement: employee entitled to EPSLA or EFMLA even if there is no work available
  - Directly contrary to the FMLA work requirement; equated leave under FFCRA to a “snow day”
  - Practically speaking: could open up leave requests from employees who are furloughed or temporarily laid off
- Health Care Provider Exemption Definition: “vastly overbroad”; narrowed to include the FMLA definition which is limited to specifically identified direct health care professionals or providers
- Intermittent Leave: employer consent is not required (goes against FMLA current advise)
- Scope of decision’s reach unclear: just the state of New York or Nationwide?
- Seek advice of counsel when interpreting these provisions of the FFCRA

# Unemployment

- Unemployment Insurance Changes
  - One week waiting period eliminated.
  - Benefits sought are not charged against the employer's experience rating during period of emergency.
  - Defined COVID-19-related reasons:
    - He or she is under a temporary medical quarantine or isolation restriction to ensure that the individual has not been affected by COVID-19 and is expected to return to work; or
    - He or she is temporarily laid off due to a partial or full closure of the individual's place of employment as a result of the state of emergency and is expected to return to work once the emergency closure is lifted.
    - He or she is on a temporary leave of absence continues to remain able and available to work for and maintains contact with the relevant employer due to:
      - medical quarantine or isolation restriction,
      - a demonstrated risk of exposure or infection, or
      - a need to care for a dependent family member as a result of COVID-19
- Workshare program allows employers to apply on behalf of their company or a unit of the company, but has restrictive rules on the amount of reduction in hours and has separate application process.
  - COVID-19 related closures or reductions may not be so predictable.
- "Supplementing" benefits with additional payments may **jeopardize** employees' eligibility.

# EEOC Guidance

## Can we screen our employees?

- Pre-COVID-19: Generally, no.
- Post-COVID-19: Generally, yes with some clear parameters.
  - Body Temperature
  - Screening questions including fever, cough, sore throat, chills, shortness of breath
  - Information is still confidential pursuant to the ADA (not generally HIPAA)
  - Testing for COVID-19: Job-related and consistent business necessity
    - Be sure tests are accurate and reliable and come from a reputable source.
    - Review US FDA guidance
    - Consider who is administering the test

# ADA Implications?

**Employee does not want return to work because they have an illness or disease which makes them more at risk if they acquire COVID-19**

- Conduct the “interactive process” under the ADA to determine if there are any reasonable accommodations
- Possible reasonable accommodations:
  - Continued telework
  - Staggering work shifts
  - Providing different office environment
  - Additional leave?

# Liability for COVID-19 Claims

- Employee Litigation
  - Lawsuits in other states, injunctive relief, PPE, remote work, or leave.
    - Breach of Employment Agreement
    - Interference with FFCRA or FMLA, including misclassification
    - Non-compete
    - WARN Act (mass layoffs)
    - Whistleblower (masks, healthcare worker PPE)
    - Retaliation
    - Worker's Compensation
    - Discrimination
  - 1, 038 Complaints as of October 30 (according to one tracker), only 1 in Maine—prisoner seeking unemployment
- Liability to customers (Millinocket wedding venue example—the gift that keeps on giving)

# Liability for COVID-19 Claims

- Key Takeaways:
  - **Follow health and safety guidance and enforce it.**
    - **Pandemic Policy**
      - Screening
      - Social distancing
      - Masking, PPE
      - Hygiene
      - What will occur in the event of an illness
    - **Policies for Families First Coronavirus Response Act Leave (Emergency Paid Sick and Expanded Family & Medical Leave)**
    - **DECD Checklists, Postings**
  - **Protect yourself**
    - **Liability Waivers**
    - **Understand your insurance coverage**

# Common HR Issues of Today

## **Employee does not want return to work because they are comfortable receiving unemployment**

- Refusal to accept work without good cause will likely jeopardize their eligibility to collect unemployment
- Desire to simply not work and collect unemployment is not good cause

## **Employee does not want to return to work because they are afraid of getting COVID-19**

- You do not have to take this at face value
- Ask questions about why they are fearful
- Explain what you are doing to ensure a safe work environment
- Without more, this may not be good cause to refuse work

# Common HR Issues of Today

**Employee has symptoms of COVID, when can they return to work (i.e. “discontinue home isolation”)?**

- CDC guidance prefers the “symptom-based strategy” a/o July 22, 2020
  - At least 24-hours have passed since last fever without the use of fever-reducing medications
  - Improvement in symptoms
  - For severe cases, 20 days after symptom onset may be warranted
  - For persons who never develop symptoms, isolation and other precautions can be discontinued 10 days after first positive PT-PCR test for SARS-CoV-2 RNA.
- Can require them to work from home if possible (both physically and work-wise)
- EPSLA likely triggered

**It’s flu season, and symptoms are the same. What does that mean?**

- Follow CDC guidance—you don’t want the flu to wipe out your office anymore than you want COVID in your office.

# Common HR Issues of Today

**Employee refuses to wear a mask when they are required to wear one while working.**

- You can enforce mask requirements
- Make sure there isn't an underlying medical condition which prohibits them from wearing a mask and consider reasonable accommodations

**A member of the public refuses to wear a mask.**

- You can enforce mask requirements
- Make sure there isn't an underlying medical condition which prohibits them from wearing a mask and consider reasonable accommodations

## Pay Attention to the Changing Information

- Follow closely CDC's ever evolving guidance
- Monitor Maine's Reopening Website frequently (<https://www.maine.gov/covid19/restartingmaine>)
- Watch Dr. Shah's bi-weekly press conference
- If you don't receive Bernstein Shur's client alerts, let us know! We will put you on the list.
- Other HR/Business publications also issuing update and alerts.

# Questions?

Thank you!

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