

Navigating the Uncharted Employment Realities of COVID-19

April 21, 2020

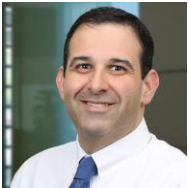
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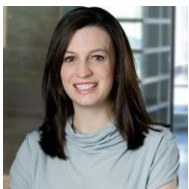
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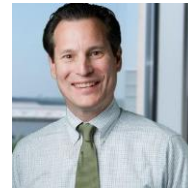
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Preface & Disclaimer

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“Opening Up America Again” Guidelines

- Starting to focus on what it looks like to re-open businesses
- White House issued guidance for states and local governments on April 16
- Leaves much discretion to the states and local governments

“Opening Up America Again” Guidelines

Gating Criteria

- Downward trajectory of reported of influenza-like illnesses and COVID-like syndromic cases within a 14-day period
- Downward trajectory of documented cases or positive tests as a percentage of total tests within a 14-day period
- Treating all patients without crisis care and a robust testing program for at-risk healthcare workers, including antibody testing

Preparedness Guidelines

- Appropriate methods for testing and contact tracing
- Healthcare system capacity (meaning being able to withstand a surge in ICU capacity and the ability to provide sufficient PPE and medical equipment in the event of a surge)
- Having plans to protect the health and safety of workers in critical industries, protecting employees and users of mass transit, and monitoring conditions and immediately taking steps to limit and mitigate any rebounds

“Opening Up America Again” Guidelines

- At all stages employers should:
 - Develop and implement policies regarding:
 - Social distancing and protective equipment
 - Temperature checks
 - Testing, isolating, and contact tracing
 - Sanitation
 - Use and disinfection of common and high-traffic areas
 - Business travel
 - Monitor workforce for indicative symptoms. Do not allow symptomatic people to physically return to work until cleared by a medical provider
 - Develop and implement policies and procedures for contact tracing following an employee COVID+ test

PHASE 1

- States and regions that satisfy the gating criteria
- All Employers
 - Encourage telework
 - Return to work in phases
 - Close common areas
 - Minimize non-essential travel
 - Strongly consider special accommodations for members of a vulnerable population

PHASE 1

- Specific Types of Employers
 - Schools and organized youth activities should remain closed
 - Visits to senior living facilities and hospitals should be prohibited
 - Large venues (restaurants, movie theaters, sporting venues, places of worship) should only operate under strict physical distancing protocols
 - Elective surgeries can resume as clinically appropriate, on an outpatient basis at facilities that adhere to CMS guidelines
 - Gyms can open if they adhere to strict physical distancing and sanitation protocols
 - Bars should remain closed

PHASE 2

- States and regions with no evidence of a rebound and that satisfy gating criteria a second time
- All Employers
 - Continue to encourage telework
 - Keep common areas closed
 - Non-essential travel can resume
 - Continue to strongly consider special accommodations for members of a vulnerable population

PHASE 2

- Specific Types of Employers
 - Schools and organized youth activities can reopen (applies to daycare and camp)
 - Visits to senior care facilities and hospitals should still be prohibited
 - Large venues can operate under moderate physical distancing protocols
 - Elective surgeries can resume on both an out-patient and in-patient basis at facilities that adhere to CMS guidelines
 - Gyms can remain open but still adhere to strict physical distancing and sanitation protocols
 - Bars can operate with diminished standing-room occupancy, where applicable and appropriate

PHASE 3

- States and regions with no evidence of a rebound and that satisfy the gating criteria a third time
- All Employers
 - Unrestricted staffing of worksites
- Specific Types of Employers
 - Visits to senior care facilities and hospitals can resume
 - Large venues can operate under limited physical distancing protocols
 - Gyms can remain open if they adhere to standard sanitation protocols
 - Bars may operate with increased standing room occupancy

Suggestions for Employers

- Think about policies for reopening now:
 - Screening protocols
 - Encouraging good hygiene
 - Providing PPE
 - Encouraging continued telework
 - Staged re-entry
 - Staggering work shifts, breaks, meals
 - Closing common areas
 - Limiting visitors to the business
 - Limit in-office conversations
 - Reconfiguring office spaces
 - Creating a recovery management team
 - Requirements will vary state-by-state and, possibly, region-by-region
 - **Be flexible**
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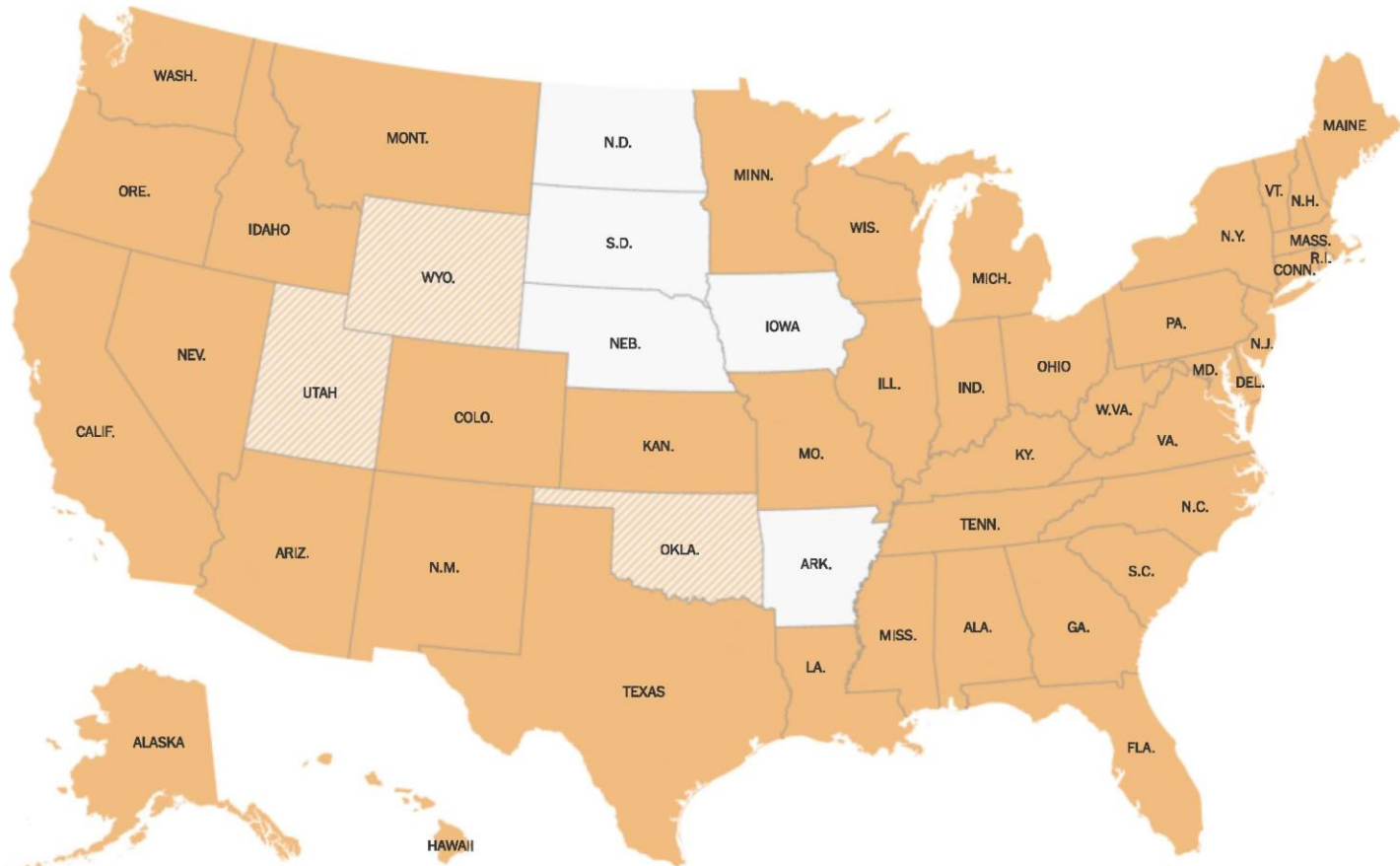


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Stay-at-Home Orders and Paid Leave Coverage



Stay-at-Home Orders and Paid Leave Coverage

- An employee is entitled to paid sick leave if the employee is unable to work because he or she is “subject to a Federal, State, or local quarantine or isolation order related to COVID-19.”
- What counts as a “quarantine or isolation order”?

Stay-at-Home Orders and Paid Leave Coverage

- The FFCRA defines “quarantine or isolation order” to include “quarantine, isolation, containment, shelter-in-place, or stay-at-home orders issued by any Federal, State, or local government authority that cause the Employee to be unable to work even though his or her Employer has work that the Employee could perform but for the order.”

Stay-at-Home Orders and Paid Leave Coverage

- A critical part of the definition is whether the Employee is “unable to work even though [the] Employer has work the Employee could perform but for the order.”
- If the Employer has no work for the Employee, then the Employee is not entitled to take paid sick leave. The employee would be unable to work even if he or she was not required to comply with the quarantine or isolation order.

Stay-at-Home Orders and Paid Leave Coverage

- An employee is not eligible for paid leave if the worksite closes pursuant to a shelter-in-place order, or if it closes for any other reason, such as lack of business.
- However, employers should note that when they reopen and recall the affected employees to work, the recalled employees will be eligible for paid sick or family leave, if they meet the applicable requirements.

Stay-at-Home Orders and Safe Passage Issues

- Louisiana and Texas, like many other states, are subject to stay-at-home orders.
- The stay-at-home orders have impacted interstate and intrastate travel, even for essential businesses and activities.
- Texas requires that all travelers coming into the state from specified hotspots must self-quarantine for 14 days.
<https://tdem.texas.gov/essentialservices/>
- Exceptions for essential activities and essential services.

Stay-at-Home Orders and Safe Passage Issues

- Safe passage letters allow employees to (1) travel to and from the worksite or while performing job duties, and (2) travel across state lines without the requirement to self-quarantine.
 - Best practices:
 - Print an individual letter, on company letterhead, for each affected employee, and date and sign the letter.
 - The letter should identify the employee by name.
 - State that the employee is employed by your company, which is an essential business. Include within your statement a brief explanation of why your company is an essential business within the applicable stay-at-home order.
 - Provide contact information for a company representative, who can be available to answer questions from law enforcement or validate the employee's status, if needed.
 - Instruct the employee to carry his/her company ID, badge, or driver's license and be prepared to prove his/her identity, if necessary.
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Leave for School Closures/Childcare Unavailability

- Available under FMLA+ or EPSL.
- FMLA+ provides up to twelve weeks of expanded family and medical leave, ten of which are paid. After the first ten workdays have elapsed, employee receives 2/3 of regular rate of pay for the hours would have been scheduled to work. The maximum twelve weeks of FMLA+ is reduced by the amount of the FMLA leave entitlement already taken in that year.
- EPSL provides for an initial two weeks of paid leave (also at 2/3 rate). This period thus covers the first ten workdays of FMLA+, which are otherwise unpaid unless employee elects to use existing vacation, personal, or medical or sick leave under employer policy.
- Employee must be able to perform work for his or her employer but for the need to care for his or her son or daughter.

Leave for School Closures/Childcare Unavailability

- Only available to care for your own “son or daughter.”
 - “Son or daughter” is your own child, including biological, adopted, foster, stepchild, legal ward, in loco parentis, and mentally/physically disabled adult child. IRS guidance states “special circumstances” required if child is over age 14.
 - Applies to school/place of care/child care provider closed due to COVID-19 reasons.
 - A “place of care” is a physical location, including day care facilities, preschools, before and after school care programs, schools, homes, summer camps, summer enrichment programs, and respite care programs.
 - A “child care provider” includes nannies, au pairs, babysitters, and individuals who provide child care at no cost and without a license on a regular basis.
 - Applies to physical location being closed, even if online instruction provided.
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Leave for School Closures/Childcare Unavailability

- Employees must provide notice of need as soon as is practicable.
- Employee must provide:
 - (a) their name, (b) dates for which leave is requested, (c) qualifying reason, (d) oral/written statement that unable to work because of the qualifying reason, (e) name of the child, (f) name of school/place of care/child care provider that has closed or become unavailable, and (g) representation that “no other suitable person will be caring for the child during the period.”
- If employer and employee agree, may be taken intermittently.



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FFCRA – Employee Leave Requests

- Notice may not be required in advance, and may only be required after the first workday (or portion thereof) for which an employee takes EPSL or FMLA+.
- It will be reasonable for notice to be given by the employee or by employee's spokesperson (*e.g.*, spouse, adult family member, or other responsible party) if the employee is unable to do so personally.
- It will be reasonable for an employer to require oral notice and sufficient information for an Employer to determine whether the requested leave is covered by the EPSL or the FMLA+ provisions.
- Employer may not require the notice to include documentation beyond what is allowed by DOL regulations § 826.100.

FFCRA – General Documentation Requirements

An employee is required to provide documentation containing the following information prior to taking EPSL or FMLA+ paid leave:

- Employee's name.
- Date(s) for which leave is requested.
- Qualifying reason for the leave.
- Oral or written statement that the employee is unable to work (or telework) due to qualified reason.

FFCRA – Specific Leave-Type Documentation Requirements

- The name of the governmental entity if due to the employee (or individual the employee is caring for) being subject to a governmental quarantine or isolation order.
 - The **name of the healthcare provider** who ordered quarantine if due to the employee (or individual the employee is caring for) being ordered to quarantine by a healthcare provider. (**Note – the reg. does not say a doctor’s note can be required**)
 - In the case of need to care for minor son or daughter: (i) the name of the child being cared for; (ii) the name of the school, place of care, or child care provider that has closed or become unavailable; and (iii.) a representation that no other suitable person will be caring for the child.
 - Such additional material as needed for the employer to support a request for tax credits pursuant to the FFCRA.
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IRS Guidelines (Documentation From Employee to Substantiate Tax Credits)

- IRS guidance regarding required documentation to support payroll tax credit (FAQ 44) closely mirrors the DOL regulations.
- A statement of the COVID-19 related reason the employee is requesting leave **and written support for such reason.**
- In the case of the need to care for minor son or daughter the age of the child (or children) to be cared for, and, in the case of a child older than fourteen during daylight hours, a statement that special circumstances exist requiring the employee to provide care.

Employer Best Practices Regard FFCRA Documentation

- Employers should adopt a FFCRA leave request form for use by employees.
- Request that an employee provide as much documentation as they have available (physician note, documentation regarding closure of school or unavailability of child care provider, etc.) (more documentation is better to substantiate the payroll tax credit)
- But avoid drawing a hard line regarding documentation requirements beyond what the DOL regulations require (to avoid improper denial of FFCRA leave requests).
- Be reasonable regarding timing of paid leave requests (opportunity to cure deficiencies).

FFCRA Posting Requirements

- Every employer covered by FFCRA's paid leave provisions is required to post on its premises, in conspicuous places, a notice explaining FFCRA paid leave rights and process for filing complaints of violations with the DOL.
- Employer may satisfy this requirement by emailing or direct mailing this notice to employees, or posting this notice on an internal or external website.
- Notice of employee rights form has been published by the DOL:
https://www.dol.gov/sites/dolgov/files/WHD/posters/FFCRA_Poster_WH1422_Non-Federal.pdf

Prohibited Employer Acts

- Employer is prohibited from refusing to provide the required paid leave.
- Employer is prohibited from discharging, disciplining, or discriminating against any employee for exercise of FFCRA leave rights.
- Employer is prohibited from discharging, disciplining, or discriminating against any Employee because they have filed any complaint or instituted any enforcements proceeding regarding FFCRA rights.

Employer Liability for FFCRA Violations

- Failure to provide paid sick leave is considered failure to pay the minimum wage as required by the federal Fair Labor Standards Act. Employer can be liable for the amount of unpaid sick leave benefit (up to 80 hours of pay), an equal amount of liquidated damages and attorney fees.
- Violations of the expanded FMLA provisions are subject to claims under the federal Family Medical Leave Act. Employer can be liable for back pay, an equal amount of liquidated damages and attorney fees.
- Back pay and injunctive relief (reinstatement) are also available to remedy retaliation and interference claims.

Enforcement of FFCRA Obligations

- Employee complaints may be filed with the DOL Wage and Hour Division.
- DOL has full investigative authority and subpoena power to remedy alleged violations. DOL may file suit to enforce FFCRA requirements.
- Individual employee complaint is likely to lead to broader DOL investigation of employer's FFCRA compliance practices. It may also lead to FMLA and FLSA compliance audits.
- Employees have a private right of action under the FMLA and FLSA to enforce paid leave provisions of the FFCRA. A collective action (*ie.* opt-in-class action) is also available to enforce paid sick leave rights under the FFCRA.



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Substitution, Topping Off, and Other Forms of Employer Paid Leave

- 1993 FMLA
 - Unpaid 12 weeks of leave
 - Allowed for substitution of paid for unpaid leave
 - Coordination with paid leave

Substitution, Topping Off, and Other Forms of Employer Paid Leave

- 2020 FMLA+ (12 weeks leave)
 - Unpaid leave for 10 days (2 weeks)
 - Paid leave at 2/3 pay for 10 weeks
 - Leave is not at 100% pay
 - 2020 EPSL
 - 80 hours (think 10 days) paid leave at full pay for “sick leave” (subject to cap)
 - 80 hours paid leave at 2/3 for “care” (with overlap with FMLA+, subject to cap)
 - Thus, leave may not be at 100% pay
 - Key - employee choice to use EPSL or employer-provided leave (“sequencing”)
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Substitution, Topping Off, and Other Forms of Employer Paid Leave

- 2020 FMLA+ Substitution Paid for Unpaid Leave
 - Substitution and topping off = coordination with other forms of paid leave
 - First 10 days FMLA+ leave is unpaid – employer can require and employee can choose to substitute employer paid leave for unpaid FMLA+ leave
 - Basis for FMLA+ is also covered leave under the EPSL (school or day care closure)
 - Employee (only) can choose to use EPSL for unpaid FMLA+
 - Leave is then not unpaid – so no substitution allowed (because 10 days of leave is not unpaid)
 - Leave is not 100% (but at 2/3 pay), so employer and employee can agree to apply other employer paid leave to make up the difference (“top off”); but the regs and FAQ 86 suggest employer can require “top off”
 - Employee choice not to use EPSL for FMLA+ (full circle)
 - FMLA+ leave is then unpaid for 10 days
 - Employee can choose and employer can require employee to substitute employer-provided paid leave for unpaid FMLA+ leave

Substitution, Topping Off, and Other Forms of Employer Paid Leave

- 2020 EPSL Topping Off
 - 80 hours paid at full pay (subject to cap) for “sick leave”
 - 80 hours paid leave at 2/3 for “care leave” (with some overlap with FMLA+)
 - Leave may not be at 100% pay (subject to a cap or 2/3 pay)
 - Employer and employee may agree to apply other paid leave to make up the difference (“top off”)



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Unemployment Benefits

- CARES Act Expansion
 - Individuals who would not otherwise qualify
 - \$600/week federal benefit
 - Pandemic Emergency Unemployment Compensation
- Louisiana Suspensions
 - “Without good cause attributable to a substantial change made to the employment by the employer ...”
 - Searching for replacement employment
 - Employer challenges
 - Employer tax rating



Unemployment Benefits

- The \$847 Question ...
- Relationship to FFRCA leave ...



OSHA

COVID-19 is a recordable illness, and employers are responsible for recording cases of COVID-19, if:

1. The case is a confirmed case of COVID-19, as defined by the CDC;
2. The case is work-related, as defined by 29 CFR § 1904.5; and
3. The case involves one or more of the general recording criteria set forth in 29 CFR § 1904.7.



OSHA

Work-relatedness determination:

- There is objective evidence that a COVID-19 case may be work-related.
 - Example: a number of cases developing among workers who work closely together without an alternative explanation
- The evidence was reasonably available to the employer.
 - Information given to the employer by employees
 - Information that an employer learns regarding its employees' health and safety in the ordinary course of managing its business and employees
- Healthcare facilities, emergency response organizations (emergency medical, firefighting, and law enforcement services), and correctional institutions must make the determination

QUESTIONS?

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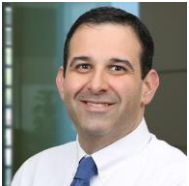
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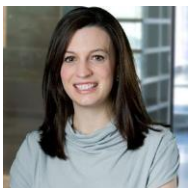
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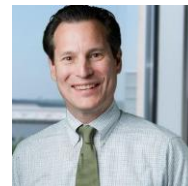
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