

Employee Leaves and Common Issues During the COVID-19 Pandemic

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Disclaimer

The COVID-19 crisis is a fluid, dynamic situation. Details are changing rapidly and new information is learned every day. In addition, most of us are in uncharted waters, so best practices are being written in real time. What we are presenting is our best guidance based on what we know today. Each individual company and manager will need to make their own decision based on their business needs. Nothing presented today should be considered legal advice or mandates by any organization or any of the presenters. You should check with your own legal advisors and consultants on what is best for your business.

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Roadmap

1. Leave in the Era of COVID-19
 - FFCRA – A Refresher
2. Pre-COVID-19 Employee Leave
 - FMLA
 - ADA
 - State and local sick leave laws
3. Common Issues
4. Best Practices for Employers



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EMPLOYEE LEAVE IN THE COVID-19 ERA



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Employee Leave in the COVID-19 Era

Families First Coronavirus Relief Act (FFCRA)

- Provides two types of emergency leave in response to COVID-19 pandemic
 1. Emergency Paid Sick Leave (**EPSL**)
 2. Expanded FMLA (**EFMLA**)



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EPSL Hypothetical

Your employee, Tricky Tricia, calls out of work because she has a fever and cough. Tricia says that she is going to see her doctor for a COVID-19 test, but she can't get an appointment for 3 days. Tricia has a history of attendance issues, including unexcused absences and failing to come to work on time. Tricia cannot work remotely. How should you handle Tricia's request for time off?

- If you have less than 500 employees, you are covered by the FFCRA and Tricia is likely entitled to EPSL leave. Tricia has symptoms of COVID-19 and is seeking a medical diagnosis from her doctor, which is protected leave under the FFCRA. *Be careful: This request off is not the time to start enforcing discipline for past policy violations.*

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EFMLA Hypothetical No. 1

George took 3 weeks of FMLA leave in January 2020 to recover from surgery. Now he requests 12 weeks of EFMLA leave because his child's school requiring distance learning due to COVID-19. Is he entitled to 12 weeks of EFMLA leave?

- No. Any FMLA leave an employee has already taken in the last 12 months reduces the amount of FMLA leave that is available under the EFMLA, and vice-versa
- The employee is entitled to 9 weeks of EFMLA leave to be used by 12/31/20.

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EFMLA Hypothetical No. 2

- Maria tells her employer that she needs several weeks off of work to care for her 8 year old son, who is doing virtual learning. You ask Maria if her school is closed and she reports that in-person learning is available, but she has decided to opt for virtual learning instead as a safety precaution. Is she covered by the EFMLA?
- Probably not. The leave is not due to school closure or unavailability due to COVID-19. This leave is based on employee's personal preference to keep student home (even though the reason for leave may be well-intentioned due to safety concerns)

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Pre-COVID-19 Leave: A Refresher

- Family and Medical Leave Act (**FMLA**)
- Americans with Disabilities Act (**ADA**)
- State and local sick leave laws



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Family and Medical Leave Act (FMLA)

- Applies to employers with:
 - 50+ employees within 75-mile radius
 - For each working day during 20+ calendar workweeks
 - In current or preceding calendar year
- Eligible employees have up to 12 weeks of **unpaid** leave in a 12-month period, *if the employee has*
 - Employed by covered employer for at least 12 months; *and*
 - Worked at least 1,250 hours in the consecutive 12 months prior to leave

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Reasons for FMLA

Primary reasons for leave:

- Employee is suffering from a “serious health condition”
- Care for a child, spouse, or parents suffering from “a serious health condition”
- Birth of new child, bonding, or placement of child for adoption or foster care within one year of birth/placement

“**Serious health condition**” includes many illnesses, injuries and impairments resulting in:

- Overnight/in-patient care, or
- Absence from regular daily activities for 3+ days; *and*
- Continuing treatment or supervision by health care provider

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IS COVID-19 A SERIOUS HEALTH CONDITION?

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Americans with Disabilities Act (ADA)

- **Covered employers:**
 - Private employers with 15+ employees
 - State and local government employers, agencies, labor unions
- Applicable where leave not available under any other employer benefit or program (even if exhausted all other leave)

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ADA – Reasonable Accommodations

- *Requires employers to provide:*
 - **reasonable accommodations** to
 - qualified individuals with a **disability**
 - to allow employee to perform primary job duties
 - *Provided that* accommodation does not cause **undue hardship**
- Accommodations *may* include unpaid leave

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ADA and Disabilities

- Under the ADA, “**disability**” means a physical or mental impairment that substantially limits one or more major life activities, or a person who has a record of such an impairment, or is regarded as having such an impairment.
 - Cover disabilities can include those that impact a person’s seeing, hearing, speaking, walking, breathing, performing manual tasks, learning, caring for oneself, etc.
- Pregnancy itself is not a disability under the ADA; but pregnancy-related conditions may be

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IS COVID-19 A DISABILITY UNDER THE ADA OR STATE LAW?

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Employee Screening

- COVID-19 itself is not necessarily a disability, but it could lead to a disability, or pose safety concern for employees who are highly vulnerable to severe reactions to the virus
 - Remember to follow the ADA's **interactive process!**
- Employees are not entitled to an accommodation under the ADA solely to protect a high-risk family member from potential exposure, or solely due to fear of exposure to the virus

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The ADA and COVID-19 Medical Testing or Questions

- Employers may ask employees **limited questions related to COVID-19 symptoms** (i.e. fever, chills, cough, shortness of breath, etc.), or conduct temperature screenings during the pandemic
- All employee information related to COVID-19, testing, exposure, etc. must be kept confidential (but employee names may be shared with public health agency)

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Employee Medical Information

- **As always**, employee medical information—including COVID-19 screening and testing results—is confidential
 - A manager who learns that an employee was diagnosed with or has COVID-19 symptoms may share this *only* with appropriate employer officials.
 - An employer may designate a representative to interview an employee who is suspected or confirmed to have the virus (contact tracing)

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COVID Documentation- Hypothetical

- Ailing Avery, who reports to her workplace every day, reports to her office manager that she is experiencing symptoms of COVID-19 and wishes to telework for several days until she receives the results of a COVID-19 test. Can the office manager tell Avery's co-workers why Avery is not in the office?

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Hypothetical, Cont'd

- No! He should say only that Avery is teleworking.
- Employee medical information—including information related to COVID-19—must be kept confidential.
- The office manager may, however, tell those with a legitimate business reason to know about Avery's circumstance (*e.g.*, those who may need to take action in accordance with public health guidance).
- The employer can tell individuals who had **direct contact** with Avery that there is a suspected (or confirmed) case of COVID and instruct them to quarantine or monitor for symptoms, but they cannot reveal Avery's identity

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Don't Forget About State Sick Leave Laws

- Federal law does not require paid sick leave for private sector employees
- More states and cities are requiring paid or unpaid sick leave in recent years
 - *Ex. AZ, CA, CT, DC, MA, MD, MI, NJ, NV, OR, RI, VT, WA*
 - *Local: PA, IL, MN, NY, TX*
- *Some state sick leave laws have been expanded to protect COVID-19-related leave. Be on the lookout for new legal updates!*

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Recent EEOC Guidance

- Employers may screen employees entering the workplace for COVID-19 because an individual with the virus will pose a **direct threat** to the health of others.
 - Employers may administer or require **COVID-19 testing** to determine if employee currently has the virus
- Employers may administer COVID-19 tests if doing so is
 - (1) job related; and
 - (2) consistent with a business necessity

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Employee Screening

- Employers may ask all employees in the workplace if they have a **diagnosis or symptoms** of the virus, or recent travel to a **hot-spot**
- Employers should not ask employees if family members have COVID-19 or related symptoms.
 - Instead, ask if employee may have been in contact with anyone who has been diagnosed with, or has symptoms of the virus.

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Employee Screening

- Employers may screen applicants for symptoms of COVID-19 **after making a conditional job offer**, as long as it does so for all new hires in the same type of job.
- Employers can ask why an employee is absent from work
- Employees who do not cooperate with screening can be sent home

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EEOC & Remote Workers

- Employers have an **obligation to prevent unlawful harassment** of employees who are teleworking, including harassment via email or video conferences
- Employers may ask employees in advance of their return-to-work date if they require accommodations for a disability upon return
 - Related to COVID-19 or otherwise
 - Start the interactive process

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EEOC & Teleworking

- Employees do not have automatic entitlement to continued teleworking once called back to work
- If the employer altered an employee's essential job functions during period of teleworking, the employer did not permanently change them
 - But accommodations should be provided where a disability-related limitation requires teleworking, and does not cause undue hardship
 - Consider updated undue hardship if employee has demonstrated ability to perform their essential job functions remotely

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COMMON HR ISSUES DUE TO COVID-19

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Common Issues- Hypothetical No. 1

Amazing Apartments LLC learns that a new maintenance employee hired 2 months ago was in close contact with a friend who just tested positive COVID-19. Yesterday, the maintenance employee worked on an outdoor window repair project with two other maintenance workers. The maintenance employee does not have any symptoms, but is going to take the day off to go get tested for the virus.

- How should Amazing Apartments LLC respond to the employees request for the day off?
- What information, if anything, should be shared with the other maintenance employees?

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Hypothetical No. 1 Cont'd

- If Amazing Apartments LLC has less than 500 employees, it is covered by the FFCRA and must consider EPSL/EFMLA
 - Remember, all employees qualify for EPSL leave, regardless of length of employment.
- Since the maintenance employee does not have any symptoms and is not required by a doctor to stay home or get tested, leave likely not covered by the FFCRA
- Next look to your PTO policies, will day off be paid or unpaid?
- Should the employee quarantine for 14 days based on close contact with COVID-19-positive person? Probably yes. Review latest CDC/State guidance.
- Other maintenance staff should be notified of possible exposure, but no specifics about employee due to ADA confidentiality protections.

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PPE and Accommodations

- An employer can and should require use of **Personal Protective Equipment (PPE)** in the workplace as recommended by federal, state and local government
- Employees who question or refuse to wear PPE may be seeking an accommodation due to disability (*e.g.*, use of face coverings)
- Follow standard ADA “**interactive process**” steps to determine if reasonable accommodation can be provided.

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EEOC & Remote Workers

Peter supervises retail employees at a local clothing store. Peter tells his manager that he cannot wear a face mask at work (as required by company policy) because the face mask is uncomfortable to wear with his glasses and makes it difficult for him to breathe. Peter cannot perform his job remotely.

- Does Peter have to wear a face mask at work?

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Hypothetical No. 2 Cont'd

- Face mask comfortability is not a legitimate excuse to violate an employer's safety/PPE policies
- BUT having difficulty breathing *could* relate to an underlying disability that is covered by the ADA. Talk to Peter to find out more information about his request and consider if the interactive process/alternative PPE should be considered (i.e. face shield, plexiglass wall for desk space, etc.)

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Common Issues- Hypothetical No. 3

- Calo College hired Jim 6 months ago as the Administrator of Student Affairs. Jim had been reporting to work daily, but tells HR that being in the office during the pandemic has made him extremely anxious and he cannot focus on his work. Jim mentions that he would prefer to work remotely and he also is going to discuss this concern with his therapist.
- Should the College allow Jim to work remotely?

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Hypothetical No. 3, Cont'd

- Calo College needs to determine whether Jim is requesting a reasonable accommodation under the ADA
 - **Remember, no minimum service requirement to be protected by the ADA*
- Although most people have experienced increased stress due to the pandemic, employees with diagnosed mental health conditions likely have a qualifying “disability” under the ADA
- Jim mentioned seeing a therapist, which suggests that he may be suffering from an ADA-protected mental health condition
- Calo College should respond to Jim’s request to work from home by engaging in the interactive process to determine if his request is **reasonable and will not cause an undue hardship** on the College

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COVID-19 and Leave Fraud



- Employees who fake a COVID-19 diagnosis or exposure can create costly issues for an employer
 - Requiring co-workers to miss work to quarantine
 - Partial or full facility shutdown and cleaning
 - Interruption to business
- Employees in South Carolina and Georgia have been arrested for faking COVID-19 diagnoses or exposure

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Employee Screening

- Require doctor’s note to confirm positive COVID-19 test results
- Look up doctor’s office/treatment center online to confirm address, contact information and providers, as available
- Take note of inconsistencies in font, spacing, or signs that a document has been tampered with
- Talk to employee to confirm content of doctor’s note and ask questions about any unusual circumstances
- With HIPAA authorization, contact provider’s office to confirm/verify contents of the doctor’s note

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Wrap-Up: Best Practices for Employers



- Update leave policy
- Post required notices
- Train HR personnel
- Have procedure for reviewing COVID-19 leave requests and medical certifications
- Maintain complete and accurate records

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Best Practices Cont'd

- Monitor applicable government orders as they evolve in different phases in different states and localities
- Monitor changing guidance and best practices
- Plan and prepare for second wave of stay at home orders
- Evaluate what worked and did not work with existing policies, create new policies where needed

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For more information on COVID-19, please visit
Saul Ewing Arnstein & Lehr's COVID-19 resource
page:

<https://www.saul.com/COVID-19-resource-page>

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Thank You!



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