

Guidance in Trying Times: The COVID-19 Pandemic



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****Illinois Employment Reminders**

- ▶ **Minimum Wage Increases**
 - ▶ **\$9.25/hr as of January 1, 2020; \$10/hr on July 1, 2020**
- ▶ **Recreational Cannabis**
 - ▶ **Reasonable, non-discriminatory drug testing policies still okay (including pre-employment and random)**
- ▶ **Workplace Transparency Act**
 - ▶ **Restrictions on confidentiality, non-disclosure, and non-disparagement clauses**
 - ▶ **List of provisions to work into/remove from employment, arbitration, or settlement agreements**

****Illinois Employment Reminders**

- ▶ **Illinois Human Rights Act**
 - ▶ Definition of “unlawful discrimination” now includes “actual or perceived”
 - ▶ Mandatory annual sexual harassment training
 - ▶ Extra requirements for restaurants, bars, and coffee shops
 - ▶ New disclosure requirements regarding adverse judgments
- ▶ **Equal Pay Act**
 - ▶ Prohibited from asking applicants to disclose prior compensation history
 - ▶ No gag orders on employees discussing compensation with others
- ▶ **Hotel & Casino Employee Safety Act**
 - ▶ Extra requirements for hotels and casinos
- ▶ **Victims’ Economic Security & Safety Act (VESSA)**
 - ▶ Expanded coverage now includes gender violence

****Federal Employment Reminders**

- ▶ **Fair Labor Standards Act**

- ▶ **Salary basis threshold for overtime-exempt test upped from \$23,660/year to \$35,308/year**

Families First Coronavirus Response Act (“FFCRA”)

- ▶ **Became law March 18, 2020**
- ▶ **Effective April 1, 2020; Leave provisions effective 4/1/2020-12/31/2020**
- ▶ **Provides for paid leave under Emergency Family and Medical Leave Expansion Act and Emergency Paid Sick Leave Act for qualifying reasons**
- ▶ **DOL regulations came out April 1, 2020**
 - ▶ **Can be found at:**
<https://www.federalregister.gov/documents/2020/04/06/2020-07237/paid-leave-under-the-families-first-coronavirus-response-act>

Emergency Family and Medical Leave Expansion Act (“COVID-19 FMLA Leave”)

▶ Eligibility

- ▶ Employee working at least 30 calendar days before leave starts – rehired employees; temporary employees?
 - ▶ Employee can be eligible even if ineligible for FMLA
- ▶ Employers having fewer than 500 employees – who counts?
- ▶ Depends on how much FMLA leave was taken before 4/1/2020

▶ Type of leave

- ▶ When employee cannot work (or telework) because school/place of care closed or childcare provider is unavailable due to COVID-19
 - ▶ Definition of “place of care” and “childcare provider” is broad
 - ▶ Must be no other suitable individual available to care for the child

COVID-19 FMLA Leave

- ▶ **Paid Leave?**
 - ▶ **Yes – but, first 10 days of 12 weeks are unpaid**
 - ▶ **10 days could be paid if COVID-19 Sick Leave (for same reason) or other accrued preexisting leave is used**
 - ▶ **Employee can only take COVID-19 Sick Leave and preexisting paid leave simultaneously if employer agrees**
 - ▶ **After 10 days, paid 2/3 of regular rate of pay up to \$200/day or \$10,000 total (\$12,000 total if COVID-19 Sick Leave is used during 1st ten days)**
 - ▶ **Employee may elect or employer may require employee to concurrently take preexisting leave**
 - ▶ **If agreed, COVID-19 FMLA Leave may be taken intermittently**

COVID-19 FMLA Leave

- ▶ **Health coverage**
 - ▶ **If group health insurance coverage elected, employee is entitled to coverage during COVID-19 FMLA Leave (normal contributions needed)**
 - ▶ **If employee does not return after leave – look at documentation for coverage**
 - ▶ **If coverage gone, look at COBRA benefits**
 - ▶ **Disability benefits possible**
- ▶ **FMLA taken for other reasons will count against amount of COVID-19 FMLA Leave**

Emergency Paid Sick Leave Act ("COVID-19 Sick Leave")

- ▶ **Eligibility**
 - ▶ **Employers with fewer than 500 employees – who counts?**
 - ▶ **Full-time employees (those that work at least 40 hours a week)– max 80 hours of paid leave**
 - ▶ **Part-time employees – paid leave for average # hours in 2 weeks**
- ▶ **Any sick leave given before 4/1/2020 irrelevant – new leave requirement**
- ▶ **Employer can satisfy obligations through multiemployer CBA fund/plan**
- ▶ **Employees cannot force employer to find replacement**
- ▶ **Employee may, but is not required to take COVID-19 Sick Leave before preexisting leave**

COVID-19 Sick Leave

► **Qualifying Reasons, if employee is unable to work (or telework) because:**

(1) Employee is subject to local quarantine or isolation order (includes stay-at-home orders) related to COVID-19;

(2) Employee advised by health care provider to self-quarantine;

(3) Employee has COVID-19 symptoms and seeking medical diagnosis;

(4) Employee is caring for an individual subject to local quarantine or isolation order or individual advised to self-quarantine;

What “individual” can an employee care for?

(5) Employee is caring for child if school or place of care has closed or child-care provider is unavailable due to COVID-19 precautions; or

(6) Employee is experiencing any other substantially similar condition (None at this time)

COVID-19 Sick Leave

- ▶ **Amount of Pay**
 - ▶ Sick leave for reasons 1-3 above is paid at regular rate of pay capped at \$511/day and \$5,110 total
 - ▶ Sick leave for reasons 4-6 is paid at 2/3 regular rate of pay, capped at \$200/day and \$2,000 total
- ▶ **Hours**
 - ▶ Paid for # of hours normally worked
 - ▶ If varying schedule, hours based on average 6 month period
- ▶ **Health coverage**
 - ▶ Should continue to be provided

COVID-19 Sick Leave

- ▶ If agreed, employee may take entire portion of COVID-19 Sick Leave intermittently for only Reason #5 above
 - ▶ May be taken in any increment of time agreed to
- ▶ If an employee works onsite, an employee may not take COVID-19 Sick Leave intermittently if Leave is taken for Reasons 1-4 or 6 above
 - ▶ Once an employee begins taking such leave for Reasons 1-4 and 6, the employee must use the permitted days consecutively until employee no longer has a qualifying reason to take COVID-19 Sick Leave
 - ▶ If an employee is teleworking or normally works from home, employer and employee can agree to intermittent leave and in any agreed time increment
- ▶ Only amount of leave actually taken will count toward leave entitlement

FFCRA Leave – Misc.

- ▶ **Non-enforcement period from March 18, 2020 – April 17, 2020**
 - ▶ **If employer acted reasonable & in good faith by:**
 - ▶ **Remedying violations**
 - ▶ **No willful violations**
 - ▶ **Written commitment to comply**
- ▶ **Employers must post notice**
- ▶ **Employee must give notice of leave as soon as practicable – no later than the first workday that employee takes leave**
 - ▶ **Must provide documentation, if not, employer will give employee notice of failure and opportunity to provide notice/documentation before denying**

FFCRA Leave – Misc.

- ▶ Employers should maintain information and documentation
 - ▶ Especially for tax credits (see below)
- ▶ Closed business before or after April 1, 2020; furloughed employees; reduced hours; laid off – employees not eligible for FFCRA Leave
- ▶ Generally a right to return to work
- ▶ Generally cannot take FFCRA Leave and be on workers' compensation or temporary disability benefits
- ▶ Employee may be eligible for FFCRA Leave if on leave of absence (depends on if voluntary/involuntary)

FFCRA Leave - Exemptions

- ▶ **Exemptions:**
 - ▶ **Small business (only for child care related leave);**
 - ▶ **Health care provider; and**
 - ▶ **Emergency responder.**
 - ▶ **Can be made on a case-by-case basis**

FFCRA Leave – Tax Credits

- ▶ **Refundable tax credit helps cover 100% of benefit costs**
 - ▶ **Computed on quarterly basis**
- ▶ **Tax credits also available for related qualified health plan expenses**
- ▶ **IRS has provided some information regarding refundable tax credits**

FFCRA Leave – Public Employers

- ▶ **Applicable to public employers?**
 - ▶ **DOL FAQs provide that an employee is entitled to COVID-19 FMLA Leave if the employee is employed by a non-federal public agency**
 - ▶ **FMLA includes public agency in employer definition under FLSA**
- ▶ **Public employers must comply with both COVID-19 FMLA and Sick Leave regardless of the number of employees employed**
- ▶ **Same health care provider and emergency responder “exemptions” to FFCRA Leave**

Executive Order 2020-10 – March 20, 2020

- ▶ **Stay-at-Home Order**
 - ▶ **Non-essential business must cease (except minimum basic operations)**
- ▶ **What does this mean for FFCRA Leave?**
- ▶ **March 20, 2020 Stay-at-Home Order extended through April 30, 2020**

Minimum Basic Operations

- ▶ Essentially allows a business to remain afloat during COVID-19 crisis
- ▶ A business can carry out minimum basic operations if the following is met:
 - ▶ Minimum activities are necessary to maintain the business's inventory, preserve the site and equipment, etc. OR
 - ▶ Minimum activities to facilitate remote working

EEOC's March 27, 2020 Webinar

- ▶ EEOC prerecorded a webinar regarding questions on COVID-19 and the ADA, ADEA, Title 7, and GINA.
- ▶ Consisted of panelists answering the 22 most common public questions
 - ▶ Most questions were related to what an employer can or cannot do during the COVID-19 crisis
- ▶ Laws the EEOC enforce still apply during crisis but does not interfere/prevent employers from following CDC or other public health authority guidelines

EEOC Guidance

- ▶ **For onsite employees with COVID-19/symptoms: can be asked to have their temperatures taken and whether the employees have COVID-19, symptoms of it, or were tested for it**
- ▶ **If an onsite employee has COVID-19 or symptoms of it, such employee can be excluded due to being a direct threat to health/safety (exclusion is allowed by the ADA)**

EEOC Guidance Cont.

- ▶ **To ask only one employee questions related to COVID-19 or take their temp, employer must have a reasonable belief based on objective evidence that they have COVID-19 /symptoms**
- ▶ **Refrain from asking questions directed at an employee's family**
- ▶ **Abide by ADA confidentiality provisions**

EEOC Guidance Cont.

- ▶ Coworkers and managers can report an employee with COVID-19 or symptoms of it to appropriate official
- ▶ If an employee is remote working because they have COVID-19 or symptoms of it, employer can state such employee is remote working without saying why
- ▶ Employers cannot exclude workers 65+ from work, force them to telework, or be placed on involuntary leave
- ▶ ADEA does not have reasonable accommodations for workers 65+

EEOC Guidance Cont.

- ▶ Cannot lay off or furlough a pregnant employee even if high risk
- ▶ Pregnant employee should not be denied remote work if other employees are provided with it if they are similar in their ability or inability to work
 - ▶ Pregnancy-related medical conditions may trigger ADA accommodations
 - ▶ Pregnancy itself ≠ ADA disability
- ▶ Exclusion/tolerating of a hostile work environment based on national origin/religion prohibited even if based on concerns of transmission

EEOC Guidance Cont.

- ▶ The EEOC is unclear whether COVID-19 is or could be a disability – but employee with COVID-19 or symptoms of it may be excluded from worksite
- ▶ If an employee has a disability that puts him at a greater risk of severe illness if he contracts COVID-19, he can then ask for an ADA accommodation
 - ▶ Employer can confirm disability and whether the accommodation is necessary
 - ▶ Employer can consider undue hardship
 - ▶ Be prepared to seek confirmation in other manners (other than doctor note)

EEOC Guidance Cont.

- ▶ **ADA Reasonable accommodations for remote work**
 - ▶ Discuss employee needs and what accommodation will work
 - ▶ Undue hardship considerations are unique – at-home equipment available?
 - ▶ Be receptive to interim accommodation while discussing or waiting for confirmation
- ▶ **Once pandemic is over, employer does not have to automatically grant remote work as an ADA accommodation**
 - ▶ Understand disability-related limitations; performance of essential function
 - ▶ Renewed request should be evaluated under ADA general rules

EEOC Guidance Cont.

- ▶ If before the pandemic, a remote work ADA accommodation request was denied due to concerns essential functions will not be performed and remote work was performed due to the pandemic– can an employer deny request again?
 - ▶ Temporary remote work is relevant – could be trial period (i.e. were essential functions performed?)
 - ▶ Engage in a cooperative, integrative process

EEOC Guidance Cont.

- ▶ **Hiring during COVID-19 Crisis**
 - ▶ **ADA allows job applicants to be screened for COVID-19 symptoms (if all employees are screened for the same position)**
 - ▶ **ADA permits an applicant's temp to be taken pre-employment**
 - ▶ **If applicant has COVID-19 or symptoms of it, start date can be delayed**
 - ▶ **Job offer may be withdrawn if applicant has COVID-19 or symptoms of it**
- ▶ **Employer may require certification of fitness for duty**
 - ▶ **Employer should consider alternative approaches to doctors' notes**

EEOC COVID-19 Resources

- ▶ <https://www.eeoc.gov/>
- ▶ https://www.eeoc.gov/eeoc/newsroom/wysk/wysk_ada_rehabilitation_act_coronavirus.cfm
- ▶ https://www.eeoc.gov/facts/pandemic_flu.html#secB
- ▶ <https://www.youtube.com/watch?v=i8bHOtOffJU> – Webinar

Coronavirus Aid, Relief, and Economic Security Act (“CARES Act”)

- ▶ **Enacted March 27, 2020**
- ▶ **\$2 trillion stimulus bill**
- ▶ **Prominent provisions:**
 - ▶ **Expands unemployment insurance benefits**
 - ▶ **Provides individual stimulus payments (depending on income)**
 - ▶ **Aid to small and large businesses; states; hospitals; etc.**
 - ▶ **Small businesses eligible for \$10,000 emergency advance**
 - ▶ **Employee Retention Tax Credit**
 - ▶ **Certain amendments to the FFCRA**

QUESTIONS?