



## **Q&A From Our Recent Webinar: Preparing Employers for the New Normal – Reopening During the COVID-19 Pandemic**

**Q : Is there liability for the employer if they take responsibility to manage the COVID-19 protocols to ensure a safe work environment? Should there be a hold harmless agreement with staff to acknowledge compliance with protocols?**

**A :** All employers are legally obligated to provide a safe place to work. Having employees acknowledge in writing that they will notify the employer if they show symptoms, are exposed to the virus, and are aware of the safeguards the employer put in place can be a useful tool in keeping the workplace COVID-free. But a hold-harmless agreement will not insulate the employer from potential liability.

**Q : If we have an employee out on EFMLA, but we know daycares are reopening, are they required to notify us and return to work?**

**A :** Employees are entitled to EFMLA leave if they have a child home because their school or daycare is closed for reasons relating to COVID-19. If the daycare reopens, the employee might no longer be entitled to the leave, but it would depend on the employee's specific circumstances. The employee may still qualify for the leave if their child care provider is unavailable (such as, for example, if a daycare reopens with reduced capacity). There is nothing in the statute that specifically requires the employee to notify the employer if circumstances change. However, if the employee has made affirmative misrepresentations, the employer can take corrective action.

**Q : Are face coverings necessary in the office if the business is not a medical office?**

**Q : Hello, is it mandatory to require employees to wear facemask? If they have a doctor's note stating they cannot wear one what would you suggest?**

**A :** Whether face coverings are legally necessary depends on the rules of the jurisdiction you operate in and may also depend on the type of work being done. Whether face coverings are necessary to control the spread of the virus depends on how closely people work together, the ventilation, and other factors. If the employee has a medical reason why they cannot wear a face covering, you should engage the employee in a dialogue as to the reasons for that restriction – focusing on what the employee can and can't do rather than the underlying medical issue. The goal of the dialogue is to determine if the objection is valid and whether there are other ways to address the employee's concern (such as having them work remotely).

**Q : Do you by chance have a list of NYC health departments and who to contact if someone comes down with the Covid virus?**

**A :** We do not. If one becomes available, we will post it on our Coronavirus Resource Page, which has state-specific information.

**Q : Do you recommend that all employees be surveyed to find out if they need an accommodation due to COVID-19 prior to returning to work? Or, should an employer wait for an employee to request an accommodation?**

**A :** Asking employees before they return to work gives employers more time to respond and explore whether accommodations are necessary.

**Q : What would be your recommendation for employees who are not able to come back to work because schools and childcare are closed and the husbands are able to come back to their work, so no one is able to take care of kids? I am talking about nurses and medical staff. Right now husbands are taking care of the kids. How can we handle that if we are a health center.**

**A :** Employers can decline to provide leave under the FFCRA to health care providers or emergency responders. “Health care providers” include “anyone employed at any doctor’s office, hospital, health care center, clinic, post-secondary educational institution offering health care instruction, medical school, local health department or agency, nursing facility, retirement facility, nursing home, home health care provider, any facility that performs laboratory or medical testing, pharmacy, or any similar institution, Employer, or entity.” This includes temporary facilities and sites providing medical services that are similar to the above institutions. It also includes individuals employed by entities that contract with the above institutions to provide services or to maintain the operation of the facility. In addition, it includes anyone employed by any entity that provides medical services, produces medical products, or is otherwise involved in the making of COVID-19 related medical equipment, tests, drugs, vaccines, diagnostic vehicles or treatments.

“Emergency responders” include anyone necessary to provide transport, care, health care, comfort and nutrition to COVID-19 patients or others needed for the response to COVID-19. It includes military or national guard, law enforcement officers, correctional institution personnel, fire fighters, emergency medical services personnel, physicians, nurses, public health personnel, EMTs, paramedics, emergency management personnel, 911 operators, child welfare workers and service providers, public works personnel and persons with skills or training in operating specialized equipment or other skills needed to provide aid in a declared emergency, as well as individuals who work for such facilities employing these individuals and whose work is necessary to maintain the operation of the facility.

**Q : Is it retaliation or does an ER risk a possible NLRA charge for disciplining employees who refuse to abide by COVID-19 related safety policies or procedures because they see them as a violation of their rights and civil liberties?**

**A :** It's only retaliation if the employer takes action against someone for engaging in protected activity. Refusing to follow safety procedures would not be protected activity unless, for example, employees reasonably believed that the procedures were unsafe or infringed on their religious beliefs.

**Q : We can't do our own testing. Can we send employees to a test site and have them provide results before being allowed to enter?**

**A :** There's no requirements that employers perform COVID-19 testing onsite. Few employers will have that capability. So it's fine to use outside vendors for that function.

**Q : If an employee is offered position back after COVID leave expires due to child care qualifier and declines to return due to ongoing child care requirements, can the employer consider the job abandoned?**

**A :** If the employee is no longer entitled to protected leave and declines to return to work, the employee can terminate the employment and refill the position with someone new.

**Q : For FFCRA and other scenarios, does the employee need to apply and or request it?**

**A :** The employee does not need to use any "magic words" to request FFCRA leave. If an employee requests time off and the employer is aware of facts that could qualify them for FFCRA leave, the employer should ask follow-up questions to determine whether a FFCRA qualifying reason is present. If a qualifying reason is present and the employee still has available FFCRA leave, the employer should provide the leave.

**Q : Is COVID-19 considered a serious medical condition under FMLA?**

**A :** COVID-19 infection may be considered a serious medical condition under the FMLA. Under the FMLA, a serious health condition includes an illness that involves "inpatient care" or "continuing treatment by a health care provider." Both of these terms are defined in detail by the FMLA's regulations and involve fact-specific determinations regarding a specific individual's circumstances and the severity of their symptoms. If an employee shares that they or a family member are COVID-19 positive, the employer should begin the regular process of documenting and evaluating whether the employee qualifies for FMLA leave—even if FFCRA paid leave may also apply.

**Q : For hourly employees, non-union, is it also law in PA that you should be getting paid while waiting in line to get temp check?**

**A :** Yes.

**Q : What if a school or daycare re-opens but the employee isn't comfortable sending them to the daycare facility. Can we force them to return to work or terminate them?**

**A :** An employee who takes EFMLA leave because their child's school or daycare are closed may still qualify for EFMLA leave after the school or daycare reopens, depending on the employee's specific circumstances. This will be a fact-sensitive determination and should be considered on a case-by-case basis. Employers should attempt to engage the employee and determine the employee's specific situation before taking any adverse action.

**Q : If schools are closed for summer break, can employee still qualify for FFCRA leave to stay home to care for children?**

**A :** Possibly, depending on the circumstances. For more information, please see our firm's Alert, "Schools Out: The Use of Paid Leave for Summer Child Care," written by our colleague Liku T. Madoshi, Esq., which is available at the following link: <https://www.foxrothschild.com/publications/schools-out-the-use-of-paid-leave-for-summer-child-care/>

**Q : How can employers verify employees' need for FFCRA? What kind of documentation can be requested and/or is required to qualify for the payroll tax credit? Will the government provide a form or should employers create their own?**

**A :** Verification will depend on the employee's qualifying reason. For example, if an employee takes FFCRA leave because they are subject to a governmental quarantine order, it is appropriate to ask the employee to provide a statement identifying the government entity issuing the order. Similarly, if an employee has been advised to self-quarantine by a health care provider, it is appropriate to ask the employee to provide the name of the health care provider advising the self-quarantine and the expected dates of the self-quarantine.

However, employers should be mindful that, in some jurisdictions with applicable paid sick leave or other laws, employers may be prohibited from requesting doctor's notes under certain circumstance. Employers should take care to follow these laws, in order to avoid drawing potential claims.

To date, there is no specific form, so employers should plan to create their own documentation processes. The IRS has provided some guidance on how employers can document eligibility for the payroll tax credit for qualifying FFCRA wages at the following website: [https://www.irs.gov/newsroom/covid-19-related-tax-credits-how-to-substantiate-eligibility-and-periods-of-time-for-which-credits-are-available-faqs#substantiate\\_eligibility](https://www.irs.gov/newsroom/covid-19-related-tax-credits-how-to-substantiate-eligibility-and-periods-of-time-for-which-credits-are-available-faqs#substantiate_eligibility).

**Q : If an employee is sent home because they came in contact with another employee who came back positive. Do they qualify?**

**A :** In order to qualify for paid sick leave under the FFCRA in this scenario, the employee would have to show that they are subject to a federal, state, or local quarantine or isolation order related to COVID-19, that they were advised by a health care provider to self-quarantine due to concerns related to COVID-19, or that the employee experienced COVID-19 symptoms themselves and is seeking a diagnosis.

**Q : If an employee is COVID-19 positive, do we have to keep their name private from the other employees when contact tracing?**

**A :** Yes. Under the Americans with Disabilities Act, employers are required to keep confidential any information regarding the medical condition or history of an employee, which would include the fact that an employee has tested positive for COVID-19. The employer can share the employee's name only if the employee consents. If the employee consents, it is wise to get his or her consent in writing.

**Q : What if an employee refuses to have their temperature taken?**

**A :** The employer can require the employee undergo the temperature check prior to returning to work. However, prior to engaging in any discipline, the employer should engage in a two-way conversation with the employee to understand the reason for the employee's objection to having his or her temperature taken and provide accommodations as appropriate. For example, if the employee's refusal is related to a disability the employee has, the employer should discuss with the employee whether an appropriate accommodation exists.

**Q : When shelter in place restrictions are lifted, per state guidelines, what are thoughts on compensating remote workers less than those in same role, for instance, who may be required to work onsite should a company decide to expand its remote work program?**

**A :** As a general rule, employers are allowed to set different compensation rates for different positions as long as the reason for the difference in compensation is based on a legitimate business reason, and not based on any employee's or group of employees' protected characteristics.

**Q : I have employees who have filed a claim for UI for over a month now and haven't received anything yet. Is there anything that an employer can do to help them?**

**A :** Unemployment insurance benefits are a matter of state law, so an employer's options regarding supporting employees that are applying for benefits will depend on the state in which the employee applied for benefits. For more information, contact the department of labor in the state in which the employee applied for benefits.

**Q : If someone complains, and you investigate and confirm that the company is following all CDC and state requirements, can you take action against an employee who will not stop complaining to co-workers because it is causing issues?**

**A :** It depends on the nature of the employee's complaints. It is a violation of federal law for employers to retaliate against employees because they report unsafe and unhealthful working conditions during the coronavirus pandemic. In addition, in some states employers are not allowed to retaliate against employees for reporting a potential violation of law as well. If the nature of the employee's complaints are that the employee does not believe the employer is following legal requirements regarding reopening, or providing employees with a workplace free of known hazards, the employee's complaints may be protected by state or federal law and it may be considered illegal retaliation to terminate them for those complaints.

**Q : Can the return to work policy include a statement that by arriving at work, the employee is certifying that they self-tested for fever and are negative, and do not have any symptoms? Or does employer need to collect a self-test form every day?**

**A :** Generally, employers are not required to conduct temperature checks, unless otherwise provided by a specific state's reopening requirements. An employer may choose to ask an employee to take his or her own temperature every day before arriving at work and to report if he or she has a fever before coming to work. It is advisable to communicate such an expectation to employees in writing and to have employees acknowledge their receipt of that communication so it is clear they understand what is expected of them.

