



COVID-19 Employment Law Developments You Need to Know About Before the New Year

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Families First Coronavirus Response Act

- By now, most are familiar with the FFCRA, which created two new emergency paid leave requirements in response to the COVID-19 global pandemic.
- Emergency Paid Sick Leave (EPSL) entitles certain employees of covered employers to take up to two weeks of paid sick leave for any combination of the following qualifying reasons if the employee is unable to work because he/she is
 - subject to a federal, state, or local quarantine or isolation order related to COVID-19 (**this does not mean a general stay at home order**)
 - has been advised by a health care professional to self-quarantine (**whether or not the employee has tested positive**)
 - Is experiencing COVID-19 symptoms **and** seeking a medical diagnosis
 - is caring for an individual who is subject to either of the points described above (**2/3 pay**)
 - is caring for a child due to school or daycare closures (**2/3 pay**) or
 - Is experiencing “substantially similar conditions” to those of COVID-19 (**which has not been defined**)
- The Emergency Family Medical Leave Act (EFMLA) entitles employees to up to ten additional weeks of paid leave for child care related reasons.

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Interpretation Of FFCRA In Dispute

- The administrative body charged with interpreting the FFCRA, the Department of Labor (DOL) issued new and changing FAQs in the months following the FFCRA's effective date of April 1, 2020.
- Since then there have been challenges to that guidance:
 - On August 3, 2020, in *State of New York v. U.S. Department of Labor*, a federal district court invalidated portions of relevant regulations passed in the aftermath of the first wave of the virus.
 - On September 11, 2020, the US Department of Labor announced revisions, effective September 16, 2020.

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DOL Revisions For The FFCRA

- The DOL did not alter all of its guidance based on the Court's ruling. Instead it reaffirmed and provided additional explanation for why its original guidance was correct:
 - Employees may take FFCRA leave only if work would otherwise be available to them.
 - An employee needs employer approval to take FFCRA leave intermittently.
 - An employer of a "healthcare provider" can exempt itself from the FFCRA provisions but only for employees employed to provide diagnostic services, preventative services, treatment services or other services that are integrated with and necessary to the provision of patient care which, if not provided, would adversely impact patient care.
 - Employees must provide required documentation supporting their need for FFCRA leave to their employers as soon as practicable.
 - Notice of a need to take expanded family and medical leave must be made as soon as practicable.

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DOL Revisions (Con't.)

- These revisions are not immune from further legal challenge. We are especially concerned with the DOL indicating employers must require documentation in support of the need for leave.
- While it sound reasonable for employers to mandate documentation, this requirement *is not written into the FFCRA*. Thus, we expect some crafty plaintiff's lawyers will seek to challenge employer's decisions to deny leave for lack of documentation.
- We always recommend employers not *condition* leave on providing documentation but instead request it after leave is approved. Keep track of all requests for leave to prove compliance and make taking tax credits for the amounts paid easier.

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Tax Consideration For COVID-19 Leave

- **Paid Sick Leave Credit**
 - Eligible employers may receive a refundable sick leave credit at the employee's regular rate of pay, up to \$511 per day and \$5110 in the aggregate, for a total of 10 days
- **Child Care Credit**
 - For an employee who is caring for someone with the virus, or caring for a child for whom childcare is unavailable due to the virus, employers may claim a credit for two-thirds of the employee's regular rate of pay, up to \$200 per day and \$2,000 in the aggregate
 - Eligible employers are entitled to an additional tax credit based on costs to maintain health insurance coverage for the employee during the leave period
- **Prompt Payment for the Cost of Providing Leave**
 - When employers pay their employees, they are required to withhold their employees' paychecks federal income taxes and the employees' share of Social Security and Medicare taxes. The employers are then required to deposit these federal taxes, along with their share of Social Security and Medicare taxes, and file quarterly payroll tax returns. Eligible employers who pay qualifying sick or childcare leave will be able to retain an amount of the payroll taxes equal to the amount paid out, rather than depositing that amount with the IRS
- **Small Business Exemption**
 - Employers with fewer than 50 employees may be eligible for an exemption from the leave requirements relating to school closings or childcare unavailability where those requirements would jeopardize the business's ability to continue, interpreted as jeopardy to the viability of the business as a going concern

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COVID-19 Accommodations

- By now, most employers know they can screen for symptoms, take employee temperatures, mandate PPE and administer or send employees for COVID-19 tests.
- The EEOC has issued helpful and specific guidance that every employer should be familiar with. Simply google "EEOC COVID-19" and click on "**What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws**"
- With a COVID-19 vaccine potentially available in months, many of you may question whether an employer mandate that employees be vaccinated.
 - The EEOC guidance from 2009 states that barring undue hardship, an employee may be entitled to an exemption from a mandatory vaccination requirement based on:
 - › An ADA covered disability as a reasonable accommodation and/or
 - › A religious exemption: based on an employee's sincerely held religious belief, practice or observance which prevents the employee from taking a vaccine
- Note, these same exemptions/request for accommodation apply to mandates regarding the influenza vaccine, which many employers are requiring this year.

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California's COVID-19 Laws for 2020-2021

- AB 1867 Supplemental Paid Sick Leave (SPSL) for employees of Businesses with 500+ employees. Effective September 19, 2020 and is not retroactive.
- SB 1159 – Worker's Compensation Presumption of COVID-19 as Industrial Injury and Reporting Requirements. Effective September 17, 2020.
- AB 685 – COVID-19 Employer Notification Protocol requiring written notice of COVID-19 exposure. Effective January 1, 2021.

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Supplemental Paid Sick Leave - SPSL

1. Subject to a Federal, State, or local quarantine or isolation order related to COVID-19; or
 - » The *individual* worker is subject to an order to quarantine. This does not mean a general stay at home order.
2. Advised by a health care provider to self-quarantine or self-isolate due to concerns related to COVID-19; or
 - » The most common scenario here is that the employee tests positive or is presumptive positive and the employee's doctor orders him/her to quarantine or isolate.
3. **Is prohibited from working by the Hiring Entity due to health concerns related to the potential transmission of COVID-19.**
 - » **Employer sends employee home due to COVID-19 symptoms, positive result, or close contact exposure. Also, if there is an outbreak or a closure of a facility due to a positive result, and employees are required to stay home, SPSL would be due under this qualifying reason.**

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Most Common Client Questions re: SPSL

- **Can I require documentation such as a positive test result or doctor's note?**
 - No. Paid leave may not be *conditioned* on providing documentation.
- **I am a health care provider/emergency responder employer and I exempted myself from providing leave under the FFCRA but I have less than 500 employees. Do I have to pay SPSL?**
 - Yes!
- **Do I have to pay SPSL after the new year?**
 - As of today, there has been no approved extension of SPSL and it is set to expire December 31, 2020.
- **I have over 500 employees nationwide so I must pay SPSL. Do I need to pay to employees who work outside of CA?**
 - No. Though many states, including our neighbors Nevada and Arizona have sick leave laws that could kick in for COVID-19 reasons.
- **Can an employee get SPSL multiple times for different reasons?**
 - An employee can use their available SPSL hours for any number of qualifying reasons and may use it intermittently over time, but an employer is not required to pay more than the total available hours.
- **Can I get a tax credit for SPSL payments like employers who pay FFCRA leave get?**
 - Unfortunately there is no provision for a tax credit in SPSL. I do recommend all employers use specific pay codes to identify SPSL leave to assist later in proving compliance with the law.

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Workers Compensation COVID-19 Presumption (SB 1159)

- If you have five + employees, there is a rebuttable presumption that employees who test positive for COVID-19 caught it at work, when:
 - The employee tests positive for COVID-19 within 14 days after a day that the employee performed labor or services at the employee's place of employment at the employer's direction; and
 - The employee's positive test occurred **during a period of an "outbreak"** at the employee's specific place of employment.
- "Outbreak"
 - 100 or fewer employees: Four employees test positive for COVID-19 within 14 calendar days.
 - 100 or more employees: Four percent of the number of employees who reported to the specific place of employment test positive within 14 calendar days.
- No "outbreak" = no rebuttable presumption. But still have duty to report positive results to your WC claims administrator.

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Workers Compensation Reporting Requirements Related to COVID-19

- Within three business days notify your WC claims administrator if:
 1. An employee tested positive.
 2. The date when the employee tested positive, which is the date the specimen was collected for testing;
 3. The specific address or addresses of the employee's specific place of employment during the 14-day period preceding the date of the employee's positive test; and
 4. The highest number of employees who reported to work at the employee's specific place of employment in the 45-day period preceding the last day the employee worked at each specific place of employment.
- If you have not done so already, you must report information in Nos. 1-3 above for any employee who tested positive between July 6, 2020 and September 17, 2020. For No. 4, report the highest number of employees who reported to work during the July 6 to September 17 timeframe.
- SB remains in effect until January 1, 2023.

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Most Common Client Question re: SB 1159

- How do I rebut the presumption that my employee contracted COVID-19 at work?
 - Take detailed notes regarding information your employee provides about contact he has had with exposed or positive individuals, taking care not to ask about specific family members.
 - It is more common for someone to become infected at home or at a family gathering, so ask if anyone the employee lives with or has had recent contact with has been infected or exposed.
 - Have robust written safety measures in place and get employee acknowledgments of those measures. If you have signs up in your workplace, or stations set up with sanitizer or for symptoms check-in, take pictures! This will help you demonstrate what you are doing to mitigate risk.

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AB 685 – Notifying Employees of COVID-19 Exposure in the Workplace

- Have you learned of an employee with laboratory confirmed case of COVID-19, a diagnosis from a health care provider, an isolation order from a public health official or a learned of an employee death due to COVID-19?
 - Then within **one business day** you must:
 - » Provide written notice to **all employees** and employers of subcontractors, **who were at the same worksite** as the infected person for **48 hours** before the infected person developed symptoms.
 - » **Worksite** means the building, store, facility, agricultural field, or other location where a worker worked during the infectious period and does not include any location the infected employee did not enter
 - Written notice may be provided in person, email, text message or other form of communications if the employee will receive it within one business day.
 - Notice must be in both English and any language understood by majority of employees. AB 685 requires that the notice to any exclusive representative must contain the same information required in Cal/OSHA's Form 300.

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Employee Reporting Requirements for COVID-19 Exposure in the Workplace (Con't.)

- **What must the notice say?** In addition to notice of the potential exposure, the notice must contain the following information:
 - Available benefits for the employee: workers' compensation, COVID-19-related leave, company sick leave, state-mandated leave, supplemental sick leave, or negotiated leave provisions;
 - A statement that the employer will not retaliate or discriminate against employees for having COVID-19 or seeking leave for COVID-19 related reasons.
 - A statement regarding the disinfection and safety plan the employer plans to implement and complete per the guidelines of the CDC.

Penalties are steep! Make sure to keep copies of these notices for three years, stored in a **confidential** medical file.

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Most Common Client Questions re: AB 685

- **My company offers onsite COVID-19 testing. If an employee or contractor comes in for just a test that day and we later learn of an exposure that overlaps with the time that person was in the building for a test, must we provide notice?**
 - AB 685 provides that an employer can learn of a positive result through its own testing protocol. Another means is learning of a diagnosis from a subcontracted employee's employer. In either scenario, you must notify employees who were at the same *worksite* as the infected person for a minimum of 48 hours before the infected person's symptoms developed. For example, if an employee or contractor comes into your facility for a test, and tests positive, but has not been at a worksite with other employees in the 48 hours prior to that person being symptomatic, then there would be no employees to notify other than the personnel who administered the COVID-19 test. If the infected person had been to work in the days before the diagnosis, then notice is required to only those employees who worked at the same worksite within 48 hours. All of this said, it is best to err on the side of providing notice.
- **Do I have to keep the infected employee or subcontractor's name private even though my employees will know who it is?**
 - Yes! You have an obligation to keep this information confidential. If your employees play detective and figure it out, that is okay, but do not be the one to share this information.
- **How do I determine the infectious period for someone who did not develop symptoms?**
 - For an individual who tests positive but never develops symptoms, the infectious period begins two days before and ends 10 days after the specimen for their first positive test for COVID-19 was collected.
 - For symptomatic individuals, the infectious period ends when 10 days have passed since symptoms first appeared, AND at least 24 hours have passed with no fever (without use of fever-reducing medications), AND other symptoms have improved.

Visit our GRSM COVID-19 hub on our website for my full article on SB 685.

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Reporting COVID-19 Outbreaks to Public Health

- An **outbreak** is currently defined as three lab-confirmed COVID-19 cases at the same worksite within 14 days. Check the CDPH website for updates regularly and note this definition is **different** than what is required under the Workers' Compensation notification requirement.
- **What to include?**
 - Information about the worksite – name of company/institution, business address, and North American Industry Classification System (NAICS) industry code.
 - Names and occupations of workers with COVID-19.
 - Additional information requested by the local health department as part of their investigation.
- Any employer who has an outbreak under the new law must continue to give notice to the local public health department of any subsequent lab-confirmed cases of COVID-19 at the worksite.

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Other Common COVID-19 Client Questions

- **Can I avoid paying SPSSL, FFCRA leave or other local sick leave requirements if I have my own paid sick leave policy?**
 - Yes, but only if you provide the same amount of leave for the same qualifying reasons.
- **Can I discipline my employees for violating my COVID-19 safety practices?**
 - You can and should. While you can't retaliate or discriminate against employees who need COVID-19 related leave, you can discipline or terminate employees for not completing symptom check-in forms, not wearing face coverings, not keeping physically distant where possible and for being untruthful about symptoms or exposure.
- **Can I require my employees take a COVID-19 test?**
 - the EEOC provides that employers may mandate health screenings and can "administer" COVID-19 tests before allowing employees to enter the workplace. There is no definition of the term "administer" though this is reasonably interpreted to mean the employer brings in a testing provider, sends its employees to an outside provider or refers its employees to a free testing site. Be sure to pay employees for the time it takes to get the test. There is no requirement that employees choose their own testing provider or use their own doctor to get the test.
- **Should I require my employees take a COVID-19 test?**
 - Not necessarily. Testing will not always reveal if someone is actively infected as it can take 2 to 14 days after infection for a person to test positive. Follow CDC guidelines, but in general, take a hybrid approach and ask questions about symptoms and wait several days before asking your employee to test. While not all employees will have symptoms, allowing return to work only after symptoms have resolved per CDC guidelines is the safest approach to protect the rest of your workforce.

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Common COVID-19 Client Questions (Con't.)

- **Can I prevent my employees from traveling outside of their home county?**
 - Unfortunately you cannot prohibit employees from engaging in lawful activities but you can restrict employees from coming into work if you know they engage in high risk activities like travel or participating in large gatherings. Remember, if the reason an employee is not coming into work is COVID-19 related, you may have to pay sick leave depending on which law you as an employer fall under.
- **Can we ask our employees about their personal travel plans?**
 - Yes. You may institute a policy where all employees must disclose personal travel and prior to return to work, you are permitted to ask where an employee traveled and whether he was exposed to COVID-19 during the trip.
- **Can we mandate that after employees return from out-of-state or out of country travel that they have unpaid time off and cannot return to work until they quarantine at home and show proof of a negative test?**
 - Maybe. If your county (such as Santa Clara County in California) has a mandatory quarantine period, then this will likely be seen as a quarantine or isolation order from a federal, state or local government and thus is a qualifying reason for paid leave under the FFCRA's sick leave provision (EPSSL) and under SPSSL.
- **What else can we do besides temperature and symptoms check-in to help decrease exposures?**
 - Hold regular trainings – similar to "tailgate" safety meetings to stress the importance of safe pandemic practices and to remind employees that if they are engaging in activities that put themselves at risk and then come to work, they are putting others at risk. Step-up measures to keep employees at a distance from one another including discouraging or prohibiting carpooling.

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Roadmap of Potential COVID Claims

- Claims Arising Out of RIF/Furloughs, Layoffs and Recalls
- Failure to pay required sick leave for COVID-19 qualifying reasons
- Claims Arising from Disability Related issues and requests for Accommodation
- Retaliation/Whistleblower Claims for reporting COVID-19 safety violations
- Wage and hour claims under the FLSA and State laws – expect to see claims for failure to pay for COVID-19 testing, time spent for screening/symptoms check-in and testing
- Class Actions possible and a genuine risk to employers and CA leads the way in class action and COVID-19 related claims
 - Of the 271 wage and hour certification decisions in 2019, Plaintiffs won 199 of 245 conditional certification rulings— approximately 81 percent.
 - The value of the top 10 private-plaintiff wage and hour class actions in 2019 totaled \$449.05 million, nearly double the 2018 total of \$253.5 million (wage/hour settlements may not be confidential)

QUESTIONS?

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