

PANDEMIC

BUT DON'T PANIC

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BARBARA HOEY

Co-chair
bhoey@kelleydrye.com

DIANA HAMAR

Senior Associate
dhamar@kelleydrye.com

MARK KONKEL

Co-chair
mkonkel@kelleydrye.com



Setting the Stage

You are the Director of Human Resources in a company with facilities across the country and significant business domestically and overseas. In just the last week:

- A national emergency has been declared
- The schools in cities where most of your employees work have been closed and most employees can't find immediate childcare
- Entire nations are locked down, and the U.S. is heading that way. Travel is completely disrupted
- Most public facilities are closed, large public gatherings are banned, and many businesses are shuttered
- Sick and exposed are quarantined
- People are being urged to "hunker down" at home and are afraid to go to work
- New leave laws have been passed to deal with the crisis

And we have no idea how long this is going to last.

Major Practical Problems

- One employee reported that she has a cough “thinks” she may be positive for COVID-19
- Another isn’t sick, but is worried and wants to stay home
- Half your workforce has requested leave because their kids are at home
- You are concerned about your entire workforce getting sick, but equally worried that business cannot just stop
- If certain “essential employees” aren’t working, the business will grind to a halt
- You can’t directly monitor the productivity of employees working remotely but still need to track non-exempt employees’ time

New COVID-19 Law

Families First Coronavirus Response Act (“FFCRA”)

- FMLA Amendments
- Paid Sick Days
- Emergency Unemployment Insurance
- Applies to employers with less than 500 employees

FFCRA – Major Components

- New paid sick leave days
- New paid FMLA leave:
 - If ordered to quarantine
 - To care for a family member
 - To care for child if school / daycare closed or caregiver is ill

FFCRA – Deeper Dive

Paid Sick Days

- An employer (less than 500 employees) is required to give every non-exempt employee paid sick time in the event of a “public health emergency” if: (i) the employee is going to be absent because they were diagnosed; (ii) their attendance could jeopardize the health of others; (iii) they are quarantined or caring for someone who is quarantined; or (iv) to care for a child whose school is closed
 - Full time – two weeks of paid sick leave (80 hours)
 - Part time – pro rated
- This is **in addition** to your existing sick leave policy

FFCRA – Deeper Dive

FMLA

After the two weeks of **fully paid leave** (paid under the new Emergency Paid Sick Leave Act) employer with less than 500 employees must provide:

- ◆ Workers caring for a child whose school or day care has been shut must be paid at a rate of no less than two-thirds of the employee's usual pay for the duration of 10 weeks
- ◆ As of now: excludes healthcare workers/workers in quarantine/workers caring for family in quarantine
- **Reinstatement** – Employee must be reinstated (with some limited exceptions) at the end of that period

FFCRA – Deeper Dive

Emergency Unemployment Insurance Stabilization and Access

- \$1 billion in grant aid to state agencies running unemployment insurance programs
- States will be eligible for the full amount of aid as long as they have taken specific steps for coronavirus such as waiving the waiting week for unemployment benefits, and the work search requirements for those “directly impacted by COVID-19 due to an illness in the workplace or direction from a public health official to isolate or quarantine workers”

Overriding Principles

In a rapidly changing situation, clear thinking is critical. Every decision should factor in four rules:

1. Safety first
2. Protect the business
3. Avoid stereotypes

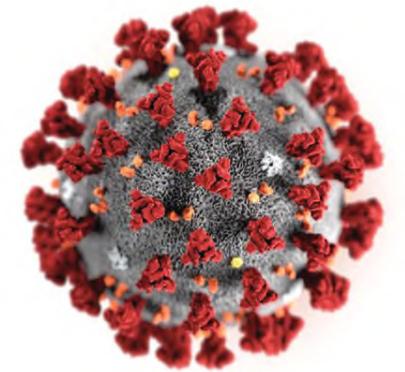
Most important: Don't Overreact and Be Flexible

RULE 1: SAFETY FIRST

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Keep the Workplace Healthy

- Practice good hygiene
- Require notice of employee (and family) travel
- Be vigilant in detecting sick employees
- Have employees advise if they feel ill or are exposed (employer is not a doctor)
- Send sick employees home



Employee Travel

Can I prohibit an employee from traveling on their personal time? (Answer: maybe)

- **Nonessential or personal travel?**
 - Note: an employer can't forbid an employee from traveling but has absolute control over its premises: **if you travel, you may not be able to come back to work**
- **Mandate quarantine following travel**
 - **But don't overreact**: the virus is *everywhere*, so the mere fact of travel isn't the best way to decide who to quarantine
- **Monitor for symptoms upon return & encourage candor**

Taking Your Workforce's Temperature

Can I take an employee's temperature before permitting them to work? (Answer: yes)

However, temperature tests may not be the most effective method for protecting your workforce

- Temperature test = "Medical examination"
- Must be job related and consistent with business necessity (direct threat to the health and safety of workers and the public)
- EEOC guidance during pandemic

Americans With Disabilities Act

- EEOC Guidance states ADA-covered employers may:
 - Ask employees if they are experiencing influenza-like symptoms, “such as fever or chills and a cough or sore throat”
 - Measure employees’ body temperatures
 - Send employees home if they are experiencing any of the Coronavirus symptoms
 - Inquire as to where an employee has traveled (business or personal travel) and require them to remain at home until it is clear that they do not have pandemic influenza symptoms

ADA (continued)

- Adopt infection control practices and wear personal protective gear (however, where an employee with a disability needs a related reasonable accommodation, e.g., non-latex gloves), the employer should provide these absent undue hardship)
- Ask employees why they have been absent from work
- Asking why an individual did not report to work is not a disability-related inquiry

Privacy Concerns

- ADA and GINA require employers to maintain confidentiality of employee health information (e.g., preexisting conditions, diagnoses)
- Separate file for medical information
- HIPAA

Occupational Safety and Health Act

- Employers have a legal obligation under Section 5(a)(1) of the Occupational Safety Health Act to provide “employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm...”
- OSHA, CDC and WHO guidelines

Hypothetical: Ms. Corona

Ms. Corona is a new receptionist (hourly worker) and comes to work with a noticeable cough.

She is also seen sweating and splashing cold water on her face in the restroom.

What should you do?

Managing Your Workforce

- An employer may require workers to go home if they exhibit symptoms of COVID-19. Use your judgment.
- OSHA and CDC recommend that a sick employee should be sent home
- Consider sending home any additional employees who worked directly with the possibly infected person
- Remind **managers** and **employees** that you are not a doctor!

Managing Your Workforce

When should I require employees to stay home?

In light of recent developments with COVID-19, employers should consider mandatory work from home policies.

The following employees should be asked to remain at home:

- those who are ill or feel flu-like symptoms;
- those who have traveled to countries where there is a large exposure (China, Iran, South Korea, Italy, Japan, Hong Kong, [New Rochelle?](#)); and
- those who have been exposed to the virus, through family, a friend or some other meeting or contact.

Managing Your Workforce

What about employees who worked with ill or “infected” employees?

- Employers should send home (or mandate work from home) all employees who worked closely (between 3 to 6 feet) with an infected or ill employee for the 14-day quarantine period
- Employers should facilitate environmental cleanup of the affected employee’s workspace and any potentially contaminated areas
- Employers should make best efforts not to identify the infected employee by name. To respond to employee concerns, employers should inform workers of the steps taken to mitigate exposure, such as environmental cleanup

Managing Your Workforce

What if an employee refuses to come to work because they are afraid of contracting COVID-19?

- Provide timely updates to employees to keep transparency and a calm environment
- Provide all employees with COVID-19 education training that is appropriate for their exposure risk
- Take employee fears seriously and address employee refusal to come to work on a case-by-case basis
 - Is the employee pregnant or elderly or immuno-suppressed?
 - Was there a possible exposure in your workplace?

Hypothetical: Ms. Corona

Ms. Corona tests positive for COVID-19.

Now what?

Employee Tests Positive

- **Do not panic**
- Send Ms. Corona home for self-quarantine for at least 14 days
- Identify others she came into contact with, advise about potential exposure, and send them home
- Identify all areas she came into contact with at the workplace and sanitize immediately
- If not already in place, consider temporary shutdown and work from home policy

Employee Tests Positive (continued)

Do I have to tell all of my other employees? (Answer: maybe)

Legal issue versus moral issue?

- Think “best interest of my employees”
- Revealing that someone has been diagnosed, but not who has been diagnosed does not violate confidentiality requirements under ADA and GINA
- Third-party liability? (Grandparent, pregnant or ill family member)

Employee Tests Positive (continued)

Do we have to report that someone tested positive?

(Answer: maybe)

Under OSHA recordkeeping requirements, COVID-19 may be “recordable illness” if a worker is infected as a result of performing their work-related duties. However, case must be:

- A confirmed case
- Work-related
- Meet other general recording criteria (e.g. medical treatment beyond first-aid, days away from work)

RULE 2: PROTECT YOUR BUSINESS



Work From Home / Staggered Shifts

- Update work-from-home policy
- Help managers and department supervisors establish best practices for managing a remote workforce
- Staggered work shifts, if necessary (Team A / Team B)

Implementing Remote Workforce

- Electronic Hygiene
- Work From Home Policy
- Expenses

Electronic Hygiene

Employers should advise and take steps to ensure that their employees:

- **Do not** use public Wi-Fi or unsecured personal networks
- **Do use** company-issued devices or company-secured networks
- **Do not** transfer corporate/client data using personal email accounts or sync with personal cloud storage accounts
- **Be careful** with physical confidential materials

Work From Home Policy

- Timekeeping / Work hours
- Written Telecommuting Agreement
- Equipment and Technology Support
- Security (*see* electronic hygiene)
- Set standards of responsiveness and productivity

Hypothetical: Mr. Virelle

Mr. Virelle is working on a project (with a pressing deadline). However, he is working from home and is virtually nowhere to be found.

How should you manage Mr. Virelle?

Work From Home Best Practices

- Method for tracking time and productivity
- Employee check-ins
- Approvals for overtime
- Fielding technical questions
- Logistics pertaining to remote work
- Closer supervision

Expenses

- DOL does not directly address whether an employer must reimburse home expenses
- FLSA would not require an employer to reimburse an employee for personal costs related to internet access, phone service, etc.
- Assess whether additional costs will need to be incurred by employee beyond an employee's personal costs

Paying Employees

Are we required to keep paying employees who are not working? (Answer: It depends).

- Exempt vs. Non-Exempt
- Sick vs. Well

Exempt

- Must receive the full guaranteed salary **for any week in which he or she performs any work**
- The exempt employee does not have to be paid for any week in which no work is performed
 - **BUT** - Employer can require employees to use PTO
 - ◆ Can deduct for full days missed for 'personal reasons'

Exempt (continued)

If an exempt employee has exhausted all PTO, do I have to pay the employee if she misses a full day of work?

It depends (this is complicated)

- Partial day absences cannot be deducted once PTO is exhausted
- Full day absences for personal reasons may, however, be deducted
- Pay can be docked for missed full days due to illness, but only if fixed policy in place

Non-Exempt

- Employers are only required to pay **for hours actually worked**
- If working from home option is offered, employer must pay minimum wage, and time and one half regular rate for overtime hours
- If not an option, consider keeping employees on payroll, but do not need to pay for time not worked

Hypothetical: Back to Mr. Virelle

What if Mr. Virelle is sick or subject to quarantine due to exposure?

What if Mr. Virelle claims he is “well”, but is quarantined?

Is he entitled to get paid time off?

Sick vs. “Well”

- Sick employees may qualify for paid sick time or disability leave, if the illness lingers
- If the employee is “well” but just quarantined, they may not qualify for sick leave, but may work remotely
- Under FFCRA, however, quarantined “well” employees would qualify for paid sick time and possibly FMLA leave

Hypothetical: Ms. Quarantini

Ms. Quarantini comes to you, as the Director of Human Resources, and asks whether she can take FMLA leave because her daughter's school closed due to COVID-19?

Can Ms. Quarantini use FMLA leave?

The “Old” FMLA

- **Probably No** – FMLA would not cover a leave to care for a “well” child
- FMLA may cover leave if child has COVID-19, assuming that is a ‘serious health condition’
- Same result under New York Paid Family Leave Law

Impact of “New” FMLA (FFCRA)

Probably Yes – under FFCRA (for covered employers and employees)

- New FFCRA leave:
 - First: Up to 80 hours of emergency paid sick leave to self-isolate, obtain medical diagnosis, comply with order by a public official or health care provider, care for family members experiencing symptoms or ordered to isolate, or to care for a child if school is closed
 - Second: 10 weeks of paid FMLA leave at 2/3 pay to care for a child if school is closed
- Reinstatement guaranteed
 - New exceptions related to economic hardship

Planning Ahead For Your Business

- Furloughs
- Layoffs
- Workers' Compensation

Furloughs (Temporary Layoff)

- No work = No pay
- If furloughed – Advise exempt v. non-exempt employees, advise them that the/y are **not to perform any work** (e.g. no checking email listening to voicemails); temporarily shut off access
- Exempt employee special considerations:
 - Must be paid same minimum salary each pay period
 - If exempt employee performs any work, she is entitled to pay, and failure to pay jeopardizes exempt status

Furloughs (continued)

- Unemployment Benefits (vary by state)
- DOL permits flexibility for states to amend UI benefits laws
- Ex. – Connecticut suspended requirement that workers applying for UI benefits be “actively searching for work.” Employees subject to a furlough, but expect to return to work, can seek up to six weeks of benefits
- FFCRA - Emergency Unemployment Insurance Stabilization and Access Act of 2020
 - Consider work sharing as an option?

Layoffs – WARN (Federal)

- Applies to employers with 100 or more employees
- Generally, employers must provide 60 days' written notice of a “plant closing” or “mass layoff”
- No exception for epidemics, but **may** fall under “unforeseeable business circumstances”
- Even if exception is met, employers still must give as much advanced written notice as possible
- State “mini-WARN” laws may apply

Workers' Compensation

- Workers' compensation benefits are compensation provided to employees for certain on-the-job injuries and occupational illnesses

Is coronavirus compensable under Workers' compensation law? (Answer: maybe)

In the course and scope of an employee's employment

- Ex. Washington Department of Labor and Industries – Healthcare workers and first responders

Returning to Work

Can an employer require employees who have been away from work during a pandemic to provide a doctor's note certifying fitness to return to work?

Legally, yes. Practically – Why?

There are not enough testing kits, making it difficult to condition employee return on a negative test result

Can you condition return on employees being symptom free?

Yes. Remember ADA considerations.

RULE 3: AVOID STEREOTYPES

Hypothetical: Back to Ms. Corona

Ms. Corona comes back to work, healthy and virus-free, but co-workers are seen actively avoiding her.

What should you do?

Discrimination

Potential for Disability Discrimination / Race and National Origin Discrimination

- Monitor anti-harassment and anti-bullying policies
- Have an open dialogue with workforce and foster safe environment to alleviate employee concerns
- Investigate and remedy signs of discrimination and harassment in the workplace

Stay Calm and Stay Informed

- Up to date information on COVID-19: [Coronavirus Disease 2019 \(COVID-19\)](#)
- The CDC's interim guidance to employers: [Interim Guidance for Businesses and Employers to Plan and Respond to Coronavirus Disease 2019 \(COVID-19\), February 2020](#)
- Information regarding employee travel: [Traveler's Health](#)
- The CDC's Interim Guidance for Risk Assessment Guide: [Interim US Guidance for Risk Assessment and Public Health Management of Persons with Potential Coronavirus Disease 2019 \(COVID-19\) Exposure in Travel-associated or Community Settings](#)

CONTACTS



BARBARA HOEY
CO-CHAIR
(212) 808-7628
BHOEY@KELLEYDRYE.COM



MARK KONKEL
CO-CHAIR
(212) 808-7959
MKONKEL@KELLEYDRYE.COM



DIANA HAMAR
SENIOR ASSOCIATE
(212) 808-7908
DHAMAR@KELLEYDRYE.COM

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Employer Survival Kit: Coronavirus Edition

By [Mark Konkell](#), [Alison Frimmel](#)
Labor Days Blog Post

MARCH 4, 2020

With the arrival of 2019 novel coronavirus ("COVID-19") to the United States, employers should begin thinking about strategies to mitigate business interruptions, ensure employee safety, and avoid unnecessary litigation.

Know Your Resources

Employers should continue to monitor reliable guidance provided by the U.S. Centers for Disease Control and Prevention ("CDC") and local public health agencies. Understanding how COVID-19 is transmitted and what steps can be taken to protect diagnosed or exposed employees is essential to dispelling employee fears. Employers can educate employees on prevention and symptoms and should be prepared to answer employee concerns regarding workplace safety. The following are guides which may be helpful to employers:

- Up to date information on COVID-19 can be found here: [Coronavirus Disease 2019 \(COVID-19\)](#)
- The CDC's interim guidance to employers can be found here: [Interim Guidance for Businesses and Employers to Plan and Respond to Coronavirus Disease 2019 \(COVID-19\), February 2020](#)
- Information regarding employee travel can be found here: [Traveler's Health](#)
- The CDC's Interim Guidance for Risk Assessment Guide can be found here: [Interim US Guidance for Risk Assessment and Public Health Management of Persons with Potential Coronavirus Disease 2019 \(COVID-19\) Exposure in Travel-associated or Community Settings](#)

Keep Your Workforce Informed

Employers can and should provide their workforce notice regarding potential exposure. However, when doing so, less is more. Employers should not identify diagnosed individuals by name, or provide other identifying information, which could expose confidential employee health information. This is

because under federal, state, and local laws, infectious diseases may constitute disabilities, and thereby confer protected status. Employers should nevertheless address in detail the steps taken to mitigate exposure to COVID-19, including environmental cleaning and other preventative measures, such as supplying antibacterial wipes for employees to use at workspaces and hand sanitizer for use throughout the employer's facility.

Understand the Interplay with Employment Laws

Although the breadth of COVID-19's impact remains to be seen, employers must be careful to avoid discrimination against employees who are disabled or perceived as disabled because they are exhibiting symptoms of COVID-19, or because they belong to races or nationalities linked to the virus. Employers should also be aware that COVID-19 might present other legal risks. For example: employees suffering from, or caring for a family member suffering from COVID-19, may be eligible for protections under the FMLA; employees who contracted COVID-19 through occupational exposure may have Workers' Compensation claims; and employees raising collective concerns regarding working conditions or changes to operations as a result of the virus may be protected under the NLRA.

Employer Tips

While much is still unknown regarding the scope of COVID-19's impact on businesses and workforces throughout the US, employers should consider the following tips:

- Develop a written plan of action if someone become sick with COVID-19, which includes steps to ensure the confidentiality of any employee health information.
- Request employees limit non-essential travel to the affected regions, and provide notice in the event of such travel.
- Consider flexible work arrangements for pregnant or immunocompromised employees, or in the event of a worsening outbreak flexible work hours for employees that commute.
- Understand your workforce vulnerabilities, how staffing shortages could potentially interrupt your operations, and the implications (if any) on applicable collective bargaining agreements.
- Temper employee fears by circulating information from the CDC and other reliable sources.
- Never make determinations regarding employee risk based on race, or national origin.
- Combat potential discrimination by monitoring employee conduct and enforcing anti-bullying and anti-harassment policies.

Finally, and perhaps, most importantly, when an employee issues arises because of COVID-19, employers should consult legal counsel to mitigate risks and forestall potential litigation.

Coronavirus: Managing Your Workforce During a Pandemic

By [Barbara Hoey](#), [Alison Frimmel](#)

Kelley Drye Client Advisory

Related Practices: [Labor and Employment Litigation](#), [Labor and Employment Counseling and Compliance](#), [Labor and Employment](#)

MARCH 10, 2020

As federal, state and local governments continue to develop their responses to the COVID-19 outbreak, employers may find themselves in uncharted territory as to how to deal with emerging employee issues.

There are three overriding rules that all employers should remember:

1. **Think safety first.** Keeping those employees who are infected or at risk of infection at home to ensure that the rest of the workforce is safe should be the number one priority.
2. **Think about how you can keep your business going.** Make sure your work-from-home policies and technology are up to date, and remind employees how to use them.
3. **Avoid stereotypes.** Do not allow employees to assume that people of certain ethnicities are at a higher risk than others. If you become aware of any discrimination or harassment—stop it immediately.

Below are some general answers to questions our clients have been asking. However, please be aware that this is a very fact-specific and complex topic; COVID-19 related employment issues are evolving by the hour. Employers are cautioned to stay abreast of federal, state, and local government advisories, and to consult legal counsel before making employment decisions or changing policy.

When should I require employees to stay home?

Use your judgment, but the following employees should be asked to remain at home:

- those who are ill or feel flu-like symptoms;

- those who have traveled to countries where there is a large exposure (China, Iran, South Korea, Italy, Japan, Hong Kong); and
- those who have been exposed to the virus, through family, a friend or some other meeting or contact.

The key should be – if one employee presents a threat to other employees, employers can legally request **and require** the sick employee to stay home for the COVID-19's incubation period (14 days).

In fact, for other employees who are entitled to a safe workplace, requiring those who are at risk of infection to remain out is the prudent thing to do.

When asking employees to stay home, employers should be aware of the FMLA and ADA, and should take steps to ensure confidentiality of all employee health information.

Consider whether an employee can work at home, and thus get paid. This may depend on whether they are home ill, or well and just quarantined.

Finally, don't ask any questions or take any actions on the basis of race, ethnicity or national origin. Put the duty on the employee to come forward.

What if an employee comes to work with physical signs of COVID-19?

First, remember Rule 1 and think safety first. If an employee has questionable symptoms, send them home and encourage them to see a doctor and/or get tested.

Second, consider whether those who had contact with the sick employee also need to be sent home. This may wait until the first employee is tested.

Employers should be careful when questioning an employee regarding symptoms. While it is unclear whether COVID-19 will qualify as a disability under the ADA, employees may have other conditions, which do constitute as disabilities. Furthermore, if an employer regards an employee as disabled, state and federal laws may be implicated.

If you haven't already, now is the time to train and retrain supervisors on how to deal with employees who arrive to work with symptoms. The employer's primary goals should be ensuring workplace safety, maintaining employee confidentiality, and reducing panic among the workforce.

Note, most employers should not conduct medical testing.

What about employees who worked with ill or “infected” employees?

Employers should send home all employees who worked closely (between 3 to 6 feet) with an infected or ill employee for the 14-day quarantine period to ensure that infection does not spread.

In addition, employers should facilitate environmental cleanup of the affected employee’s workspace and any potentially contaminated areas.

Employers should make best efforts to not identify the infected employee by name. To respond to employee concerns, employers should inform workers of the steps taken to mitigate exposure, such as environmental cleanup.

What should employers do about employees who face increased risk of infection?

Consider flexible work arrangements and make plans for them. Government agencies and now many companies are encouraging work from home arrangements. This is an effective strategy for infection control.

Employers should also implement and enforce personal hygiene protocols, including handwashing and use of hand sanitizers, asking symptomatic employees to seek medical attention and allowing work from home.

Can employees refuse to come to work?

Maybe. But, you do not always have to pay them.

Employers should address employee refusal to come to work on a case-by-case basis. Employers should understand the basis of the employee’s refusal and what the employee is asking for before requiring an employee to come to work.

For example:

- Is the employee pregnant or elderly or immuno-suppressed?
- Was there a possible exposure in your workplace?



In those cases, employees may have a good reason to be concerned.

Employers should not undermine their employee's legitimate fears. Why? Because employees could conceivably be protected under the FMLA, and/or state leave laws, and could have other interacting conditions that qualify them as disabled under federal and state laws.

However, if there is no 'legitimate' reason and the employee cannot work from home, you are not required to give paid time off.

Employers should under no circumstances rubberstamp employee refusal to work which is based on discriminatory reasons.

Can I prohibit an employee from traveling to a non-restricted area in their personal time?

Maybe. Employers can (and many are) asking employees to refrain from nonessential or personal travel. But, this request may be difficult to enforce.

As an alternative, employers should educate their employees regarding travel and the potential risk of exposure and consider asking employees to "self-quarantine" following their travel, rather than returning to the workplace.

In the event an employee does travel for personal reasons and the employer does not require a period of self-quarantine, employers should monitor their employees upon return for symptoms. Keep in mind employees **do not** necessarily need to be paid during a period of self-quarantine after personal travel.

How do I minimize workplace issues of harassment and discrimination?

Be vigilant. Continue to monitor anti-harassment and anti-bullying policies. Employees may, either consciously or unconsciously, exhibit bias toward their colleagues because of COVID-19. Do not let unfounded employee fears permeate the workplace regarding sick colleagues. Employers should take steps to immediately investigate and remedy signs of race or ethnicity discrimination and harassment in the workplace.

Should employers allow telecommuting?

Yes. In this situation, employers should consider flexible work arrangements as a possibility for all employees and, in particular, immunocompromised employees. In the event of a worsening outbreak, employers should contemplate flexible work hours for employees who commute (e.g., delayed start times).

Employers must be aware that they will need to pay nonexempt employees for all hours worked, including overtime. Accordingly, employers should have a system in place to verify hours worked.

If employers fail to establish methods for streamlining business operations now, they may be faced with business interruptions. Consider not only a method for tracking time, but for employee check-ins, approvals for overtime, and fielding technical questions and logistics pertaining to remote work.

Do I have to pay an employee who is quarantined or ill?

The answer depends on certain factors, including, employee classification, whether the employee is sick or "well," and whether or not they are working remotely while out.

Sick vs. "Well"

- Sick employees may qualify for paid sick time or disability leave if the illness lingers. A sick employee may also work from home, if they are able.
- If the employee is well but just quarantined, they may not qualify for sick leave, but may work remotely.

Exempt vs. Non-Exempt

If an employee is quarantined and working remotely, the answer varies depending on the employee's classification.

- Exempt employees - under state and federal law, employers must always pay exempt employees' full salary if they work any day, or in certain cases for part of the workweek. If

the exempt employee is working at home, and doing their job, they should be paid for the days they are working.

- Non-exempt employees - are by law required to be paid only for hours actually worked. If the nonexempt employee is at home and cannot work remotely, you do not have to pay them.

For non-exempt employees, consider letting them stay on payroll, if possible. After all, you do not want to lose your workers just because of this (hopefully short) absence.

First, check whether they qualify for sick pay or PTO, if through no fault of their own, are forced to be out of work due to quarantine or school closures. Some state and local laws (like the New York City's paid sick leave law) require paid sick leave when a school or day care is closed, or they need time off to care for a family member.

Second, an employer could decide to loosen its sick pay policies for this unique situation, and offer pay to non-exempt workers who are forced off the job.

If you cannot pay them, look into whether they qualify for unemployment benefits or for sick pay.

Employers should additionally be aware of expanding state legislation in response to the crisis, which may provide broader protections for workers.

This is a complicated and ever-changing issue. As questions arise, please do not hesitate to contact the Kelley Drye [Labor and Employment group](#).

Families First Coronavirus Response Act

By [Barbara Hoey](#), [Mark Konkell](#), [Diana Hamar](#)

Kelley Drye Client Advisory

Related Practices: [COVID-19 Resource Center](#), [Labor and Employment Litigation](#), [Labor and Employment Counseling and Compliance](#), [Labor and Employment](#)

MARCH 16, 2020

On Friday, March 13, the House passed the Families First Coronavirus Response Act ("FFCRA" or "the Act") (HR 6201). This bill is not yet a law, but probably will be voted on this week or next. If the bill is signed into law by the President (which he has promised to do), the law will take effect 15 days after signing.

The FFCRA contains two main centerpieces: (1) new paid Family and Medical Leave to deal with the COVID-19 "public health emergency"; and (2) emergency paid sick leave. This advisory addresses the most important aspects of the FFCRA. We have injected some initial guidance to employers in italics, but this advisory is not designed to address all of the many details of the Act. Please look for a deeper dive and analysis from us when the law becomes effective.

NEW PAID FMLA LEAVE FOR A "PUBLIC HEALTH EMERGENCY"

Employers: With some confusion over versions of the Act, the most current draft says it applies to employers with fewer than 500 employees, who must provide up to 12 weeks of paid leave to employees for a "public health emergency," with a right of reinstatement at the end of that leave.

Comment: The 500 employee threshold has been called the "Big Box Exclusion" and excludes large employers like Wal-Mart and McDonalds.

Employees: The Act applies to all employees who have been employed for at least 30 days.

Comment: This is much broader than the FMLA. It does not require 12 months of employment or 1250 hours worked.

Leave: An employee is entitled to this new leave for the following reasons:

- To adhere to an order or recommendation by a government entity or a health care provider, to quarantine due to exposure to COVID-19 or due to symptoms of COVID-19;
- To care for a family member who is at risk, and is adhering to an order that they quarantine due to exposure to or symptoms of COVID-19; or
- To care for the employee's child (under 18), if the child's school or daycare is closed, or a caregiver has or is unavailable, due to COVID-19.

Family Member: Defined as spouse, child under 18 (adopted or natural), parent, step-parent or domestic partner.

Pay: After the two weeks of fully paid leave (paid under the new Emergency Paid Sick Leave Act, covered in Part II), employees will have to be paid at a rate of no less than two-thirds of the employee's usual pay for the duration of the 12 weeks.

Comment: Employees may use accrued personal or sick leave during the first 14 days, but employers may not require employees to do so.

EMERGENCY PAID SICK LEAVE ACT

Leave: This section requires that employers with fewer than 500 employees give all employees up to two weeks of paid sick leave, for the purpose of:

- Quarantining or seeking a diagnosis or preventive care for coronavirus; or "self-isolate" because of a diagnosis of coronavirus;
- Caring for a family member who is quarantined or diagnosed with coronavirus; or
- Caring for a child whose school has closed, or if a child care provider is unavailable, due to coronavirus.

Pay: This sick leave must be paid at the employee's regular rate (capped at \$511 per day), as follows:

- Full-time employees are entitled to two weeks of paid sick leave (80 hours)
- Part-time employees are entitled to the number of hours of paid sick time equal to the number of hours they work, on average, over a 2-week period.

Existing Policies: Employers who have existing paid sick leave policies must provide this leave in addition to any paid leave currently offered.

- Sick Leave policies also cannot be changed after this Act goes into effect.
- This leave does not carry over from year to year.

- The Act provides a refundable tax credit to offset the cost of this leave.

GENERAL PROVISIONS OF THE FFCRA

Notice: Employers will be required to post a notice informing employees of their rights to these new leaves.

CBAs: Employers who are part of a plan under a multiemployer collective agreement can satisfy their obligation by making contributions to that plan, provided the plan will allow employees to have time off as the Act requires.

Term: The Act expires on December 31, 2020.

Preemption: The bill expressly provides that it does not preempt existing state or local paid sick leave entitlements.

What's Next?

The COVID-19 situation is evolving rapidly, to say the very least. The ultimate outcome of the proposed legislation—and more importantly, the scope of the crisis—can and will change daily. Employers need to react in real time, so we are monitoring this closely and will provide moment-to-moment updates as they become available.

If you have any questions, please reach out to any attorney in our Employment group.