



General Counsel Employment Law Report

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It's a Small (Germy) World After All: How To Clean Up

Alas, COVID-19 keeps on spreading and with it a host of workplace issues. Not to be outdone by the [EEOC](#) and the [Department of Labor](#), [OSHA](#) has just [made recommendations](#) addressing safe workplace issues.

What is an employer to do? Breathe (but not too close to anyone). Practical solutions exist. We have been fielding questions for days and realized your current policies may not be sufficient to navigate this rapid challenge. We have developed a framework for a comprehensive response plan that can be tailored to fit your organization's unique needs. The fixed fee **COVID-19 Toolkit** provides key documents (e.g., notice, written plan, sick leave guidance, recommendations, FAQs, Return to Work Form) and workplace poster links. We are at the ready to provide this—please contact us.

I recommend this New Yorker [article](#) on face touching throughout history and why it is impossible to stop. It won't help but great writing—and misery loves company.

Questions? We can help.

When Friday the 13th Has Nothing on Your Bad Luck Week

Oh boy we live in interesting times. In an effort to provide helpful information and not cheap click-bait, I held off on writing about the House relief bill today. Good thing because it is held up over the Paid Sick Leave provision. But there is still plenty happening in DC (as well as your state no doubt) that will impact the workforce. Here is what to watch:

- Trump is expected to declare a National State of Emergency this afternoon which, among other things, puts FEMA in charge of the response;
- The House Bill being worked out now (for which the Senate is hanging around to vote on rather than take their break) includes provisions for paid sick leave in the case of a state of emergency;
- The proposed paid sick leave, if it makes it into the final bill, can be found [here](#);
- The same bill calls for major changes to the FMLA under a state of emergency:
 - Employees eligible after 30 days (not 1250 hours and 12 months) of work for employers with 1 (not 50) or more employee;
 - Medical certification time and conditions loosened;
 - Cannot mandate use of PTO concurrently;
 - Definition of parent and family member expanded.

We will let you know on Monday what changes, if any, were made by Congress and the President that impact your workplace. Practical solutions are out there. We have developed a framework for a comprehensive response plan that can be tailored to fit your organization's unique needs: the fixed fee **COVID-19 Toolkit**.

Contact us. We can help. Enjoy the weekend and maybe a news break.

What you need to know and do:

FFCRA

The federal government has enacted the sweeping Families First Coronavirus Response Act (FFCRA). The obligations on many employers may seem staggering. In response, we have developed a Families [First Coronavirus Compliance Package](#), described [here](#). Emergency leave, paid sick leave, enhanced family and medical leave plus notice and posting requirements are addressed. We will update this Compliance Package via email as required to keep you informed and in line with the law.

Not all employers have obligations under the FFCRA (see below) but employers of all sizes must keep their workplace safe. Our [COVID-19 Infectious Disease Response Toolkit](#) can assist with this onerous task. The Toolkit, like the FFCRA Compliance Package, is updated and emailed to you as changes unfold.

Speaking of changes, here is the just-updated summary of the FFCRA, including real life examples from clients so far:

Families First Coronavirus Response Act

Yesterday, Congress passed and the President signed, the Families First Coronavirus Response Act.

This law requires employers with **less than 500 employees** to provide two new forms of paid leave: **Emergency Family Leave and Paid Sick Leave**. These leaves can only be taken for reasons related to the Coronavirus pandemic.

Employers will need to pay employees Paid Sick Leave and Emergency Family Leave upfront, and seek a tax credit against the employer portion of Social Security contributions, and reimbursement through taxes, from the government later. The Treasury may issue advances to employers to cover these costs.

Employers will need to provide Paid Sick Leave and Emergency Family Medical Leave for qualifying coronavirus-related reasons throughout 2020, but not beyond.

When trying to figure out how to organize leave plans and prepare for the impact of these new laws, we can help. Do not hesitate to reach out with questions and to utilize our [FFCRA Compliance Package](#).

Covered Employers:

The Families First Coronavirus Response Act applies to all employers with **less than 500** employees, and to public employers of any size.

- **Exceptions:**
 - **Emergency Family Leave:**

- The Department of Labor is likely to exempt certain health care providers and emergency responders
- The Department of Labor is **likely to exempt small business with less than 50 employees when the requirement to provide EFL would jeopardize the viability of the business.**
- **Paid Sick Time:**
 - The Department of Labor is likely to exempt certain health care providers and emergency responders by allowing those employers to opt out of providing paid sick time
 - The Department of Labor is **likely to exempt small business with less than 50 employees when the requirement to provide sick time would jeopardize the viability of the business.**

Here's an Outline of the Requirements under both of these Leaves:

Emergency Family Medical Leave

Eligibility: Any employee who has worked at least 30 days for a covered employer is eligible for Emergency Family Leave ("EFL").

Leave Entitlement: Employees are eligible for up to 12 weeks of leave.

When can Employees Take EFL?

Employees will be able to take up to 12 weeks of Emergency Family Medical Leave if they are unable to work or telework for the following reasons:

- To care for a child (under 18 years of age) of an employee if the child's school or place of care has been closed, or the childcare provider is unavailable due to coronavirus.

If both parents work for the same employer, only one of the parents would be eligible to take this leave to care for the child, as the child would then have a caretaker.

Wage Payments: Emergency Family Medical Leave is partially paid by the employer, depending on the length of leave:

- The First 10 days are unpaid. An employee can use any accrued PTO or the Emergency Paid Sick Leave during this time, but cannot be required to do so.
- After those first 10 days, an employer must pay employees at **2/3** their regular hourly rate. You are **NOT** required to pay more than \$200 per day or \$10,000 in total for one employee's leave.

Notice: An employer can only request notice for the need for leave "as soon as practicable."

Job Protection and Reinstatement: The default FMLA rules apply, meaning that an employer must return the employee to the same or equivalent position upon their return from leave.

- **Exception:** If you have less than 25 employees, and there is an economic downturn that causes changes to your business, and you are no longer able to reinstate the employee, you do not need to. You will still need to use reasonable efforts to place the employee back in a similar position for a 1-year period.

Hot Topic – Example of Use of EFL: A healthy employee has a 2-year old child whose daycare has closed and has been teleworking for the last week. The employee has been juggling caring for their child, while also performing work, not able to give their best to either. This employee does not have another caregiver to care for the child. This employee will be eligible to take Emergency Family Leave:

- The employee elects to use Emergency Paid Sick Leave to be paid for the first 10 days of their Emergency Family. The employee gets paid at her regular rate because of that election.
- The employee is paid at 2/3 their regular rate for all days taken for Emergency Family Leave after those first 10 days. The employee elects to use her accrued vacation time to make up the 1/3 difference in pay, so that she continues to receive her regular pay.

If an employee and her spouse have been teleworking and caring for their 5-year old child who is out of school, either the employee or her spouse can elect to use Emergency Family Leave to care for the child who needs a caretaker, while the other can continue teleworking because the child now has a caretaker. In this case, the employee chooses to be the caretaker of the child and take Emergency Family Leave:

- The employee elects not to use any accrued PTO or Emergency Paid Sick Leave for the first 10 days, meaning that the employee will not be paid for that time.
- The employee is paid at 2/3 her regular rate for all days taken for Emergency Family Leave after those first 10 days. The employee does not use any PTO to make up the 1/3 difference in pay.
- At the end of the 12 weeks of Emergency Family Leave, the employee elects to use Paid Sick Leave to continue caring for her child who is still out of school due to the coronavirus outbreak.

In contrast, a healthy employee has a 14-year old child whose school has been closed and the employee has been teleworking for the last week. The employee's child is self-sufficient and the care for the child does not interfere with the employee's ability to telework. In this situation, the employee would not qualify for Emergency Family Leave because they are still able to work, even though the employee's child does not have another caretaker.

Emergency Paid Sick Leave

Eligibility: All current employees who work for a covered employer are eligible. Employers of health care employees or emergency responders can elect to exclude such employees from coverage, if the DOL creates regulations allowing this.

Leave Entitlement: Employees are eligible for 2 weeks of paid leave (80 hours for full-time employees, pro-rata based on average hours worked for part-time employees).

When Can Employees Take Paid Sick Leave?

Employees can take paid sick leave when they are unable to work or telework because:

- The employee is subject to a Federal, State, or local quarantine or isolation order related to COVID-19;
- The employee is self-isolating as ordered by a health care provider because the employee is diagnosed with COVID 19 or to concerns related to COVID-19;

- The employee needs to obtain a medical diagnosis or care if the employee is experiencing the symptoms of COVID 19;
- The employee needs to care for the employee's family member who is subject to a Federal, State or local quarantine or isolation order related to COVID-19 or has been advised to self-quarantine by a healthcare provider for concerns related to COVID-19;
- The employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services in consultation with the Secretary of the Treasury and the Secretary of Labor; and
- The employee needs to care for the child of such employee if the school or child care has been closed due to COVID 19, or the child care provider of such son or daughter is unavailable.

Wage Payments: An employer must pay employees for Paid Sick Leave at the following rates:

- If an employee takes sick leave for their own sickness or mandated quarantine/isolation, the employee must be paid at their regular rate. You do NOT have to pay the employee more than \$511 per day or \$5,110 in total for this leave.
- If an employee takes sick leave for any other qualifying reason, the employee must be paid at 2/3 their regular rate. You do NOT have to pay the employee more than \$200 per day or \$2,000 in total.

If you Already have a PTO or Sick Leave Policy: This leave does not diminish any rights to leave in any other Federal, State, or local law, collective bargaining agreement, or existing employer policy. An employee may choose to use the paid sick leave under this law prior to use of other leaves.

An employer cannot ask an employee to find a replacement worker when using Paid Sick Leave.

Retaliation: Retaliation and discrimination for taking leave under this law is prohibited.

Obtaining Medical Note or Other Verification: An employer cannot require a notice for the first day of paid sick leave taken under this law. An employer can require an employee follow reasonable notice procedures in order to continue receiving paid sick time after the first day of leave.

Notice: Employers will be required to post notice of this law and its benefits in a conspicuous place in the workplace.

Hot Topic – Differences between Furloughs and Layoffs: In this trying time, many clients have been reaching out to us about employee layoffs or furloughs. There is a difference between the two:

- **Layoffs:**
 - Layoffs can be temporary or permanent, but when an employee is laid off, the employment relationship has ended. This means that employees will qualify for COBRA immediately and may apply for unemployment.
 - Depending on your state requirements, an employer will have to payout any accrued PTO on separation from employment.
 - Layoffs, even temporary ones, may trigger the WARN Act, which requires employers to give 60 days' notice prior to the layoff, if the layoff
 - If an employee is laid off, you do not have to provide them these paid leaves under FFCRA.

- **Furloughs:**

- Furloughs are similar to layoffs, but the employment relationship still exists. A furlough is like a mandated unpaid leave of absence, where the employee is expected to come back to work at some point in the future.
- Employees can still apply for unemployment when they are furloughed.
- Employees will still have access to their Health Benefits under their Employer's plan. If the furlough continues past a certain point, employees may no longer be eligible for Health Benefits and must be offered COBRA.
- When an employee is furloughed, they will still be eligible to use these paid leaves under FFCRA, because they have not been separated from employment.

How will Employers be Reimbursed or Credited for these Leave Programs?

Employers will be eligible for a tax credit of 100% of qualified paid sick and family leave wages an employer pays to employees for the Employer Social Security Contribution tax (Section 3111(a) of IRC) or Excise Tax (3221(a)). If an employer's obligation to pay employees for either of these leave programs exceed their yearly tax contribution to Social Security and Excise Tax, the employer will be able to seek full reimbursement through their taxes. We would advise you to work with your accountant on this issue as it will be fluid.

Treasury Secretary Mnuchin said over the weekend that his agency would advance funds to business so they can meet the paid sick-leave requirements. Employers will be able to use cash deposited with the IRS to pay sick-leave wages. For business that do not have sufficient taxes to draw from, the Treasury would make advances to cover the costs. The Treasury Department's latest press release is [here](#).

Emergency Unemployment Insurance Stabilization and Access Act: States may end up waiving their waiting period during this time of crisis in order to obtain additional stimulus funds under this law. There are also additional grants that may extend the length of time states will provide benefits for.

Working remotely, with scrubbed hands, we are at full capacity and at the ready. Please do not hesitate to reach out.

An Update and a Useful Chart: FFCRA

Remember seasons? It's Spring. We live in interesting times...

We have created a [chart](#) that details the eligibility, leave and pay obligations under the Families First Coronavirus Response Act (FFCRA).

Here is an [update](#) of yesterday's FFCRA Summary, which clarifies pay obligations under Emergency Paid Sick Leave when elected before Emergency Family Leave under Hot Topics.

Need help with [FFCRA Compliance](#)? A [COVID 19 Infectious Disease Response Toolkit](#) for your workplace? Answers to questions? We have that all covered.

Get some rest, get some air, and we will keep an eye on updates and changes. We can help.

Teleworking Can Be an Exceptional Solution & Just Updated Guidance from the Feds

As quarantines, social distancing requirements, state-specific isolation ([Massachusetts](#) just added to the growing list) and business shutdown orders become more widespread, the need to develop effective strategies to maintain your business operation has never been greater. At the same time employers need information and advice in real time. This Alert addresses both those issues.

UPDATES: In response to newly published DOL and IRS guidance, [we updated our overview](#) of what employers need to know about the Families First Coronavirus Response Act. We also **updated our FFCRA Monitoring and Use Chart**. Our clients from coast to coast have found the contents of both our [COVID-19 Infectious Disease Toolkit](#) and our [FFCRA Compliance Package](#) to be very helpful. The contents, for which you receive updates, can be purchased for a fixed fee—mike@foleylawpractice.com.

TELEWORKING: Depending upon your industry and how work within your organization is performed, teleworking arrangements can provide an exceptional solution. Teleworking allows employees to work during quarantines, isolation orders and most business shutdown orders. It is also important to remember that if an employee is home to care for a child under the age of 18 whose school or daycare has closed and can telework, *that employee is not eligible for paid family leave under the FFCRA*.

COMPLIANCE ISSUES: While teleworking arrangements are a godsend for many employers and employees right now, there are some important issues that must be considered when employees are transitioned to teleworking arrangements:

- **Equipment**—The first step in assessing whether a position is appropriate for a teleworking arrangement is to determine whether the individual employee will have the necessary equipment to perform the essential functions of his/her duty efficiently and productively. Other equipment-related issues to consider are which business-related expenses that the company will reimburse: office supplies, shipping costs, home internet upgrade, etc.
- **Security**—As a preliminary matter, employers should ensure that their employees are using secure connections and not risking exposure of confidential and proprietary information by using their home internet or worse, public connections. We recommend that your organization's appropriate use policy be incorporated into your teleworking arrangement guidelines.
- **Safety**—Inform teleworking employees that they are expected to maintain their home workspace in a safe manner, free from safety hazards. It is good practice to provide a teleworking employee with a safety checklist that must be completed on a weekly basis. Under OSHA, an employer's obligation to provide a safe workplace includes the remote worksite.

Teleworking employees should be reminded that they are responsible to notify Human Resources if they suffer an injury while working at home (normally covered by the company's workers' compensation policy) and advise the employee that he/she are liable for injuries sustained by visitors within their home worksite.

- **Time recording for hourly non-exempt staff**—it is important to define the length of the workday and workweek to control costs and to manage overtime. Setting expectations up front and development effective time recording practices will be the key.

Teleworking can be a great asset to a business in this historically challenging time if done correctly. Our **Covid-19 Infectious Disease Toolkit** includes a position survey questionnaire and a remote working arrangement expectation template. We stand ready to help—Stay well!



General Counsel's Office Hours

Special Member Benefit



All CCHRA members in good standing will have the special benefit of being able to call Attorney Michael E. Foley, in his role as the CCHRA General Counsel, to obtain his guidance on employment law compliance issues and corresponding HR-related risk management during his CCHRA GC Office Hours – **at no cost**.

[Click here](#) for the description of the role of the CCHRA General Counsel. As General Counsel, Mike will be available within his virtual and gratis office hours for all CCHRA members from 2 pm to 3 pm on the first and third Tuesday of each month. The guidance Mike provides during his office hours will cover all issues that arise within the broad spectrum of the employment relationship to help CCHRA members achieve compliance with the extensive regulations that govern their workplace and to better understand best employment practices.

Issues related to the Internal Revenue Code/the Internal Revenue Service or ERISA-related issues will not be covered under this arrangement, nor will the interpretation, editing or drafting of documents. The office hours will be limited to providing guidance on employment law questions and corresponding HR-related risk management that can be answered in one telephone conversation. Mike can be reached during his CCHRA General Counsel Office Hours at 508-548-4888.

Mike Foley has been representing employers, small and large, for-profit and not-for-profit within all industry sectors and in all matters of labor and employment law for over 30 years. He draws on the breadth of his experience to offer employers an uncommon approach and practical solutions. [Click here](#) for Mike's bio.