



Employer Obligations and Resources Regarding New Federally Required Paid Family Leave and Paid Sick Leave as a Result of COVID-19

A. New Covid-19 Federal Paid Leave Requirements Signed into Law.

On March 18, 2020, President Trump signed into law the Families First Coronavirus Response Act (the “Act”) to provide some relief to employees as a result of COVID-19. The law, which only applies to private employers with fewer than 500 employees, goes into effect on April 2, 2020 and will expire on December 31, 2020. The key provisions of the Act include an emergency expansion of the Family and Medical Leave Act (FMLA) and a new federal paid sick leave law.

	Eligibility	Leave Entitlement
Emergency Family and Medical Leave Expansion Act	<p>All employers with 1-499 employees</p> <p>Any employee that has worked for the employer for 30 days prior to the designated leave.</p>	<p>12 weeks of <u>paid family leave</u> at two-thirds the employee’s regular rate of pay (up to a maximum of \$200 per day) to care for a child whose school or child-care provider is closed or unavailable for reasons related to COVID-19.</p> <p>*the first 10 days are unpaid, but an employee may use paid sick leave to cover such time.</p> <p>Part-time employees are entitled to be paid based on the average number of hours they worked for the six months prior to taking Emergency FMLA. Employees who have worked for less than six months prior to leave are entitled to the reasonable expectation at hiring of the average number of hours the employee would normally be scheduled to work.</p>
Emergency Paid Sick Leave Act	<p>All employers with 1-499 employees</p> <p>All employees, regardless of how much time they have worked for the employer</p>	<p>Two weeks (80 hours) of <u>paid sick time</u> at the employee’s regular rate of pay (up to a maximum of \$511 per day) while the employee is quarantined, self-quarantined, or experiencing COVID-19 symptoms and seeking diagnosis; or</p> <p>Two weeks (80 hours) of <u>paid sick time</u> at two-thirds the employee’s regular rate of pay (up to a maximum of \$200 per day) while caring for an individual subject to quarantine or self-quarantine, caring for a child whose school or childcare provider is closed or unavailable for reasons related to COVID-19, or experiencing a substantially similar condition as specified by the Secretary of Health and Human Services, in consultation with the Secretaries of the Treasury and Labor.</p>

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The Act requires employers to post and keep posted a notice of the emergency paid sick leave requirements, which will be provided by the Secretary of Labor in the coming days. Although the Act does not say anything about providing employees an electronic copy, employers should be prepared to email employees a copy of the Notice, especially given the substantial number of employees now working remotely. Additionally, employers should consider revising their current FMLA policy to reflect the temporary basis. Employers can attach a rider to the employee handbook, and send a copy of the updated policies and the required paid sick leave notice to all employees via email.

Finally, the Act provides tax credits for employers who are required to provide Emergency Paid Family and Medical Leave and Paid Sick Leave, which are allowed against the employer portion of Social Security taxes. Employers will be reimbursed if their costs for qualified sick leave or qualified family leave wages exceed the taxes they would owe.

For further detail on the Families First Coronavirus Response Act, please visit the [Employer Defense Report](#).

B. Employment and Workplace Safety Law FAQs

- 1. When may an employer take the body temperature of employees during the COVID-19 pandemic?*

Generally, measuring an employee's body temperature is a medical examination that would be impermissible under the Americans with Disabilities Act ("ADA"). Because the CDC and state/local health authorities have acknowledged community spread of COVID-19 and issued attendant precautions, employers may now measure employees' body temperature without risking running afoul of the ADA. However, employers should be aware that some people with COVID-19 do not have a fever.

- 2. How much information may an employer request from an employee who calls in sick in order to protect the rest of its workforce during the COVID-19 pandemic?*

During a pandemic, employers may ask employees if they are experiencing symptoms of the pandemic virus. For COVID-19, these include symptoms such as fever, chills, cough, shortness of breath, or sore throat. Employers must maintain all information about employee illness as a confidential medical record in compliance with the ADA.

- 3. If an employee with an underlying health condition refuses to come into work out of fears of COVID-19 and their job duties do not permit telework, is that employee eligible for leave under the Family and Medical Leave Act ("FMLA")?*

There are steps you can take to ensure that employees feel they are working in a safe working environment, such as extra cleaning, reduced staff, and limited interaction with co-workers. However, an employee who does not want to report to work due to their unrelated health condition would not be eligible for FMLA unless they are under the care of a medical provider for his or her

own serious health condition. Just staying home from work because they do not want to contract the virus out of fear because they are more susceptible due to an underlying health condition is not an FMLA-eligible condition.

4. *What are our regulatory recordkeeping and reporting obligations in the event one of our employees tests positive for the COVID-19?*

An employer's reporting and recording obligations will largely depend on whether the case of COVID-19 is work-related. OSHA has already developed some guidance as to how its regulations may be triggered by an employee contracting COVID-19, including some information on treatment of injuries and illnesses. As an initial matter, OSHA has confirmed that COVID-19 will not fall within the exemption to work-relatedness established in 29 C.F.R. 1904.5(b)(2)(viii): "While 29 CFR 1904.5(b)(2)(viii) exempts recording of the common cold and flu, COVID-19 is a recordable illness when a worker is infected on the job." Thus, for purposes of reporting a case of COVID-19, an employer would have to determine (1) whether the illness is work-related; and (b) whether it meets one of the criteria for reporting to OSHA (i.e., fatality, in-patient hospitalization, amputation, or loss of an eye).

While it may be possible to trace an exposure to the workplace, with the level of community spread we are seeing around the world, objectively concluding that the work environment was more likely than not the source of the exposure is a big stretch. OSHA suggested that they will not expect very many cases to be recorded or reported as work-related in general industry outside of healthcare and nursing care facilities. Rather, they told us, the only time they would expect to see a conclusion that a COVID-19 case is work-related is when there is a "cluster" of confirmed cases among people who work closely together; e.g., 75% of the staff in your billing department contracted the virus after working closely together for a time.

Even in those instances where a conclusion is made that a case is work-related (which would make it *recordable* on the 300 log), it is unlikely that very many (or any) non-fatal CV-19 cases that result in a hospitalization will be reportable to OSHA because of the latency/incubation period between exposure/contraction of the viruses, and the time symptoms appear or are significant enough to result in an in-patient hospitalization... that will almost always be more than 24 hours. According to the CDC, individuals typically do not begin showing symptoms until 2 to 14 days after the exposure. Thus, in most cases, the exposure and ensuing illness will result in a recordable event, but not a reportable one. Note, for cases where the virus results in death, the reporting window is 30 days; i.e., if it is determined to be work related, and it is a confirmed diagnosis, it would be reportable if the employee succumbs to the illness within 30 days of the exposure that resulted in the illness. That is more likely than the hospitalization, but again, the work-related conclusion should be very rare.

5. *What should we do if we are unable to acquire filtering facepieces (N95s) due to the supply shortage, but we have tasks that require employees to wear N95s?*

This is a tricky situation that many employers find themselves in, and OSHA has not yet issued any guidance on this topic – with the exception of the [temporary exemption](#) for annual fit testing requirement for health care employers. If filtering facepieces (dust masks) are mandatory and required to protect the health of employees, you still need to comply with that program and OSHA's regulations regarding the written respiratory protection program and provide OSHA-compliant dust masks/N95 respirators. OSHA has not issued any guidance providing employers leeway on this topic.

There are a couple of options to resolve this issue. First, if filtering facepieces (dust masks) are not available, you may need to look into additional respiratory protection, such as reusable full facepiece respirators. Note that if you transition from using disposable N95 respirators to another reusable type, there are additional requirements in OSHA's respiratory protection standard to take particular note of, such as the storage, cleaning, inspecting, and maintenance provisions, in addition to fit-testing and medical clearances. The second way to potentially resolve this dilemma is to use engineering controls to eliminate the need to filtering facepieces, such as increased air circulation and installing physical barriers.

Finally, to the extent that the company does need to purchase higher-level respirators, it would be prudent to consider limiting the number of employees who are required to perform any tasks that require the respirators. This way the company will limit its employees using, cleaning, storing, and reusing the masks while limiting costs and potential enforcement issues. With that being said, given the unprecedented shortage of N95s at this time, we do not anticipate regulators will be actively seeking out employers to cite them. If the problem persists, we anticipate OSHA will issue some type of guidance for general industry and construction industry employers.

6. *Are employers permitted to decline to allow employees to voluntarily use respirators (including N95 masks)?*

The answer is yes, if a respirator is not required because of exposures levels in the workplace, employers have the option to permit voluntary use or to decline to permit voluntary use respirators in the workplace. A [2018 OSHA Interpretation Letter](#) expressed the options nature of that decision. Specifically, OSHA states that "the employer **may** allow the voluntary use of respirators even where an exposure assessment shows respirator use is not required." Similarly, in that same later, OSHA states: "**If the employer determines that any voluntary respirator use is permissible**, the employer must provide the respirator users with the information contained in Appendix D of the standard ("Information for Employees Using Respirators When Not Required Under the Standard".) If you permit the use of respirators other than filtering facepieces, you must pay for required medical evaluations for voluntary users and provide voluntary users with appropriate facilities and time to clean, disinfect, maintain, and store respirators." One thing employers need to watch out for is that if they decline an employee's request to voluntarily use an N95 mask, even one supplied by the employee himself/herself, then you may well have an employee complaint heading to OSHA, in which case you need to be confident that there is not a potential exposure in the workplace that should have made respirator use mandatory.

For further information, please review our prior blog posts on employment and workplace safety topics related to COVID-19:

1. [Equal Employment Opportunity Commission Provides Guidance on What Actions Employers May Take to Address the Impact of COVID-19](#)
2. [Employers Face a Myriad of Wage & Hour Issues with COVID-19](#)
3. [March Update on How Employers can Respond to Covid-19 with FAQs](#)

Finally for further information, employers can also review our complimentary webinar regarding "[How Employers Can Respond to COVID-19 and Frequently Asked Questions.](#)" Participants in this webinar learned about recent developments and federal legal guidance including:

- Strategies for employers to prevent workplace exposures while complying with Federal and State level labor employment laws

- OSHA's guidance about preventing workers from exposure to COVID-19 and related regulatory risks
- FAQs for employers with guidance from the CDC

If you have any questions during these difficult times, please do not hesitate to reach out to [Conn Maciel Carey's Employment](#) and [Workplace Safety](#) teams for guidance.

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