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Diving Deep Into FFCRA Compliance

As of April 29, 2020

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A wider lens on workplace law



Overview

- FFCRA Emergency Paid Sick Leave
- FFCRA Expanded FMLA Leave
- FFCRA Documentation and Tax Credits
- Other legal implications – FLSA, WARN, OSHA, etc.
- Expanded Unemployment Benefits
- Alabama “Safer At Home” Order
- EXISTING LAWS NOT EQUIPPED FOR THIS EVENT AND WILL BE RAPIDLY EVOLVING AND CHANGING
- CHECK OUR WEBSITE (www.constangy.com) FOR UPDATES
- Feel free to e-mail or call with questions



COVID-19

- The CDC says the virus is thought to spread mainly from person-to-person contact.
- Between people who are in close contact with one another (within about 6 feet).
- Through respiratory droplets produced when an infected person coughs or sneezes.
- Current Guidance is virus remains alive on surfaces for up to 72-hours depending on surface and environment
- There are no vaccines or specific treatment at this time.



Planning Your Business

- Covid-19 will be around until:
 - Vaccine (12-18 months)
 - Herd Resistance (Numerous Illnesses – Hopefully Spread Out)
 - Unexpected Natural Decline in Virus
- Current Projection is 50-70% of Population Will Get Absent Vaccine
- Current Actions are About Saving Lives by Not Overwhelming Healthcare



This Too Shall Pass

(maybe like a kidney stone, but it'll pass)

- Your Game Plan: **ADAPT AND SURVIVE**
- Information and Advice Changing Daily
- First Wave is mitigating initial health crisis
- Second Wave is Getting Back to Business
- Third Wave is dealing with potential second round of infections
- Fourth wave is finding effective treatment/vaccine



Families First Coronavirus Response Act

- Law is the Floor: You Can Do More But Not Reimbursed through Payroll Tax Credits
- Does Not Make All Aspects of FMLA Apply to All Employers
- DOL Guidance Updated Constantly
- Effective April 2, 2020
- Expires December 31, 2020

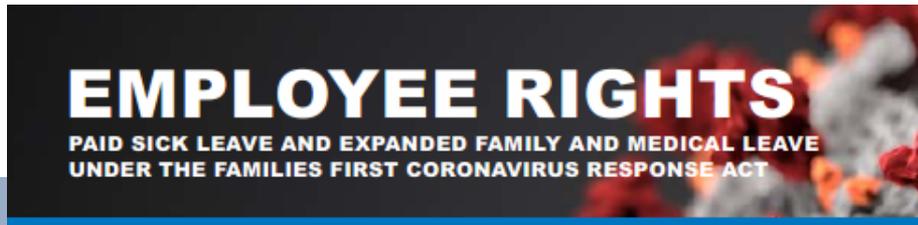


Families First Coronavirus Response Act

- Employers with Fewer than 500 Employees
 - Single/Joint Employer Issue
 - Government Employees
- Paid Expanded FMLA Leave
- Emergency Paid Sick Leave
- Prohibitions Against Termination
- Required Job Restoration
- Tax Process for Reimbursement to Employers
- Posting Requirement
- Enhanced Unemployment Grants to States



FFCRA Required Poster



- https://www.dol.gov/sites/dolgov/files/WHD/posters/FFCRA_Poster_WH1422_Non-Federal.pdf

The Families First Coronavirus Response Act (FFCRA or Act) requires certain employers to provide their employees with paid sick leave and expanded family and medical leave for specified reasons related to COVID-19. These provisions will apply from April 1, 2020 through December 31, 2020.

PAID LEAVE ENTITLEMENTS

Generally, employers covered under the Act must provide employees:

Up to two weeks (80 hours, or a part-time employee's two-week equivalent) of paid sick leave based on the higher of their regular rate of pay, or the applicable state or Federal minimum wage, paid at:

- 100% for qualifying reasons #1-3 below, up to \$511 daily and \$5,110 total;
- ⅔ for qualifying reasons #4 and 6 below, up to \$200 daily and \$2,000 total; and
- Up to 10 weeks more of paid sick leave and expanded family and medical leave paid at ⅓ for qualifying reason #5 below for up to \$200 daily and \$12,000 total.

A part-time employee is eligible for leave for the number of hours that the employee is normally scheduled to work over that period.

ELIGIBLE EMPLOYEES

In general, employees of private sector employers with fewer than 500 employees, and certain public sector employers, are eligible for up to two weeks of fully or partially paid sick leave for COVID-19 related reasons (see below). Employees who have been employed for at least 30 days prior to their leave request may be eligible for up to an additional 10 weeks of partially paid expanded family and medical leave for reason #5 below.

QUALIFYING REASONS FOR LEAVE RELATED TO COVID-19

An employee is entitled to take leave related to COVID-19 if the employee is unable to work, including unable to telework, because the employee:

- | | |
|---|---|
| <ol style="list-style-type: none">1. is subject to a Federal, State, or local quarantine or isolation order related to COVID-19;2. has been advised by a health care provider to self-quarantine related to COVID-19;3. is experiencing COVID-19 symptoms and is seeking a medical diagnosis;4. is caring for an individual subject to an order described in (1) or self-quarantine as described in (2); | <ol style="list-style-type: none">5. is caring for his or her child whose school or place of care is closed (or child care provider is unavailable) due to COVID-19 related reasons; or6. is experiencing any other substantially-similar condition specified by the U.S. Department of Health and Human Services. |
|---|---|

ENFORCEMENT

The U.S. Department of Labor's Wage and Hour Division (WHD) has the authority to investigate and enforce compliance with the FFCRA. Employers may not discharge, discipline, or otherwise discriminate against any employee who lawfully takes paid sick leave or expanded family and medical leave under the FFCRA, files a complaint, or institutes a proceeding under or related to this Act. Employers in violation of the provisions of the FFCRA will be subject to penalties and enforcement by WHD.



WAGE AND HOUR DIVISION
UNITED STATES DEPARTMENT OF LABOR

For additional information
or to file a complaint:
1-866-487-9243
TTY: 1-877-889-5627
dol.gov/agencies/whd



WH1422 REV 03/20



Emergency Paid Sick Leave

- Emergency Paid Sick Leave
 - **Effective:** April 2, 2020
 - **Employers:** Fewer than 500 employees
 - **Eligible:** All employees on payroll (no min. length of employment)
 - **Amount:** Eighty (80) Hours Paid Sick Time
 - **Pay:** Regular rate of pay for own illness (1-3) and 2/3 rate of pay to care for others (4-6)
 - Pay Cap: \$511 per day for own illness up to \$5,110 and \$200 per day up to \$2,000 to care for others
 - **Prohibitions:** CANNOT Reduce Paid Time Off Benefits If You Have Them and CANNOT Require to Use Existing Benefits First
 - No Carryover into 2021



Emergency Paid Sick Leave

- Qualifying Events:

1. Employee subject to a federal, state or local quarantine or isolation order related to COVID-19;
2. Employee advised by a health care provider to self-quarantine due to COVID-19 concerns;
3. Employee experiencing COVID-19 symptoms and seeking medical diagnosis;
4. Employee caring for an individual subject to a federal, state or local quarantine or isolation order or advised by a health care provider to self-quarantine due to COVID-19 concerns;
5. Employee caring for the employee's child if the child's school or place of care is closed or the child's care provider is unavailable due to public health emergency; or
6. Employee 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.



Paid Expanded FMLA Leave

- Paid Expanded FMLA Leave
 - **Eligible:** On payroll for thirty (30) days
 - **Amount:** Twelve (12) weeks job protected leave. Total of 12 weeks for Covid-19 qualifying events and all other FMLA events.
 - **Waiting Period:** Ten Days Unpaid Then Ten (10) weeks paid but likely coordinated with Paid Sick Days
 - **Pay Rate:** No less than 2/3 usual pay for normally scheduled hours full-time/part-time
 - **Pay Cap:** \$200 per day and \$10,000 aggregate
 - **Accrual Usage:** Cannot Require Employees to Substitute Other Paid Leave But Can Allow if Employee Elects



Paid Expanded FMLA Leave

- Paid Expanded FMLA Qualifying Event
 - To allow an employee who is unable to work or telework, to care for the employee's child (under age 18) if the child's school or place of care is closed or the child's childcare provider is unavailable due to a public health emergency
 - All other events from previous House Bill eliminated
 - Became effective April 2.



Intermittent FFCRA Leave

- If for school/child care closing or if employee working remotely the employer can (not required) permit leave to be taken intermittently.
- Otherwise employee must take the leave continuously. Can take any unused leave before end of 2020.



Small Business Exemptions from Emergency Paid Sick Leave and Expanded FMLA Leave

- Self-Certification – Document determination and retain (do not send to DOL)
- Fewer than 50 employees can be exempt from the requirement to provide expanded FMLA leave, or paid sick leave due to a school/child care closing (Reason No. 5), if an authorized officer of the company determines that:
 - (1) the leave would cause the company's expenses and financial obligations "to exceed available business revenues and cause the small business to cease operating at a minimal capacity;" OR
 - (2) the absence of the employee requesting leave would put the company's operational or financial health at risk because of the employee's "specialized skills, knowledge of the business, or responsibilities"; OR
 - (3) there are not enough employees with the requisite skills who are available to perform the work that the employee performs and that the employee's "labor or services are needed for the small business to operate at a minimal capacity."



Other Exemptions

- Health Care Workers – Anyone employed at any doctor's office, hospital, health care center, clinic, post-secondary educational institution offering health care instruction, medical school, local health department or agency, nursing facility, retirement facility, nursing home, home health care provider, any facility that performs laboratory or medical testing, pharmacy, or any similar institution, employer or entity or contractors.
- Emergency Responders – Employee necessary for provision of transport, care, health care, comfort, and nutrition of such patients or whose services are otherwise needed to limit the spread of COVID-19.



FFCRA Leave Documentation

- Employee must provide name, dates of leave, reason for leave, and an oral or written statement that the employee is unable to work because of the qualifying reason PLUS:
 - If for government issued quarantine or isolation order the name of the issuing entity;
 - If for recommended quarantine by a health care provider the name of the health care provider;
 - If caring for someone who is quarantined must also provide the name of the person and relationship
 - If for school/child care closure the name of the child, name of school/child care provider, and “a representation that no suitable person” will be caring for the child during the leave period. If over 14 must state special circumstances exist requiring the employee to provide care.



Employer Financial Assistance – Tax Credits

- Employers reimbursed for costs of leave via tax refunds and credits process – cash flow issue
- Includes qualified health plan expenses and Medicare tax
- 100% refundable tax credits if **required** to offer leave/sick days
- Federal income tax withheld from employees, employee/employer share of social security and Medicare taxes
- Must keep:
 - Copies of IRS Form 7200s (Advance Payment of Employer Credits Due to COVID-19) submitted to IRS
 - Copies of IRS Form 941s (Employer's Quarterly Federal Tax Return) submitted to IRS



No Retaliation

- Unlawful for an employer to take action against an employee because the employee took paid sick leave or engaged in other legally protected activity. A failure to provide paid sick leave is treated as a violation of the minimum wage provisions of the FLSA.
- Interference and retaliation are unlawful, as they are under the FMLA, and the remedies are the same. However, if the employer is too small to be covered by the traditional FMLA (has fewer than 50 employees), then the employee has no private right of action against the employer. Instead, the employee would have to file an administrative complaint with the DOL.



Main Areas of Employment Law Concern

- State and Local Laws Also Apply (but few in Alabama)
- COBRA
- FMLA
- ADA
- FLSA
- WARN
- NLRA
- OSHA



Common Question: WARN

- If we close or lay off employees due to decline in business will WARN apply?
 - First – consider state mini-WARN laws (not Alabama)
 - Second – Federal WARN involves closure or layoff exceeding six months or reduced hours below 50% for six months.
 - Federal WARN will (hopefully) not be implicated with layoffs if this turns around quickly but you must stay on top of this.
 - WARN may be implicated if business will be permanently closed
 - Third – WARN has an exception for “natural disasters” which may also apply to this situation and limit/reduce notice requirements.
 - Fourth – Law may change
 - MONITOR YOUR UNIQUE BUSINESS CONCERNS AND SEEK COUNSEL IF CLOSING OR LAYING OFF BECOMES NECESSARY



FLSA: Quarantines, Layoffs, and Furloughs

- Do we have to pay employees who are sent home due to business decline?
- Must review FLSA and State Laws
 - Hourly/Non-exempt employees are only paid for hours worked. So, generally nonexempt employees do not need to be paid. Consider how you would dovetail existing time off with unemployment benefits.
 - Exempt salaried employees generally must receive their full salary in any week in which they perform any work, subject to certain limited exceptions. Where an employer offers a bona fide benefits plan or vacation time, there is no prohibition on an employer requiring that such accrued leave or vacation time be taken on a specific day(s) (note new paid days). This will not affect the salary basis of payment so long as the employee still receives an amount equal to the employee's guaranteed salary. However, an employee will not be considered paid "on a salary basis" if deductions from the predetermined compensation are made for absences occasioned by the office closure during a week in which the employee performs any work.
 - Exempt salaried employees are not required to be paid their salary in weeks in which they perform no work.



FLSA: Teleworking and “Hazard Pay”

- FLSA requires employers to accurately record and pay for all hours worked regardless of location.
- Must ensure teleworking employees record all hours worked
 - Online reporting system
 - At a minimum employee should turn in their own records.
 - Consider policies restricting number of hours per day/week. Combined with strict monitoring may help prevent unexpected overtime bills.
 - Train new teleworking employees on “hours worked” and reporting.
- Hazard Pay: Include in regular rate for overtime purposes



New EEOC Guidance

- 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, ADA-covered employers may ask such 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.
- When may an ADA-covered employer take the body temperature of employees during the COVID-19 pandemic?
 - Generally, measuring an employee's body temperature is a medical examination. Because the CDC and state/local health authorities have acknowledged community spread of COVID-19 and issued attendant precautions, employers may measure employees' body temperature. However, employers should be aware that some people with COVID-19 do not have a fever. **(TAKE PRIVACY STEPS)**



New EEOC Guidance

- Does the ADA allow employers to require employees to stay home if they have symptoms of the COVID-19?
 - Yes. The CDC states that employees who become ill with symptoms of COVID-19 should leave the workplace. The ADA does not interfere with employers following this advice.
- When employees return to work, does the ADA allow employers to require doctors' notes certifying their fitness for duty?
 - Yes. Such inquiries are permitted under the ADA either because they would not be disability-related or, if the pandemic influenza were truly severe, they would be justified under the ADA standards for disability-related inquiries of employees. As a practical matter, however, doctors and other health care professionals may be too busy during and immediately after a pandemic outbreak to provide fitness-for-duty documentation. Therefore, new approaches may be necessary, such as reliance on local clinics to provide a form, a stamp, or an e-mail to certify that an individual does not have the pandemic virus.



Common Question: ADA

- Is fear of exposure a disability under the ADA?
 - Probably not standing alone but will again depend on an individual's particular health situation and any complications or exacerbations.
 - For example if an individual has a mental impairment that is exacerbated by Coronavirus fears, this may be evaluated as a potential ADA situation.



Common Question: ADA

- If an individual has a disability that is impacted by Covid-19 what accommodations must be considered?
 - Example – employees suffers from COPD or asthma or severe anxiety disorder and has received advice from physician not to leave home due to risk of exposure.
 - Must Engage in Interactive Dialogue
 - Possible accommodations To Consider
 - Work remote or in isolated environment
 - Limits on employee travel or exposure to co-workers/public
 - Availability of cleaning materials, hand sanitizer
 - Leave of Absence
 - Relief from attendance system
 - Comfort Animals



Common Question: General

- Are there discrimination issues employers should be thinking about as well?
 - The CDC has advised the following: “ Do not show prejudice to people of Asian descent, because of fear of this new virus. Do not assume that someone of Asian descent is more likely to have COVID-19.”
 - The DOL has also raised discrimination concerns.
 - Ensure that all policies and decisions regarding sending employees home are being taken in a non-discriminatory manner.



Common Question: Workers Comp

- Are there workers compensation concerns?
 - Potentially. If an employee contracts COVID-19 while traveling for work, or works in a position with heightened risk of exposure (healthcare, TSA screeners), they may file a workers compensation claim.
 - There may be an issue related to the origin of where they contracted COVID-19 and whether, even if exposed while working, the disease is covered by the system when the general public is also broadly exposed.
 - State workers' compensation laws may vary and require a differing approach. The State of Washington has announced quarantines for first responders/healthcare workers will be covered as workers' compensation.
 - Carriers seem to be accepting claims in the health care sector but denying them in other industries.



OSHA's Role

- OSHA Website provides general information.
<https://www.osha.gov/>
- OSHA defers to the Centers for Disease Control and Prevention (CDC), the National Institute for Occupational Safety and Health (NIOSH), and the World Health Organization (WHO).
- The CDC defers to State Health Departments for testing.
- OSHA has issued Guidance on Preparing Workplaces for COVID-19





Guidance on Preparing Workplaces for COVID-19

OSHA 3990-03 2020



Do I Have to Provide Masks or Gloves?

- The CDC is recommending cloth face coverings in public settings where social distancing is difficult to maintain. NOT N95 respirators or surgical masks.
- Infected people should wear masks,
 - But they should be quarantined.
- Conduct a PPE Hazard Assessment § 1910.132
 - Written certification required under § 1910.132(d)
 - Workplace evaluated
 - Person certifying the evaluation was done
 - Date(s) of the hazard assessment
 - Document identified as Certification of hazard assessment
- If you make masks available, you must provide a § 1910.134 Appendix D to each such employee who voluntarily elects to wear one.
- If you make nitrile gloves available, make sure you train on their use, § 1910.132(f)



Injury and Illness OSHA Recordability

- If an employee is exposed to the coronavirus in the work environment, and
- Is diagnosed with COVID-19 by a licensed health care professional, and
- The case results in “medical treatment,” RWA, DAFW, loss of consciousness or death.
- For most employers clear evidence is required that the case is work related. No real duty to investigate.
- Health care, emergency responders (emergency medical, firefighting, law enforcement), and correctional employers follow existing standard – must make work-relatedness determinations.
- But it has to be “more likely than not” that the work environment either caused or contributed to the illness.
- It is probably not work related if an employee either lives with someone or has come into close contact away from work with someone who is infectious.
- No emergency temporary standard.



Whistleblower Protection

- Section 11(c) of the OSH Act prohibits employers from retaliating against employees who exercise rights protected under the Act.
- Refusing to perform hazardous work is considered to be a right protected by the Act.
- A plan to reasonably protect the employee from exposure to the disease is your defense.



Unemployment Claims

- As of April 27, 2020
- ADOL has:
 - Paid \$372,344,837 in benefits to 178,761 claimants from March 16 to April 24.
 - \$247,872,000 of this is Federal Unemployment Compensation ("FPUC") – the \$600 per week federal enhancement
 - 64% of claims made since March 16 now paid.
 - *"We know that there are many who have yet to be paid, and we are working to get those claims processed quickly. It's important to note that it can take up to 21 business days to process a claim, and with the added record-setting volume, it may take longer in some cases."* ADOL Secretary Fitzgerald Washington



Unemployment Benefits Claims

- Claims Data so far....
- Alabama has a claims tracker at:

uicclaimstracker.labor.alabama.gov

Historical Table	
3/14/2020	1,824
3/21/2020	12,369
3/28/2020	80,984
4/4/2020	106,739
4/11/2020	77,515
4/18/2020	66,432



Unemployment Claims

- Pandemic Unemployment Assistance is available to self-employed, gig workers, church employees, nonprofit and government, or contract employees who ordinarily are not eligible. Max of 39 weeks between 1/27 – 12/31. AL began processing April 13
- Federal Pandemic Unemployment Compensation – the \$600 federal enhancement. Available to anyone eligible for the unemployment programs for weeks March 29 – July 25. AL began paying April 8.
- Pandemic Emergency Unemployment Compensation – Part of the CARES Act providing 13 additional weeks of unemployment benefits after a claimant exhausts regular unemployment benefits. Applied to weeks March 29 through December 31, 2020.
- Can take up to 21 days to receive benefits and payments may be made retroactively.



Unemployment Claims

- Disqualifications
 - Quit work without good work-related cause
 - Refuse to return to work
 - Refuse to receive full-time pay
- May refuse to return for “good cause” and still draw benefits: high risk family at home, caring for someone with COVID, children at home because of school closure.
- Fraudulent cases could result in fines, jail, and inability to receive future benefits until fraudulent claims repaid.
- Employers to utilize the New Hire system to report employees who refuse to return to work.



Alabama Safer At Home Order

- Effective April 30, 5:00 p.m.
- Encouraged to:
 - Minimize travel
 - Wear face coverings
 - Wash hands frequently
 - Not touch face
 - Sneeze into tissue/elbow
 - Disinfect frequently used items
- COVID + quarantined for 14 days



Alabama Safer at Home Order - Employees

4. Protections for employees. Effective April 30, 2020, at 5:00 P.M., and unless otherwise permitted or required by this order, all employers shall take reasonable steps, where practicable as work duties permit, to protect their employees by:

- a. avoiding gatherings of 10 employees or more;
- b. maintaining six feet of separation between employees;
- c. regularly disinfecting frequently used items and surfaces;
- d. encouraging handwashing;
- e. preventing employees who are sick from coming into contact with other persons;
- f. facilitating remote working arrangements; and
- g. minimizing employee travel.



Alabama Safer at Home Order - Customers

5. Protections for customers, etc. Effective April 30, 2020, at 5:00 P.M., and unless otherwise permitted or required by this order, the operator of any business, government office, or other establishment open to the public shall take reasonable steps, where practicable, to protect their customers, constituents, or other guests by:

- a. avoiding gatherings of 10 or more such persons;
- b. maintaining six feet of separation between such persons (except for those persons who share the same household); and
- c. regularly disinfecting frequently used items and surfaces.



Alabama Safer at Home Order – Still Closed...

- Entertainment Venues
 - Night clubs
 - Bowling alleys
 - Concert venues
 - Bingo halls
- Athletic Facilities
 - Gyms
 - Sports requiring interaction within six feet
- Close Contact Businesses
 - Barbers
 - Hair and Nail Salons
 - Massage Parlors



Feel Free to Call or Email with Questions...



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