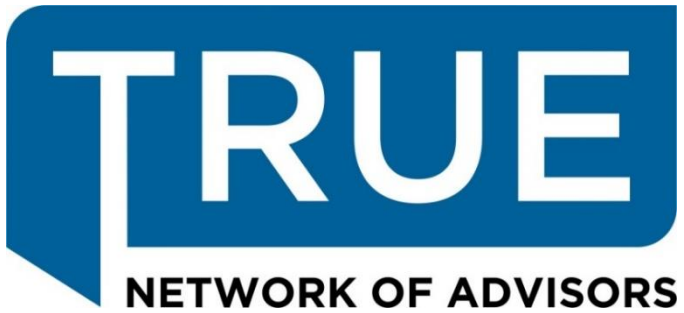
TRUE Network Advisors COVID-19 Resources Webinar Series: FFCRA and Guidance Update



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Evolving CDC Guidelines for Employers

- The more the experts learn about COVID-19, their guidance changes. Make sure you use the most recent CDC recommendations for employers and businesses:

https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html

- Or OSHA's guidance for employers:

https://www.osha.gov/Publications/OSHA3990.pdf

Evolving CDC Guidelines for Employers

- **What <u>hasn't</u> changed:**
  - Employees who have been exposed (in "close contact," which is less than 6 feet for 15 minutes or more) to an individual with symptoms or a confirmed case of COVID-19 should be instructed to **home isolate for 14 days and self-monitor** for symptoms
    - **Rule applies regardless of whether positive or symptomatic case was wearing a mask or other PPE**
  - Immediately obtaining a test result based on exposure **should not be required and is unlikely to be conclusive** due to variations and biological delays in the ability to detect the virus

Evolving CDC Guidelines for Employers

- **What <u>has</u> changed:**
  - Negative test results as part of return-to-work strategies are **no longer recommended by CDC (more on this in a minute)**
  - Rather, employees who have symptoms, have been diagnosed with COVID-19, or tested positive may discontinue home isolation if:
    - At least 10 days have passed since symptom onset and
    - At least 24 hours have passed since resolution of fever without fever-reducing meds, and
    - Other symptoms have improved

CDC notes: "A limited number of persons with severe illness may produce replication-competent virus beyond 10 days, that may warrant extending duration of isolation for up to 20 days after symptom onset."

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Evolving CDC Guidelines for Employers

- May an employer **still require negative test results** (RT-PCR testing for detection of SARS-CoV-2 RNA) as part of its return to work program?
- **Probably, yes**
  - EEOC has not changed its guidance authorizing employers to require COVID testing: See A.6 and A.7 at https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws
  - CDC suggests that testing may be used for "**persons who are severely immunocompromised**" or "**to discontinue isolation or other precautions earlier than would occur under the symptom-based strategy**"
  - Doctors offices may contradict employer requirements, citing CDC guidelines

How to Assess Leave or Accommodation Requests in Return to Work

- Start with **FFCRA** and **special state/local ordinances** (if any) mandating COVID-19-related leave
- Then **FMLA**
- Then **ADA**
- Then **other benefit plans** and policies
- Workplace culture and **retention** considerations

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 ⅔ 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:

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);
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; or
6. is experiencing any other substantially-similar condition specified by the U.S. Department of Health and Human Services.

New FFCRA FAQs on Return to School

- On August 27, DOL released new FFCRA guidance:
  - School is open but only for remote learning
    - DOL Says: FFCRA leave may be taken for the school closure reason if employees are unable to work or telework due to caring for children who are remote learning
  - School is open 7 days, but children attend on alternating schedules (M/W/F and T/Th) and remote learning takes place days when children are not attending in-person
    - DOL Says: FFCRA leave may be taken for the school closure reason if employees are unable to work or telework due to caring for children on the days they are required to attend school remotely
  - School provided parents the choice of in-person or remote learning and parents chose remote learning:
    - DOL Says: No FFCRA leave for parental choice of remote learning

The FFCRA Goes to Court

- *State of New York v. DOL* (SDNY)
- On August 3, 2020, the federal district court for the Southern District of New York ruled in favor of the State of New York's challenge against DOL regulations implementing the FFCRA
  - Court said DOL "jumped the rail" when it issued FFCRA regulations
- Invalidated four aspects of DOL Guidance
  - Work availability requirement
  - *Health care provider* definition
  - Requirement of employer consent to intermittent leave
  - Requirement that employees provide notice of leave prior to taking leave

State of New York v. DOL (SDNY, August 2020)

Work Availability Requirement

- DOL rule: Employees were not eligible for FFCRA leave when the employer had no work for them, including furloughed employees
- SDNY ruling: Not consistent with statutory language
- Result:
  - Employees may be eligible for FFCRA leave even if the employer has no current work for them
  - Employees still must have a FFCRA-qualifying reason for leave

State of New York v. DOL (SDNY, August 2020)

Health Care Provider Exemption

- DOL rule: DOL interpreted this broadly to apply on an employer level and expanded it to include vendors of the health care provider employer and virtually any entity that provides medical services, produces medical products, or is otherwise involved in the making of COVID-19 related medical supplies
- SDNY ruling: Definition is too broad because it goes beyond the FMLA-based definition referenced in the FFCRA and includes employees whose roles bear limited nexus to the provision of healthcare services

State of New York v. DOL (SDNY, August 2020)

Comparison of Health Care Provider Definitions

FMLA Definition	Doctor of medicine or osteopathy who is authorized to practice in their state; or any other person determined by the Secretary of Labor to be capable of providing health care services. Professionals so designated include podiatrists, dentists, clinical psychologists, optometrists, many chiropractors, nurse practitioners, nurse midwives, clinical social workers, physician assistants, and other similar professionals.
DOL Definition for FFCRA	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. Would also include any individual employed by an entity that contracts with any of these institutions, as well as anyone employed by any entity that provides medical services, produces medical products, or is otherwise involved in the making of COVID-19 related medical supplies.

State of New York v. DOL (SDNY, August 2020)

Health Care Provider Exemption

- **Result:**
  - Employers now must make an individualized determination of whether the employee requesting leave fits into definition of health care provider
  - Base determination upon the skills, role, duties, or capabilities of the employees who could be exempted

State of New York v. DOL (SDNY, August 2020)

Intermittent Leave

- DOL Rule: Permits employees to take leave intermittently only if the employer and the employee agree
- SDNY ruling: DOL failed to explain why employer consent is required, so employer consent is invalid
- Result:
  - Employer consent to intermittent leave not required
  - Rule is valid insofar as it bans intermittent leave based on qualifying conditions that implicate an employee's risk of viral transmission

State of New York v. DOL (SDNY, August 2020)

Intermittent Leave

Intermittent Leave <u>Not</u> Available	• Employee subject to government quarantine or isolation order related to COVID-19 • Employee has been advised by a healthcare provider to self-quarantine due to concerns related to COVID-19 • Employee is experiencing symptoms of COVID-19 and is taking leave to obtain a medical diagnosis • Employee is taking care of an individual who either is subject to a quarantine or isolation order related to COVID-19 or has been advised by a healthcare provider to self-quarantine due to concerns related to COVID-19 • or is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services
Intermittent Leave Available	• Employee who is caring for the employee's child if the child's school or place of care has been closed or the child care provider of such child is unavailable due to COVID-19-related reasons.

State of New York v. DOL (SDNY, August 2020)

Employee Advance Documentation Requirement

- DOL rule: Prior to taking leave, employee must provide documentation indicating the reason for leave, the leave duration, and the authority for the order qualifying them for leave
- SDNY ruling: The requirement to furnish documentation before taking leave is invalid. The statute allows employees to provide "such notice as is practicable"
- Result:
  - Reasonable documentation and notice requirements may still apply, but not as an advanced/precondition to for the requested leave

State of New York v. DOL (SDNY, August 2020)

- What Now?
  - Scope of ruling is not clear – court had authority to issue a nationwide injunction on DOL rules, but did not address scope
    - Same reasoning could be used by other courts
  - Court did not address any delay of effectiveness
  - DOL Options:
    - Request a temporary stay
    - Appeal
    - Revise regulations and guidance
  - Retroactive application? DOL (discretionary) Enforcement

State of New York v. DOL (SDNY, August 2020)

- **Employer Considerations:**
  - Evaluate impact of ruling and effect of adjusting FFCRA administration
  - Have employees been excluded due to (lack of) work availability?
  - Have you been excluding employees from FFCRA coverage because they fell under the “health care provider” exemption? Can they still be exempted under narrower definition?
  - Effect of intermittent leave on operations?
  - Evaluate notice and documentation procedures

CARES Act Unemployment Update

- The $600 supplemental unemployment benefit under the CARES Act has now expired (more on that in a minute)
- The **Pandemic Unemployment Assistance** ("PUA") benefit, which was created under the CARES Act for "people not otherwise eligible for regular unemployment compensation (including independent contractors and self-employed individuals)" **continues until December 31, 2020**
  - DOL Guidance on last month indicates that an employee who "**refuses to work because of COVID-19 health or safety concerns nevertheless may be eligible**" for PUA even where regular state unemployment benefits may not be an option due to the availability of work and the employee's voluntary refusal to work

Executive Order Unemployment Extension

- August 8, 2020 Executive Memoranda ordered the use of disaster relief funds for states to provide an additional $400 in weekly unemployment benefits
  - $400 weekly unemployment benefit must be requested by states and is intended to replace the $600 in federal weekly benefit previously provided under CARES Act

Executive Order Payroll Tax Deferral

- **Also on August 8, 2020 a separate Executive Memoranda authorized employers to delay the payment of the 6.2% employee portion of Social Security** payroll tax for certain employees
  - IRS Notice 2020-65 (8/28/20) explains more detail:
    - Program is voluntary for employers
    - Available for wages paid on a pay date between 9/1/20 and 12/31/20
    - Wages must be under $4,000 per bi-weekly pay period to be eligible
    - Employers would be responsible for paying the tax ratably between 1/1/21 and 4/30/21
    - No relief if employee is not employed during repayment period
    - More guidance expected

DOL Field Assistance Bulletin on Teleworking

- On August 24, US DOL issued Field Assistance Bulletin 2020-5 regarding the importance of employers to **track and retain records of hours worked** by non-exempt employees who are **remote or teleworking**
  - Reminder that "employer[s] must pay … employees for all hours worked, including work not requested but allowed and work performed at home"
  - "If the employer knows or has reason to believe that work is being performed, the time must be counted as hours worked"
  - **Employers should provide a** "reasonable reporting procedure for nonscheduled time and then compensating employees for all reported hours of work, even hours not requested by the employer"

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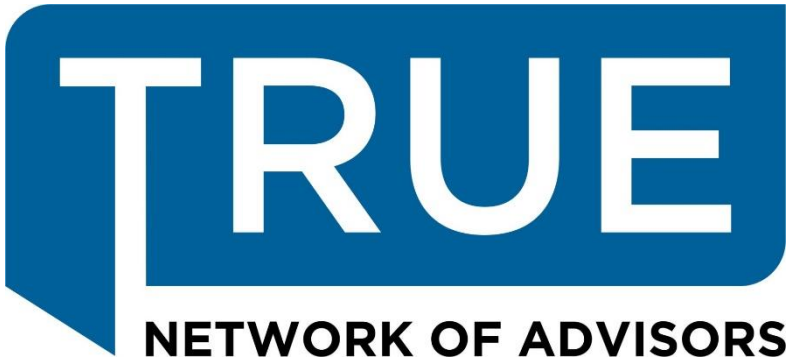

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