

# Navigating State and Federal Employee Leave Rights During the Pandemic

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**P**rior to the pandemic, multistate employers already had to grapple with different, and sometimes conflicting, leave laws. The coronavirus crisis has added another layer of complexity as federal, state and local lawmakers continue to issue COVID-19-specific mandates.

"For better or for worse, employers with work locations across multiple jurisdictions are likely already familiar with the difficulties in keeping track of and complying with the patchwork of state and local leave laws," said Brett Coburn, an attorney with Alston & Bird in Atlanta. "This ever-growing patchwork has been a trend for the last several years and definitely presents a lot of challenges."

To complicate matters more, coronavirus-related workplace laws are evolving. "One day you're in compliance, and the next day you're not, even though you haven't changed anything," said Karla Kraft, an attorney with Stradling in Newport Beach, Calif.

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Coronavirus and COVID-19 ([www.shrm.org/ResourcesAndTools/Pages/communicable-diseases.aspx](http://www.shrm.org/ResourcesAndTools/Pages/communicable-diseases.aspx))

### Coordinating Leave Entitlements

Employees may be entitled to paid leave under coronavirus-related federal emergency laws, such as the Families First Coronavirus Response Act (FFCRA), which provides workers with up to 80 hours of paid sick leave for certain reasons ([www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/labor-department-issues-more-coronavirus-related-workplace-guidance.aspx](http://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/labor-department-issues-more-coronavirus-related-workplace-guidance.aspx)) and an additional 10 weeks of partially paid family leave if employees are unable to work because their child's school or child care provider is closed or unavailable due to the pandemic.

Under the FFCRA, which covers workplaces with fewer than 500 employees, employers are eligible for tax credits to cover the cost of providing paid leave for specified reasons. The legislation sought to "ensure that workers are not forced to choose between their paychecks and the public health measures needed to combat the virus, while at the same time reimbursing businesses," the U.S. Department of Labor (DOL) said.

Employees may qualify for additional paid leave under state and local laws. Employees also may be eligible for unpaid leave under the Family and Medical Leave Act (FMLA) and similar state laws.

Furthermore, employers with at least 15 employees are covered by the Americans with Disabilities Act (ADA) and may have to provide leave as an accommodation for those whose medical conditions put them at high risk if they contract COVID-19. "Employers should consider having a policy on reasonable accommodations to ensure all understand this commitment," said Myra Creighton, an attorney with

Fisher Phillips in Atlanta.

"Each of these laws can be challenging by themselves," she said. When laws overlap or conflict, it becomes "even more challenging for employers to comply."

Coburn noted that, beyond the struggles with simply being aware of what laws apply to a particular employee, challenges can certainly arise when an employee's request for leave is made for multiple reasons at the same time.

Employers should err on the side of caution and grant leave in close-call situations in order to reduce legal risk, Coburn said. But they might not be entitled to a tax credit under the FFCRA if the leave was not truly covered by the emergency paid-leave law, he added.

Thomas Gies, an attorney with Crowell & Moring in Washington, D.C., said companies must make their best judgments on FFCRA eligibility questions.

### **Two Approaches for Multistate Policies**

"Generally speaking, employers really have two paths they might take to ensure compliance with all applicable leave laws," Coburn said.

One approach is to stay abreast of all applicable requirements in the jurisdictions where the company has employees and to tailor policies and practices to comply with applicable requirements at each facility. The other approach, which still requires staying up to speed on new laws and changes to existing laws, is to set a companywide policy that complies with the most-generous applicable leave requirements.

"If you can afford to, the easiest thing to do is comply with the strictest law for all of your offices," Kraft said.

Regardless of which approach is taken, Coburn recommended that employers designate a person or team in the HR or legal department to monitor for new leave requirements and work with outside counsel when needed.

### **Requesting Documentation**

Employers should work with the employee on the type of documentation they may submit to prove the absence was COVID-19 related if the employee is having difficulty providing it, Creighton said.

The FFCRA regulations provide specific guidance (<https://www.dol.gov/agencies/whd/pandemic/ffcra-questions>) about what information an employer should document for tax-credit purposes. For example, employees requesting leave for quarantine should provide the name of the government agency or health care provider that ordered the employee to quarantine or self-isolate. Employees who request leave for child care purposes must provide the name of the school or child care provider that has closed or become unavailable due to the pandemic and a statement that no other suitable person is available to care for their child.

Employers are not required to approve FFCRA leave if the employee doesn't provide sufficient information to support the tax-credit claim, according to the DOL. Notably, however, the FFCRA does not permit an employer to require verification from a health care provider as a condition of approving covered leave.

To the extent that an employee requests to take leave under a state or local law, Coburn said, the employer needs to be mindful of what the applicable law permits or prohibits an employer to require.

Under the Los Angeles COVID-19 emergency leave law, for example, employers can't require (<https://www.natlawreview.com/article/state-law-round-covid-19-state-and-local-paid-sick-leave-law-developments-us>) a doctor's note or other documentation for an employee's absence.

"The other area where there continues to be much talk about medical documentation is when an employee is returning to work after having been diagnosed with COVID-19 or otherwise required to self-quarantine because of exhibiting symptoms or exposure to others," he observed.

Many companies are attempting to strike a balance by requesting but not requiring a doctor's note, he said, while at the same time requiring employees to certify that they meet current U.S. Centers for Disease Control and Prevention guidelines (<https://www.cdc.gov/coronavirus/2019-ncov/index.html>) for returning to work after being sick with COVID-19.

Leave entitlements under the FFCRA have "teeth," Creighton noted, meaning that an employer may be sued for violating the law. "Given the cost of litigation if an employer does not provide the leave or if the employer terminates an employee rather than give the leave, the best practice is to request the information the regulations permit and grant the leave if it is provided."

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