FFCRA and COVID-19
Employment Law Issues
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• AV Preeminent rated by Martindale Hubbell since 2004.
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About Zashin and Rich

Zashin & Rich Co., L.P.A. ("Z&R") has over 30 attorneys who specialize in labor and employment law with offices in Columbus and Cleveland, representing both private and public employers.

Z&R represents its clients in labor negotiations, human resources matters, and civil service. Attorneys of Z&R have collectively negotiated over 1000 contracts and have represented private and public employers in arbitrations, impasse proceedings and litigation.

Attorneys represent private employers, universities and colleges, state agencies, special districts, cities, counties, townships, housing authorities, hospitals and others. Attorneys handle matters at the National Labor Relations Board, the State Employment Relations Board, State Personnel Board of Review, and local civil service commissions.
IMPACT OF COVID-19 AGENDA

- FFCRA – Family First Coronavirus Response Act
  - Emergency Family Medical Leave Expansion Act
  - Emergency Paid Sick Leave
- Worker’s Compensation
- Unemployment Compensation
- ADA
- FMLA
- FLSA
- Union Contracts
Most cases are never counted

- Cases detected in mainland China early in the outbreak
- Severe
- Cases with symptoms (e.g. fever)
- Deaths

Mild cases (hardest to count)

Source: Imperial College London
COVID-19 looks a lot closer to the season flu than to previous coronavirus outbreaks

COVID-19
Fatal cases: 3.4%

Seasonal flu
Fatal cases: 0.1%

SARS
Fatal cases: 10%

MERS
Fatal cases: 34%

COVID-19, SARS, and MERS data are global and total to date. Seasonal flu data are U.S., for the 2018-2019 season.
Chart: Elijah Wolfson for TIME • Source: CDC and WHO • Created with Datawrapper
Family First Coronavirus Response Act (FFCRA) – General Information

FFCRA consists of 3 components that impact employers
  – Family and Medical Leave Act Expansion: EFMLEA
  – Public Health Emergency Paid Sick Leave Act: EPSLA
  – Coverage of Testing for COVID-19

• **Effective Date:** April 2 until December 31, 2020

**Definition of Public Health Emergency**
“An emergency with respect to COVID-19 declared by a Federal, State, or local authority.”

Part 1: EFLMEA
Family & Medical Leave Act (Sec. 3101)

- Family and Medical Leave Expansion Act – EFLMEA
  H.R. 6201 amends FMLA 29 U.S.C. 2611
- Expansion of the reasons for the use of Family Medical Leave for “public health emergency”.
- It does **not** provide an additional 12 weeks for the separate reason of public health emergency.
  - New section: 29 USC 2612(a)(1)(F).
“Eligible Employee” for public health emergency
An employee who has been employed for at least 30 calendar days who is requesting “Public Health Emergency Leave”
  – Compare to traditional requirement of 12 months and 1250 hours worked

“Covered Employer” for public health emergency
Employer with “fewer than 500 employees”
  – Compare to traditional: 50 or more for each working day during 20 or more calendar workweeks
Exclusions: The Secretary of Labor is authorized to issue regulations that would exclude:

- Certain *health care providers and emergency responders* from the definition of eligible employees
- Employers with fewer than 50 employees from the requirements of the act when the requirements would jeopardize the viability of the business

- Sec. 3105 of the bill *allows* employers of employees who are health care providers or emergency responders to exclude such employees from the application of the public health emergency leave provisions
• **Emergency Responders** (definition Homeland Security Act)
  – According to U.S. Homeland Security Presidential Directive HSPD-8: The term *first responder* refers to those individuals who in the early stages of an incident are responsible for the protection and preservation of life, property, evidence, and the environment, including emergency response providers as defined in section 2 of the Homeland Security Act of 2002 (6 U.S.C. § 101), as well as emergency management, public health, clinical care, public works, and other skilled support personnel (such as equipment operators) that provide immediate support services during prevention, response, and recovery operations.
  – According to 6 U.S.C. § 101(6): The term *emergency response providers* includes Federal, State, and local governmental and nongovernmental emergency public safety, fire, law enforcement, emergency response, emergency medical services providers (including hospital emergency facilities), and related personnel, agencies, and authorities.
• Health Care Providers (definition from FMLA)
  – A doctor of medicine or osteopathy who is authorized to practice medicine or surgery (as appropriate) by the State in which the doctor practices
  – Any other person determined by the Secretary to be capable of providing health care services
EFLMEA - Family Medical Leave
“Qualifying Need”
for Public Health Emergency Leave
(Sec. 3102, Sec. 110(a)(2)(A))

- FMLA qualifying need - when an employee is unable to work or telework due to a need for leave to care for the son or daughter under 18 years of age if the child’s school/place of care has been closed or if the child care provider of the child(ren) is unavailable due to a public health emergency (29 USC 2612(a)(1)(F))

- Employees continue to have FMLA leave under their own or their family’s “serious medical condition”
  - Adhere to a required or recommended quarantine due to exposure or symptoms of coronavirus or
  - Care for an at-risk family member who is adhering to a required or recommendation to quarantine due to exposure to or symptoms of coronavirus
EFLMEA - Family Medical Leave
Amount of Public Health Emergency Leave
(Sec. 3102, Sec. 110(b) & (c))

• **First 10 days** of employee leave **may** consist of unpaid leave
  – Employee may elect to substitute accrued paid leaves during this 10 days

• **Law does not reference** whether the employer **may pay** the employees during the first 10 days

• **After the 10 days**, for the remainder of the 12 weeks of leave, Employers **must** pay employees at least 2/3 of the employee’s regular rate for the number of hours the employee would otherwise be normally scheduled.
  – Cap at $200 per day and $10,000 in the aggregate for each employee
EFLMEA - Family Medical Leave

Amount of Public Health Emergency Leave

(Sec. 3102, Sec. 110(b) & (c))

- Employees with irregular schedules: Calculate based on the average number of hours the employee worked for the six months prior to taking Emergency FMLA
  - For employees who have worked less than six months use the employee’s reasonable expectation at hiring of the average number of hours the employee would normally be scheduled to work

- Employee required to provide notice where foreseeable and practicable
• Employers with 25 or more employees must return employees to the same or equivalent position upon return to work (same as traditional FMLA)

• Employers with fewer than 25 employees are generally excluded from this requirement if the position no longer exists due to an economic downturn or other circumstances caused by a public health emergency.
  – This exclusion subject to the employer making reasonable attempts to return the employee to an equivalent position and requires the employer to make efforts to return the employee to work for up to a year following the employee’s leave.
Part 2: EPSLA
Emergency Paid Sick Leave Act
(Sec. 5101)

• Effective April 2, 2020
• Employer must provide emergency paid sick time to employees unable to work or telecommute because the employee is:
  1. Subject to a Federal, state, or local quarantine/isolation order related to COVID-19
  2. Under the advice of a health care provider to self-quarantine
  3. Experiencing symptoms of COVID-19 and is seeking a medical diagnosis
  4. Caring for an individual who is in self-quarantine on the advice of a health care provider or due to a federal, state, or local order
     Note → not limited to just family members
  5. Caring for a child if the school or place of care has closed or if the child care provider of the child is unavailable due to COVID-19 precautions
  6. Experiencing any other substantially similar condition specified by the Secretary of Health and Human Services

• An Employer of an employee who is a health care provider or an emergency responder may elect to exclude such employee from the application of this subsection (Sec. 5102(a))
EPSLA: Reasons Requiring Paid Sick Time
(Sec. 5102(a))

- Full time employees = 80 hours at regular rate
- Part time employees = the number of hours that such employee works, on average, over a 2-week period
- For categories 1, 2, and 3 - Employee’s own COVID-related condition, employers must pay at the regular rate
  - Capped at $511 per day or $5,110 in aggregate
- For categories 4, 5, and 6 - caring for another and “substantially similar conditions”, Employers must pay at least 2/3 of the employee’s regular rate
  - Capped at $200 per day or $2,000 in aggregate
- No carryover to the following year
EPSLA: Eligibility and Coverage

• **Employee Eligibility** – no minimum time for work
  – Employees are entitled to emergency paid sick leave regardless of how long the employee has been employed by the employer

• **Employer Coverage**
  – Includes any public employer that employs one or more employees, and any private employer that employs fewer than 500 employees
EPSLA: Notice Requirement & Prohibited Acts
(Sec. 5102(d) – Sec. 5104)

- **Notice**: Employers required to post a notice of the requirements described in the Act
  - Secretary of Labor to publish such a notice within one week

- **Prohibited Acts**
  - Cannot require employee to use other paid leaves provided by the employer before the employee uses emergency paid sick leave
  - Cannot require an employee to find a replacement employee while the employee is using leave under the Act
  - Cannot discharge or discipline employees taking leave in accordance with Act
• Nothing in the Act shall be construed to:
  – In any way diminish the rights or benefits that an employee is entitled to under any:
    • Other Federal, State, or local law;
    • Collective Bargaining Agreement; or
    • Existing employer policy
  – Require financial or other reimbursement to an employee from an employer upon the employee’s separation from employment for paid sick time under the Act that has not been used by such employee
Employers offering group health insurance benefits are prohibited from imposing any cost sharing requirements (including deductibles, co payments, and coinsurance) for the following items/services furnished during the COVID-19 health emergency:

1. In vitro diagnostic products and their administration
   - COVID-19 testing that is “approved, cleared, or authorized” by the FDA

2. Items and services furnished to an individual that result in an order for administration of testing under item (1) at any of the following:
   » Health Care Provider Office Visits (in person and telehealth visits)
   » Urgent Care Center Visits
   » Emergency Room Visits
• Tax Credit for cost of providing paid sick leave as required by the Family First Coronavirus Response Act is **NOT** available to public employers
  – Sec. 7001(e)(4)

Congress has been asked to reconsider this provision
If Police/EMS/Corrections/firefighter contracts COVID-19 in the course of performing his/her duties (to the extent that can be confirmed) is treatment and wage loss covered by WC.?

• NO. It would be considered an occupational disease rather than an injury. For an OD to be compensable, the OD must be unique to the employment and the employment must create a risk of contracting it in a greater degree and in a different manner than the general public.

• Being a pandemic makes the risk applicable to the entire population rather than unique to the work of first responders.
The BWC has an exposure policy pursuant to which it pays for testing of first responders exposed to bodily fluids, etc. which can lead to a claim.

The BWC could implement something similar to the way needle sticks and other exposures are treated with respect to first responders.

BWC issued a Covid19 FAQ dated 3-20-2020

ORC 4123.06 defines emergency medical worker
ORC 2935.01 defines police officer.
The BWC Exposure Policy is Policy No. CP-05-02.
As of March 15 Order of Governor DeWine

- Individual waiting period for unemployment suspended
- Requirement to seek work suspended for applications related to the coronavirus outbreak
- Unemployment allow for employees not offered paid leave and are quarantined by Dr. or employer
- Unemployment allowed for employees not offered paid leave and their employer temporarily closes
COVID19 and UNEMPLOYMENT

As of March 15 Order of Governor DeWine

▪ Employees who chose self-quarantine not eligible
▪ Payments paid to employees as result of shutdown will be paid from the “mutual” account
▪ Fees for late reports and late payments will be waived

SEE - http://jfs.ohio.gov/ouio/CoronavirusAndUI.stm
COVID19 and UNEMPLOYMENT

- Layoffs & severance payments & Unemployment:
  - From current ODJFS manual

4. Severance pay allocated by the employer or the department to week(s) of unemployment is deductible from unemployment benefits. Severance pay allocated by the employer to the last week or day of employment will only be deductible for that week and will not affect benefits beyond that week.

http://www.odjfs.state.oh.us/forms/num/JFS08201/pdf/ - page 37, number 4
When to Consider
Paid Leaves or Extension of Leaves

1. Employee presents COVID, is exposed, isolated
2. Employee self-concern absence
3. Child care - Parental care
4. “Compromised health condition” self or family

When may employees access paid leaves and what time limits on the use

Check applicable union contracts & policies
Considerations for Paid Leaves or Extension of Leaves

- Authority to grant paid leave RC 124.3888
- Requirement to use accumulated leave first
- Leave without pay
- Reduction in pay / layoff / furlough
  - (private sector WARN act)
- Reduction in pay/position – Public RC 124.34
- Unilateral grant of benefit
  - possible ULP if unions
- Exigent circumstances
C19 and Remote Work

- Allow or not
- Require or limit
- Technical support
- Security – hackers
COVID-19 and Union Contracts

Emergency or Exigent circumstances

- Management Rights
- Sick and Other Leaves
- Work Assignments / Bargaining unit work
- Hours of Work / Alternate provisions
- Remote Work provisions
- Insurance Payments
- Force Majeure provisions
- Emergency or Exigent conditions provisions
  - Declared by the Governor/President
ADA - What is a “Disability”

1. Physical or mental impairment that substantially limits a major life activity; OR
2. A “record of” such impairment; OR
3. Being “regarded as” having such an impairment.
   • * * Only #1 is entitled to a reasonable accommodation

Is C-19 a disability? – “regarded as” or “actual”?
Americans with Disabilities Act Considerations:

- Medical Questions
- Medical Examinations
- Stereotyping
- Adverse actions against employees with a disability
- Direct threat of infected employee

Is C-19 a disability – “regarded as” or “actual”?
COVID 19 & Employment Law Issues

**EEOC Guidance - Pandemics**

- **EEOC Guidance**  ADA still applies, but does not “interfere or prevent” employers from following the suggestions of the CDC

- **EEOC relies on guidance from 2009:**
  - Addressed Swine Flu/H1N1
  - Specifically, addressed pandemic planning before, during, and when it “appears imminent.”
  - https://www.eeoc.gov/facts/pandemic_flu.html#q16
Disability Related Inquiries Include:

– Medical examinations
  • Q. temperatures? A. depends
– Test: Questions likely to elicit disability information
Is a Temperature Test a Medical Examination Under the ADA?

• ADA does not define “medical examination.”
• EEOC defines “medical examination” as a “procedure or test that seeks information about an individual’s physical or mental impairments or health.”

The Centers for Disease Control and Prevention defines a fever as 100.4°F/38°C or higher.
During employment
– Inability to perform essential job functions
– Pose a direct threat

Focus – direct threat:
▪ “Significant risk” of “substantial harm” to the health and safety of employee/others
▪ Which cannot be eliminated by a reasonable accommodation

➢ Disability Leave or Injury Leave
The 2009 EEOC Guidance Focuses on:

- **Severity of the illness**
  - Similar to seasonal influenza or H1N1 influenza
  - not a direct threat
- **Current advice from CDC and local officials**
- **Appropriate for location**
COVID 19 & Employment Law Issues

EEOC Guidance – Disability Related Inquiries

Before a Pandemic:

– **Can’t ask** about immune systems
– **Can ask** if employee is high risk under CDC guidelines
– **Can plan**
  • Contamination/cleaning
  • Workforce planning
  • Consider potential accommodations
    – work from home
    – leave as an accommodation
During a Pandemic:

- Can send employees home with symptoms
- Can ask about symptoms
- Can take temperature
- Can ask questions about exposure after travel
- Can’t ask employee who does not have symptoms about other conditions, unless public health officials determine so
EEOC Guidance – ADA
Disability Related Inquiries

- **During a Pandemic:**
  - **Can require** employees to wash hands
  - **Can ask** for a return to work not infected
    - But, CDC is recommending against this
Is C19 a “serious medical condition”? 

An illness, injury, impairment or physical or mental condition that involves either

– inpatient care  OR

– continuing treatment by a health care provider

Q. If an employer requires that an employee stay home, should this be paid or unpaid?

Q. Would this be FMLA leave?  Depends if it meets the Emergency FML.
Q. Could an employee refuse to come to work because of fear of contracting the virus?
   Yes - if reasonable or compromised health condition

Q. Would this raise the question of work-at-home as an ADA accommodation?
   Possibly – Depends if valid disability

Q. Could an employer mandate that an employee wear protective gear, such as a face mask or latex gloves? Is this a problem under the ADA?
   No - unless job related or preventive measure
Question: Does the FMLA cover an employee who has contracted COVID-19 or takes leave to care for a family member who has contracted COVID-19?
Answer: Yes – if qualified under the new provisions under the EFMLEA, Emergency Family Leave
Question:
Does the Family Medical Leave Act ("FMLA") cover an employee that stays home from work as a precautionary measure to avoid contracting COVID-19?

Answer: NO
## FMLA Checklist - Attendance

<table>
<thead>
<tr>
<th>Completed?</th>
<th>Attendance</th>
</tr>
</thead>
<tbody>
<tr>
<td>Y</td>
<td>Notify employees about absences relating to quarantine for potential COVID-19 exposure, contracting the disease or caring for a spouse or minor child in the same household that has contacted COVID-19</td>
</tr>
<tr>
<td>N</td>
<td>Inform employees policies in instances where the schools in their geographic area are closed due to COVID-19</td>
</tr>
<tr>
<td></td>
<td>Promptly address any leave/accommodation employee requests</td>
</tr>
<tr>
<td></td>
<td>Advise employees about PTO and vacation and how those policies will interact with COVID-19 related absences</td>
</tr>
</tbody>
</table>
## FMLA Checklist – Managing Illness

<table>
<thead>
<tr>
<th>Completed?</th>
<th>Managing Illness</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Instruct employees to stay home if ill, especially if experiencing flu-like symptoms (fever, and any other symptoms, for at least 24 hours)</td>
</tr>
<tr>
<td></td>
<td>Recommend frequent and thorough hand washing, and regular use of hand sanitizer</td>
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<tr>
<td></td>
<td>Advise employees to cough/sneeze into a tissue, or if unavailable, into your elbow/shoulder, and not toward others; avoid others if ill</td>
</tr>
<tr>
<td></td>
<td>Avoid touching eyes, nose, and mouth with unwashed hands, and also any shared tools or areas until hands are cleansed; limit touching items in common areas only as necessary</td>
</tr>
<tr>
<td></td>
<td>Educate employees that facemasks are not necessary to avoid contamination</td>
</tr>
<tr>
<td></td>
<td>Inform employees they will be sent home if they arrive at work sick or develop symptoms as the workday progress</td>
</tr>
</tbody>
</table>

3/22/2020
1. Does the FLSA require an employer to pay a non-exempt employee if the employee is **sent home** due to illness/symptoms consistent with COVID-19 and performs no additional work for the rest of the day or week?

   NO

**BUT** Check applicable union contracts local ordinances and policies
2. Does the law require the employer to pay a non-exempt employee if the employer closes due to the COVID-19 outbreak, and the employee performs no additional work for the rest of the day or week? NO

3. Does the law require the employer to pay an exempt employee if the employee is sent home due to illness/symptoms consistent with COVID-19? YES
4. Does the law require the employer to pay an *exempt* employee if the employee is **sent home** due to illness/symptoms consistent with COVID-19?

   YES

5. Does the law require the employer to pay an *exempt* employee if the employer **closes** due to the COVID-19 outbreak?

   YES
6. Does the law require the employer to pay *any* employee who is under government-imposed quarantine and cannot work?

   NO

7. Can the employer legally send *employees home* if they are ill or appear to have *symptoms* associated with COVID-19?

   YES
8. Can the employer *legally ask employees* who *report feeling ill* or who call in sick whether they are experiencing symptoms consistent with COVID-19?

   YES
▪ Have a plan
  ▪ Compare to emergency or strike plan
▪ Make sure the plan is consistent with EEOC guidelines and CDC recommendations
▪ Use CDC Risk Assessment as a guide in decision making
Thank You and Good Luck!

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