The Many Faces of the FFCRA
Employment Law Issues
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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
COVID-19 Unknowns

ABBY SOMETHING...

ABBY NORMAL!!!

makeameme.org
Family First Coronavirus Response Act (FFCRA)

DOL poster

FFCRA:

CARES Act
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 Dates: April 1, 2020 until December 31, 2020

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

FFCRA is not Retroactive

Estimated costs to implement FFCRA: > $500 million
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).

DOL FAQ’s Link
https://www.dol.gov/agencies/whd/pandemic/ffcra-questions
“Eligible Employee” for public health emergency
“An employee who has been employed for at least 30 calendar days or who was laid off after March 1 and reemployed prior to December 31”

“Covered Employer”
All public Employers
Private sector - fewer than 500 employees
EFLMEA - Family Medical Leave
Expanded Coverage/Eligibility
(Sec. 3102, Sec. 110(a)(1))

Private sector - fewer than 500 employees at the
time an employee would take leave.
All for-profit and non-profit entities (FFRCA).
• Employees include:
  – Full time
  – Part time
  – Employees on leave
  – Temporary employees jointly employed (FLSA)
  – Day laborers supplied by temp agency
Exempt Employers – under 50 employees

- Exempt from providing leave or PSL for care of the son or daughter whose school or place of care has been closed or whose child care provider is unable to provide care
- Jeopardize the viability of the business as a going concern, substantial financial risk, insufficient available workers.
- Applies to both EFML and PSL
- See 826.40(b)(1) for detail
**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

- Exclusions from FMLEA: 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.  

  Sec. 3105
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.
Who is an emergency responder?

Anyone necessary for the provision of transport, care, healthcare, comfort and nutrition of such patients, or others needed for the response to COVID-19. This includes but is not limited to military or national guard, law enforcement officers, correctional institution personnel, fire fighters, emergency medical services personnel, physicians, nurses, public health personnel, emergency medical technicians, paramedics, emergency management personnel, 911 operators, child welfare workers and service providers, public works personnel, and persons with skills or training in operating specialized equipment or other skills needed to provide aid in a declared emergency, as well as individuals who work for such facilities employing these individuals and whose work is necessary to maintain the operation of the facility.
• 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
Who is a “health care provider”

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. This includes any permanent or temporary institution, facility, location, or site where medical services are provided that are similar to such institutions.
FMLA qualifying need

• 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
FMLA definition of “son or daughter”

FMLA expressly includes children 18 or older and incapable of self-care because of a mental or physical disability.

- Actually caring for the child
- For both EFMLEA and EPSLA. See 29 CFR Part 826.10

Note: FMLA definitions apply unless a specific definition is included in FFCRA
Child Care Provider definition for Emergency Family Medical Leave

Caregiver includes those not compensated only applies to the EMFL.

(c) A **Child Care Provider** is a provider who receives compensation for providing child care services on a regular basis or a child care provider as defined in 42 U.S.C. 9858n, including:

“Childcare provider” means a provider who receives compensation for providing child care services on a regular basis, including:

- a licensed center-based childcare provider
- a licensed group home childcare provider
- a family childcare provider (one individual who provides childcare services for fewer than 24 hours per day, as the sole caregiver, and in a private residence, including those who are not compensated or licensed)
- other licensed provider of childcare services for compensation
- a childcare provider that is 18 years of age or older who provides childcare services to children who are either the grandchild, great grandchild, sibling (if such provider lives in a separate residence), niece, or nephew of such provider, at the direction of the parent. Includes caregiver who is not compensated or licensed.
Employee leave request must include:

1. Employee name and leave requested
2. Date(s) leave requested
3. Covid-19 qualifying reason for leave
4. Statement that employee is unable to work or telework because of the Covid-19 qualifying reason
5. Name of entity or health care provider issuing quarantine/isolation order
6. Name/age of child; school/care provider; statement no other suitable person is available to care for child

Factors vary for EFML and PSL
Available “telework” disqualifies employees for EFML and PSL for ability to work.

- Employer has available and permits telework
- No extenuating circumstances preventing
- Telework is no less work than performed on-site
- Must record and be paid for all telework
- Employer must know of the telework time
- Telework program should be flexible

Applies to both EFML and PSL
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 or Employer may require use under current policies

• 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
• Employer FMLA policy may require employee to consecutively use available paid leave
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 1, 2020 through December 31, 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))
Employee may take paid sick leave only if being subject to an order of quarantine or isolation “prevents him/her from work or telework”

**BUT** applies only if the employer has work for employee

Applies even if the closure of a business resulted related to the Covid-19.

The employee may be eligible for unemployment.
EPSLA: Eligibility for Paid Sick Time
(Sec. 5102(a))

• Limited to the time unable to work, telework, test positive, or taking affirmative steps to obtain medical diagnosis and waiting for test results
• Eligible if sought medical advice, not meet criteria but advised to self-quarantine
• Not eligible if self-quarantine without seeking medical diagnosis
• Not eligible if telework is available
Fourth reason for PSL – care for an individual
• “but for” a need to care for the individual
• Employer must have work
• Employee must have genuine need
• Not available if he employee has no personal relationship
• Examples: immediate family member, roommate with expectation that employee care for the person quarantined (who is subject to quarantine or is vulnerable to Covid-19)
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
• 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 (sec. 5110(A))
  – Employers may exclude health care provider or emergency responder. (sec. 5102)

• Employer Coverage
  – Includes any public employer that employs one or more employees and any private employer that employs fewer than 500 employees (sec. 5110(B))
EPSLA: Notice Requirement & Prohibited Acts

(Sec. 5102(d) – Sec. 5104)

Employers required to post a notice [Link to DOL poster](https://www.dol.gov/sites/dolgov/files/WHD/posters/FFCRA_Poster_WH1422_Non-Federal.pdf)

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
– Cannot discharge or discipline employees taking leave in accordance with Act
Nothing in the FFCRA 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.
Determining an Employee’s Pay Under the Emergency Paid Sick Leave Act (EPSLA)

Start Here

Does the employee qualify under one of the six reasons (below) for leave under the EPSLA?
  YES
  Does the employee qualify for reasons 1, 2, or 3 in the EPSLA?
  NO
  Does the employee qualify for reasons 4, 5, or 6 in the EPSLA?
  NO
  The Employee is not entitled to Emergency Paid Sick Leave and must use accrued leaves.
  YES
  Does the employee work full time or part time?
    Part Time
    The Employee is entitled to Emergency Paid Sick Leave at their regular rate of pay for the average number of hours worked in a two-week period. (Max $511/day & $5,110 total)
    Full Time
    Does the employee work full time or part time?
      Part Time
      The Employee is entitled to 80 hours of Emergency Paid Sick Leave at their regular rate of pay. (Max $511/day & $5,110 total)
      Full Time
      Does the employee work full time or part time?
        Part Time
        The Employee is entitled to 80 hours of Emergency Paid Sick Leave at two thirds (2/3) their regular rate of pay. (Max $200/day & $2,000 total)
        Full Time
        The Employee is entitled to Emergency Paid Sick Leave at two thirds (2/3) their regular rate of pay for the average number of hours worked in a two-week period. (Max $200/day & $2,000 total)

Qualifying reasons to take Emergency Paid Sick Leave (all relating to COVID-19):
(1) The employee is subject to a Federal, State, or local quarantine or isolation order.
(2) The employee has been advised by a health care provider to self-quarantine.
(3) The employee is experiencing symptoms of COVID–19 and seeking a medical diagnosis.
(4) The employee is caring for an individual who is subject to such an order in (1) or such advice in (2).
(5) The employee is caring for their child whose school or place of care has closed or is unavailable.
(6) The employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services.
Determining an Employee’s Pay Under the Emergency Family and Medical Leave Expansion Act (EFMLEA)

Start Here

Has the employee been on payroll for at least 30 calendar days?

YES

Is the employee requesting leave to care for their child whose school or place of care has closed or is unavailable due to COVID-19?

YES

The employee is entitled to 12 weeks of EFMLEA leave. Has the employee already used Emergency Paid Sick Leave from the EPSLA?

YES

Does the employee have accrued balances of paid leave?

YES

The employee can use two weeks of EPSLA leave during the first two weeks of EFMLEA leave. This is paid at 2/3 the employee’s regular rate.

THEN

The following 10 weeks must be paid at 2/3 the employee’s regular rate of pay.

NO

The employee is not eligible for leave under the EFMLEA.

NO

The employee is not eligible for leave under the EFMLEA.

NO

The employee can use their accrued paid leave during the first two weeks. This is paid at the employer’s normal leave rates.

THEN

The following 10 weeks must be paid at 2/3 the employee’s regular rate of pay.

NO

The first 10 days (2 weeks) of EFMLEA leave may be unpaid.

THEN

The following 10 weeks must be paid at 2/3 the employee’s regular rate of pay.

Note: Payments to employees under the EFMLEA may not exceed $200 a day or $10,000 total.
<table>
<thead>
<tr>
<th>Qualifying Reasons for: Emergency Paid Sick Leave (EPSL)</th>
<th>Weeks 1 and 2 (80 hours)</th>
<th>Weeks 3 through 12 (additional 10 weeks)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. subject to a Federal, State, or local quarantine or isolation order related to COVID-19</td>
<td>Paid EPSL at regular rate</td>
<td>No EFML</td>
</tr>
<tr>
<td>2. has been advised by a health care provider to self-quarantine related to COVID-19</td>
<td>Paid EPSL at regular rate</td>
<td>No EFML</td>
</tr>
<tr>
<td>3. is experiencing COVID-19 symptoms and is seeking a medical diagnosis</td>
<td>Paid EPSL at regular rate</td>
<td>No EFML</td>
</tr>
<tr>
<td>4. is caring for an individual subject to an order described in (1) or self-quarantine as described in (2)</td>
<td>Paid EPSL at 2/3 regular rate</td>
<td>No EFML</td>
</tr>
<tr>
<td>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</td>
<td>Paid EPSL at 2/3 regular rate</td>
<td>Unpaid EFML</td>
</tr>
<tr>
<td><strong>This is Also the Only Qualifying Reason for Emergency Family Medical Leave (EFML)</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>6. is experiencing any other substantially-similar condition specified by the U.S. Department of Health and Human Services</td>
<td>Paid EPSL at 2/3 regular rate</td>
<td>No EFML</td>
</tr>
</tbody>
</table>
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
2. COVID-19 testing that is “approved, cleared, or authorized” by the FDA
3. 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
Ohio Unemployment Comp
As of March 15 Order of Governor DeWine

- Individual waiting period and requirement to seek work for unemployment both suspended
- 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
- Payments paid to employees as result of shutdown will be paid from the “mutual” account
- Payments paid to employees as result of shutdown will be paid from the “mutual” account
The Many Faces of the FFCRA

1. Pandemic Unemployment Assistance “PUA”
2. Federal Pandemic Unemployment Compensation “FPUC”
3. Pandemic Emergency Unemployment Compensation “PEUC”

- The CARES Act provides relief to individuals in the form of unemployment assistance beyond what is traditionally available under state unemployment insurance programs.

- The CARES Act requires states to enter into agreements with the federal government to receive reimbursement.
CARES Act Federal Unemployment

- Assistance is available without any waiting period. sec. 2105
- Provides funding for reimbursements sec.’s 2102, 2103, 2104, 2105

See Program Guidance Letters 15-20 and 16-20

Link to Act

CARES Act - Federal Unemployment Compensation

1. Section 2102 provides Pandemic Unemployment Assistance “PUA” to unemployed persons who would not otherwise been eligible to receive UC benefits (i.e. 1099 workers, gig economy workers).

Requirements: they or a family member diagnosed or have symptoms, etc.; primary for child care; quarantined or advised quarantine; had to quit; place of employment closed; and criteria established by DOL

• Assistance limited to 39 weeks, no waiting period
• Not covered if able to telework or receiving paid benefits
2. Section 2104 Federal Pandemic Unemployment Compensation (“FPUC”)

• an emergency increase in U.C. benefits amount of $600 per week in addition to an employee’s unemployment compensation by the State

• Eligible if receive $1 or more in State benefits

• Eligible employees are entitled to FPUC payment until July 31, 2020.
3. Section 2107 Pandemic Emergency Unemployment Compensation “PEUC” provides eligible employees actively seeking work who have exhausted their maximum UC benefits an additional 13 weeks of assistance.

• Under PEUC employees may receive their regular U.C. compensation and the added $600 per week Federal Pandemic Unemployment Compensation, Section 2104.
CARES Act – Federal Unemployment

Sec 2103 – Relief for Government Entities & Non-Profits (amends Social Security Act 42 USC 1103)

• DOL to issue guidelines to allow States flexibility for reimbursing employers

• DOL will transfer funds to be used exclusively to reimbursement in amounts equal to ½ of benefits paid from March 13 to Dec. 31, 2020.
Sec. 2108  Shared Work Programs - provides financing for states to implement short-time compensation/shared work programs to help avoid layoffs. Participating employers reduce affected employees’ hours in a uniform manner and employees receive unemployment assistance that is proportionate to their reduced hours.

- Limit 26 times amount of reg. UC benefits. Not apply to seasonal or temp employees. Full reimbursement.

Jfs.ohio.gov/ouc/SharedWorkOhio
SharedWork Program FAQ’s

Q. Who is eligible to participate in Shared Work?
   A. Any contributing or reimbursing employer is eligible.

Q. What is the cost to participate?
   A. The CARES Act provides funding for states to apply for 100% reimbursement for benefits paid out during the covid-19 crisis. Ohio is applying for this funding. Currently our State legislature approved a 50% coverage for employers unemployment compensation benefits.

Q. If we are eligible, can employers still offer insurance to their employees in this plan?
   A. Benefits are encouraged to remain intact for employees on SharedWork Ohio and any reduction in benefits must be equal to all employees if on SharedWork or not.
SharedWork Program FAQ’s

Q. Does this apply to all workers in an office affected by the Coronavirus issues?
   A. Employers provide a list of all employees to be part of their SharedWork Ohio plan. The reduction in work hours should be the same for each unit affected.

Q. Are there any benefits employees/employers would be eligible for from the recently passed coronavirus relief bill?
   A. The CARES Act provides an additional $600/wk in federal compensation for individuals receiving unemployment assistance including SharedWork programs. Those who qualify will be paid retroactively to when their claim was approved.
Q: Are furloughed employees eligible for Unemployment Compensation in Ohio?

A: Yes, employees furloughed are eligible for Unemployment. Ohio has waived the one week “waiting period”. An employee who is furloughed (for a week or more) is immediately eligible to receive benefits.

Under the CARES Act, the employee is eligible to receive an additional $600 in Federal Pandemic Unemployment Compensation (“FPUC”) per week of unemployment.
Q: Are employees who have had their hours reduced by an employer eligible for Unemployment Compensation in Ohio? How about the $600 FPUC described above?
A. It depends on how significantly the employee’s work schedule is reduced.

“Partial unemployment eligibility” generally applies this calculation:
Benefit Amount for One Week of Total Unemployment \text{MINUS} (any pay received by the EE over 20\% of One Week Total Unemployment Amount) = EE’s partial unemployment weekly payment.
Because the State provides a 20\% “buffer” under R.C. 4141.30(C), it is likely that anyone who has their hours reduced by more than 40\% will receive some partial unemployment compensation. Individual eligibility is calculated by week involving a number of factors.

If an employee is eligible for at least $1 in State benefits the employee is eligible to receive the $600 weekly FPUC (through July 31, 2020).
(A) As used in this section:
(1) "Exempt employee" means a permanent full-time or permanent part-time county, township, or municipal corporation employee who is not subject to a collective bargaining agreement between a public employer and an exclusive representative.

(2) "Fiscal emergency" means any of the following:
(a) A fiscal emergency declared by the governor under section 126.05 of the Revised Code.
(b) A fiscal watch or fiscal emergency has been declared or determined under section 118.023 or 118.04 of the Revised Code.
(c) Lack of funds as defined in section 124.321 of the Revised Code.
(d) Reasons of economy as described in section 124.321 of the Revised Code.
(B) (1) A county, township, or municipal corporation appointing authority may establish a mandatory cost savings program applicable to its exempt employees. Each exempt employee shall participate in the program of mandatory cost savings for not more than eighty hours, as determined by the appointing authority, in each of state fiscal years 2010 to 2013. The program may include, but is not limited to, a loss of pay or loss of holiday pay. The program may be administered differently among employees based on their classifications, appointment categories, or other relevant distinctions.

(2) After June 30, 2013, a county, township, or municipal corporation appointing authority may implement mandatory cost savings days as described in division (B)(1) of this section that apply to its exempt employees in the event of a fiscal emergency.

(C) A county, township, or municipal corporation appointing authority shall issue guidelines concerning how the appointing authority will implement the cost savings program.
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.
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.
4167.06 Right to refuse to work under unsafe conditions.

(A) A public employee acting in good faith has the right to refuse to work under conditions that the public employee reasonably believes present an imminent danger of death or serious harm to the public employee, provided that such conditions are not such as normally exist for or reasonably might be expected to occur in the occupation of the public employee.
Covid 19: Considerations for Paid Leaves or Extension of Leaves

• Authority to grant paid leave RC 124.388
• 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
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 and COVID-19

- 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”?
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 $100.4^\circ F/38^\circ C$ or higher.
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
Overtime Laws - FLSA Guidance

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 FLSA 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 FLSA require the employer to pay an *exempt* employee if the employee is *sent* *home* due to illness/symptoms consistent with COVID-19? **YES**
Overtime Laws - FLSA Guidance

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

   YES – for the full week
6. Does the FLSA 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
Thank You and Good Luck!

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