Attendance and Leave

Is COVID-19 covered under the Family and Medical Leave Act (FMLA)?

It depends. Assuming the employee satisfies the FMLA eligibility criteria, if an employee suffers complications that arise from COVID-19, that may create a serious health condition that is covered under the FMLA. Also, if an employee is caring for a family member with a serious health condition, that leave may be protected under the FMLA. However, leave taken by an employee for the purpose of avoiding getting sick would not be protected under the FMLA.

In addition, the Families First Coronavirus Response Act (FFCRA) (Division C, the Emergency Family and Medical Leave Expansion Act) amends the FMLA to cover leave for a qualifying need related to an emergency with respect to COVID-19 declared by a federal, state or local authority. A *qualifying need* means the employee is unable to work (or telework) due to a need to care for their minor child when the child's school or place of care has been closed, or the child care provider is unavailable, due to a public health emergency. The FMLA expansion, effective April 2, 2020, until December 31, 2020, applies to employers with fewer than 500 employees and to employees who have been employed for at least 30 calendar days.

Employers should review any applicable state FMLA laws as well.

Are employers allowed to require employees to leave work, or stay home, if they have symptoms of the coronavirus (COVID-19)?

Yes. The Centers for Disease Control and Prevention state that employees who become ill with symptoms of COVID-19 should leave the workplace. The Americans with Disabilities Act does not interfere with employers following this advice.

What if an employee is absent from work during the coronavirus (COVID-19) pandemic?

An employer should enforce its existing policies that could touch on an employee absence during a pandemic, such as:

- An attendance policy; and
- Applicable leave policies, such as a sick leave, family and medical leave or PTO policy.

An employee should follow existing procedures, including any modifications made in light of the pandemic (e.g., relaxed or delayed absence reporting timelines), when reporting an absence. An employer's next steps depend on the reason for the employee's absence. For example, the absence may be related to the employee's own sickness, a covered relative's sickness or an inability to find child care. An employer should work with the employee and follow establish procedures and applicable compliance requirements.

Failure to follow the work rules and meet expectations may result in discipline, although an employer may wish to counsel the employee regarding any anxiety, stress or concern the employee may have with respect to coming to work during a pandemic.

How much information may an employer request from an employee who calls in sick during the coronavirus (COVID-19) pandemic?

The Americans with Disabilities Act (ADA) allows an employer to ask employees during a pandemic if they are experiencing symptoms of COVID-19. Employers must maintain all information about employee illness as a confidential medical record in compliance with the ADA.

How should an employer plan for increased absenteeism at the workplace during the coronavirus (COVID-19) pandemic?

During a public health emergency, employers should:

- Implement plans to continue essential business functions in case the organization experiences higher than usual absenteeism;
- Encourage all but essential employees to explore flexible working arrangements, including working remotely;
- Encourage managers and supervisors to allow more flexibility with respect to absences during a pandemic because issues such as child care and accessibility to a reliable network connection may keep employees from being as productive as they would like during usual work hours; and
- Consider a supportive management style, rather than a punitive one focused on discipline, during challenging times.

What rights does an employee have with respect to absences from work based on a fear of contracting the COVID-19 strain?

A healthy, asymptomatic employee's refusal to come to work based on a fear of contracting COVID-19 may be considered protected activity, and, therefore, protected under a number of whistleblower and anti-retaliation statutes at the federal, state and local levels.

The federal Occupational Safety and Health Act (the OSH Act), as enforced by the federal Occupational Safety and Health Administration (OSHA), allows an employee who may face imminent danger or a threat of death or serious physical harm at work, to avoid the workplace. The risk of contracting COVID-19 varies depending on a work location and industry, and may increase or decrease during the outbreak. OSHA classifies risks into four levels, ranging from "very high" to "low."

Therefore, certain employees may have a better claim of being subjected to imminent danger or a threat of death or serious physical harm than others, depending on the employee's risk level.

In addition, an employer's failure to address the spread of the virus in the workplace may trigger employee protections from retaliation for missing work.

An employer should try to work with a concerned employee to devise changes to work schedules or other flexible working arrangements, such as telecommuting, to address the employee's fears and anxieties. In addition, an employer may wish to refer the employee to its employee assistance program (EAP), if one is available.

An employer should consult with legal counsel prior to imposing discipline due to potential retaliation concerns.

Are there any laws protecting employees who cannot go to work because they are quarantined due to the coronavirus (COVID-19), even if they are not sick?

Yes. Some state and local paid sick leave laws allow employees to take leave when a public health authority determines that the employee's or a family member's presence in the community may jeopardize the health of others due to exposure or suspected exposure to a communicable disease, even if the employee or family member has not actually contracted the disease. A few states have discrete quarantine/isolation laws prohibiting an employer from terminating employees who are out of work because they are quarantined by a public authority. Further, some jurisdictions have passed temporary measures and guidance expanding and/or clarifying employees' leave rights in light of the COVID-19 pandemic.

At the federal level, the Families First Coronavirus Response Act (FFCRA) (Division E, the Emergency Paid Sick Leave Act), effective April 2, 2020, until December 31, 2020, requires employers to provide paid sick leave if an employee or a family member has been advised by a health care provider to self-quarantine due to concerns related to COVID-19, among other reasons.

Discrimination / EEO

During the COVID-19 pandemic, may an employer require employees to disclose their recent travel locations or prohibit employees from traveling to a non-restricted area on their personal time?

In this case, employers must be aware of potential discrimination and privacy implications. If an employer wishes to ask about recent travels, there should be guidance in place that ensures that employees disclose when they or family members have been in areas affected by coronavirus.

However, an employer generally may not prohibit legal activity, such as travel abroad by an employee: a variety of jurisdictions protect legal off-duty activities. Employers may provide information to their employees about the dangers of travel and can monitor employees returning from travel for symptoms.

May an employer require an employee who has traveled to a coronavirus-affected area or is suspected of having the coronavirus to undergo a medical examination before returning to work?

Yes. Requiring an employee to undergo a medical exam and provide a fitness-for-duty certification is permitted under the Americans with Disabilities Act (ADA) either because it would not be disability-related or it would be justified under the ADA standards for disability-related inquiries of employees, if the pandemic is truly severe. As a practical matter, however, doctors and other health care professionals may be too busy during and immediately after an 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 email to certify that an individual does not have COVID-19.

The Equal Employment Opportunity Commission's Pandemic Preparedness Guidance instructs employers to take direction from the Centers for Disease Control and Prevention or state/local public health authorities, which would provide the objective evidence needed for a disability-related inquiry or medical examination. In its Guidance, the EEOC recognizes that public health recommendations may change during a crisis and differ between states. Employers are therefore expected to make their best efforts to obtain public health advice that is contemporaneous and appropriate for their location, and to make reasonable assessments of conditions in their workplace based on this information.

May an employer take employees' body temperature during the coronavirus (COVID-19) outbreak?

Yes. The Equal Employment Opportunity Commission explains that measuring an employee's body temperature is, generally, a medical examination under the Americans with Disabilities Act. Because the Centers for Disease Control and Prevention and state/local health authorities have acknowledged community spread of COVID-19 and issued attendant precautions, employers may measure employees' body temperature. However, be aware that some people with COVID-19 do not have a fever.

What can an employer do to address discrimination against workers of Asian descent during the coronavirus outbreak?

An employer should send a clear message to all employees and supervisors that they should not discriminate, harass, bully or retaliate against individuals of Asian descent in connection with the COVID-19 outbreak, as this in is violation of the employer's policies against discrimination, harassment and retaliation and a violation of federal, state and potentially local law. Additionally, an employer should closely monitor the workplace to ensure that individuals of Asian descent are not being discriminated against or harassed. Once notified of a complaint, an employer should promptly investigate and be prepared to take interim as well as disciplinary measures. Additionally, an employer should not prohibit an employee of Asian descent from coming to work and may prohibit them from coming to work only if there is a legitimate nondiscriminatory business

reason for doing so (e.g., the employee recently visited Asia and is showing symptoms of COVID-19).

Payroll

How can payroll personnel ensure that employees are paid on time if they do not have direct deposit and the office is closed due to the coronavirus?

Encourage these employees to sign up for direct deposit now to ensure timely and secure wage payments. Employees should be able to enter their direct deposit information into the employer's Employee Self-Service Portal (ESSP) from their homes. Designate a contact person to help employees who need to set up remote access to the ESSP or are having trouble accessing it remotely.

For employees who still refuse to sign up for direct deposit, arrange for a delivery service to get paper checks to employees on time, in accordance with the applicable state wage payment law. Deducting the delivery service's charges from their next paycheck may incentivize these employees to sign up for direct deposit.

Note that state laws require that employees receive their full pay, without discount. However, despite being charged for delivery, the employees will still receive their full pay but will simply be charged for the privilege of receiving a paper check. The charge, however, must not leave them with less than the minimum wage for the workweek.

How can payroll employees working remotely print paper paychecks during the coronavirus crisis without access to an MICR printer?

Since states' reactions to the coronavirus vary, with some businesses being required to close in some states but not in others, multistate employers may be able to tap into the resources, including MICR (magnetic ink character recognition) printers, of their other divisions located in other states.

If that is not possible, or the employer does not have more than one office or division, and employees refuse to sign up for direct deposit, every effort should be made to pay them on time in accordance with the applicable state wage payment law. Documenting efforts to comply with the state wage payment laws is important, as it can serve as the basis for a reasonable cause defense if employees or a state labor department alleges that the employer failed to pay employees on time.

Can payroll be processed remotely if payroll employees cannot make it into the office due to the coronavirus crisis?

Yes. It is possible to process a payroll remotely. This will be easiest if employees are paid by direct deposit and the payroll department has access to the following basic equipment and tools:

- Online access to management and HRIS systems;
- Cloud-facilitated file sharing;

- Laptops with robust, up-to-date virus and malware protection that require two-factor authentication;
- Mobile hotspots;
- Virtual private networks (VPNs);
- Instant messaging capabilities; and
- Video conferencing.

Even with these capabilities, payroll managers may still have to go into the office periodically to pick up the mail. In general, higher-level employees and at least one employee of each key department should always have remote working ability in case the office needs to close temporarily for any reason.

If the office is closed due to the coronavirus and some employees are short on leave time, can other employees assist their colleagues by donating some of their leave?

Yes. The IRS allows employees to donate accrued leave to other employees under two circumstances:

- An employee suffers a medical emergency; or
- An employee is a victim of a presidentially declared disaster.

In both cases, an employer must have a written leave-sharing plan that meets Internal Revenue Code (IRC) criteria and employees must request leave in writing. The donated time is not taxable to the donors of the time, but it is taxable to the employees who receive the donated time.

Medical leave- and disaster leave-sharing plans must meet certain IRC criteria.

Recruiting and Hiring

Should an employer suspend hiring during the coronavirus pandemic?

It depends. Hiring decisions will be unique to each employer based on its current workforce and business needs. For the safety of its workforce as well as job candidates, an employer should consider measures that protect health and safety such as online recruiting methods, phone interviews, video interviews and other forms of remote hiring. During this uncertain time, it is essential for an employer to be transparent and communicate as much as possible.

What are some recruiting methods an employer consider during the coronavirus pandemic?

Because outbreak of the coronavirus may prevent an employer from recruiting job candidates in person at venues such as job fairs and community centers, an employer

should consider other forms of recruiting online, including social media such as LinkedIn, Twitter and Facebook.

How should an employer handle interviewing and hiring during the coronavirus pandemic?

For the health and safety of all involved, an employer should refrain from in-person interviews during the coronavirus pandemic. Instead, employers should consider other forms of remote and video interviewing and hiring via phone calls or online platforms such as Sykpe, Zoom or Google Hangouts.

What are some tips for handling video and remote interviewing and hiring during the coronavirus pandemic?

During the interviewing and hiring process, an employer may want to:

- Make sure the employer and the job candidate have the correct information to connect to the video or remote interview and that everyone knows how to access and use the technology;
- Be prepared and have a thorough understanding of the job candidate's resume and the job description;
- Know the job-related questions that are going to be asked;
- Be friendly and communicative and try to make sure the job candidate feels comfortable and at ease;
- Convey the employer's brand, mission and values and provide the job candidate with a sense of the organization's culture since they will not be able to see it firsthand;
- Remain focused and remove any distractions during the video or remote interview;
- Record the interview if possible, but make sure to comply with any federal and state laws regarding recordings; and
- Comply with any state laws concerning video interviews.

Labor Relations

May employers discipline employees who refuse to come to work or decline to work without additional safety measures due to fears of the coronavirus without violating federal labor law?

In general, employers can enforce their attendance and work policies as normal during the coronavirus pandemic. However, employers need to be aware that concerns about safety issues related to the coronavirus may be considered protected concerted activity if two or more employees are joining together to raise those concerns.

Any concerted activity designed to increase workplace safety would be protected by the National Labor Relations Act (NLRA). NLRA protections apply to all employees, even nonunionized workers, who join together. Employees may not be disciplined or discriminated against for engaging in protected concerted activity, including for refusing to come to work for safety reasons or declining to work without safety equipment such as face masks. These protections do not apply to an employee who is acting solely on their own behalf.

As noted above, a healthy, asymptomatic employee's refusal to come to work based on a fear of contracting COVID-19 may be considered protected activity, and, therefore, also protected under a number of whistleblower and anti-retaliation statutes at the federal, state and local levels.

May a unionized employer unilaterally change work rules to deal with the coronavirus outbreak?

Whether an employer may act unilaterally to make changes to the terms and conditions of employment of a unionized workforce is highly dependent on the terms of its collective bargaining agreement (CBA) with the union. Employers should review their CBA, especially the management rights clause and provisions covering mandatory subjects of bargaining, to determine if the change being considered must be negotiated with the union.

Making any changes not permitted by the CBA to the terms and conditions of employment of union-represented employees due to the coronavirus pandemic without discussing them with the union could result in a dispute with the union or an unfair labor practice charge being filed with the National Labor Relations Board.

Downsizing

Does the coronavirus pandemic qualify as an exception to the WARN Act's advance-notice requirements?

It depends.

While the federal Worker Adjustment and Retraining Notification (WARN) Act requires covered employers to provide written notice to certain parties 60 days in advance of a plant closing or mass layoff, the Act includes exceptions for unforeseeable business circumstances and natural disasters.

The WARN Act does not directly address whether a pandemic qualifies for an exception, although the argument can be made that the coronavirus (COVID-19) and its impact were unforeseeable.

However, that does not mean an employer is absolved from providing any notice under the Act. In the event that a shutdown or mass layoff could not be reasonably foreseen 60 days in advance, an employer still must provide as much advance notice as practicable to remain in compliance.

Employers should be aware that some states, including California, have mini-WARN Acts that differ from the federal WARN Act in terms of notice, coverage and other requirements.

Source: Reed Business - XPertHR

Wage and Hour

If an employee is exhibiting symptoms, what actions may an employer take?

Although not required, many HR experts recommend that employers consider paying employees who should not be at work but cannot afford not to earn wages. Employers may also have employees use paid leave such as vacation, PTO and sick leave (be sure to check state and local leave laws to determine exact requirements). Short-term disability plans could also provide paid leave for medically related absences.

An employer should use its discretion to ensure that its people are safe and continue to be engaged as employees, while balancing business risks and realities.

Does an employer need to pay employees who are not working?

Generally, no. Federal and state minimum wage and overtime requirements are related to hours worked, so employees who are classified nonexempt who are not working are not typically entitled to wages.

However, exempt employees paid on a salary basis must be paid their entire salary if they perform any work during a seven-day workweek. (However, there is an exception when an employee decides to stay home and not work when the workplace is open.)

In addition, nonexempt employees paid on a fluctuating workweek basis must be paid their full weekly salaries for every workweek in which they perform any work.

Any changes in work schedules without advanced notice may trigger state and local scheduling laws.

Employers also must take into consideration any legal obligations to pay salaries under employment contracts, collective bargaining agreements and other policies or under state wage law. Employers should also keep in mind the public relations aspect of not paying wages during this time, as it may be damaging to employer reputation and employee morale.