

COVID-19 Answering Employers' Questions

Donald Lawless, Barnes & Thornburg LLP

March 27, 2020



Labor and employment law veteran, trusted adviser and proven advocate
Don Lawless consistently delivers responsive, focused advice that gets his
clients where they need to go under the law, while leveraging their
workforce potential and business objectives.

Don focuses his practice in the pharmaceutical and health, food processing, manufacturing, higher education and service industries. His traditional labor experience is extensive and includes contract negotiation, grievance arbitration and defense of unfair labor practice charges, and union avoidance.

Don advises on workforce restructurings and works with clients on a broad range of civil rights compliance and defense, with particular emphasis on ADA compliance, facility and program access under Titles II and III of the ADA, FMLA compliance, and employment-related contracts and policies. He also represents multinational auto parts manufacturers, major global brands and universities in OSHA-related compliance and appeals.

As vice chair of the firm's Higher Education practice group, a significant portion of Don's practice is devoted to representing college and university clients in labor and employment matters and student affairs, athletic program compliance, internal investigations, tenure denial disputes, and facility and program accessibility issues. Notably, he directed a major public university's response to a comprehensive U.S. Department of Education's Office for Civil Rights (OCR) Title IX sexual violence compliance review, and for another, developed the client's strategy in response to the anticipated expiration of student Deferred Action for Childhood Arrivals (DACA) status. Don also successfully defends civil rights matters, including many discreet student OCR complaints of discrimination typically related to disability accommodation.

Don offers honed abilities in designing and executing a wide variety of workplace investigations. He consistently executes workplace investigations that are comprehensive and complete, ascertaining all the evidence available and rendering sound, balanced conclusions that are ultimately clear and justifiable.

Don is valued by clients and colleagues for his outstanding written work product. He is dedicated to achieving success for his clients and delivering value, and for taking the time to listen carefully to each client.

Don is a frequent speaker to a variety of organizations, such as the Michigan Chamber of Commerce, the Michigan Public Employer Labor Relations

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EDUCATION

The University of Texas at Austin
 School of Law, J.D., 1986

University of Michigan, B.B.A.,
 cum laude, 1980

BAR ADMISSIONS

Michigan

COURT ADMISSIONS

U.S. District Court for the
 Western District of Michigan

PRACTICES

Labor and Employment

Affirmative Action/OFCCP
 Compliance

Collective Bargaining

Accessibility and Disability

Discipline and Termination

Discrimination Defense

EEO Compliance

Labor Relations

Management and Employee
 Training

Disability, Leave and Medical
 Issues

National Labor Relations Board
 (NLRB)

Workplace Safety

Association, the National Association of College and University Attorneys, and numerous industry-specific organizations on such subjects as medical and recreational marijuana, strategic union avoidance, NLRB-related developments, DOL wage and hour and FMLA enforcement, equal pay compliance, and EEO enforcement developments.

Professional and Community Involvement

Co-author, Lexis Practical Advisor for Michigan

Board member, Michigan Chamber of Commerce, 2016 to present

Former chair, Michigan Chamber of Commerce Health and Human Resource Committee, 2012-2017

Member, American Employment Law Council

Member, National Association of College and University Attorneys

Chair and board member, The Rapid

Member, Lakeshore Advantage

Co-founder, West Michigan Works

Former second ward commissioner, East Grand Rapids, 1997-2005

Former chair, East Grand Rapids Planning Commission, 2007-2014

Honors

The Best Lawyers in America, 2008-2020

Chambers USA, Michigan, 2017-2019

Martindale-Hubbell, AV Preeminent

Union Avoidance

Workplace Counseling

Mergers and Acquisitions - Labor Issues

Arbitration and Grievances

Downsizing and WARN Act

Student Disability

Executive Level (or C-Suite)

Internal Investigations

Investigations and Compliance

Aviation and Unmanned Aerial Vehicles

Workplace Culture 2.0

INDUSTRIES

Agriculture and Food

Education

Colleges and Universities

LANGUAGES

English

Overview

- **Today's Focus**
 - Review recently issued Families First Coronavirus Response Act guidance
 - Share our “answers” to frequently asked questions about the FFCRA and answer your questions
- **Disclaimers**
 - Uncharted territory
 - *Not legal advice*
 - Often, no clear answers
 - This is fluid
 - Special issues for unionized companies – CBA terms and mandatory subjects of bargaining
 - Register for alerts, blogs and webinars at <https://insights.btlaw.com/6/7/forms/subscribe.asp>



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Employer Question: What if an Employee Tests Positive for COVID-19

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Issues

- Treat positive and “suspected but unconfirmed” the same
- Workplace source of infection?
 - Notify worker’s comp carrier?
 - Record in OSHA 300 log?
- Eligible for FMLA leave?
- Eligible for Family First Coronavirus Response Act leave?
 - Fewer than 500 employees
- Notify managers and supervisors of leave for non-disciplinary reasons
- Notify co-workers of exposure without naming infected employee



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Issues

- 14-day quarantine for employees with close contact
- Notify third parties of exposure
- Arrange for professional cleaning
- Communications with Public Health
 - Notify health department?
 - Respond to inquiries by CDC or public health officials



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Return-To-Work Issues

- **Test-based strategy:** Exclude from work until
 - Resolution of fever without the use of fever-reducing medications **and**
 - Improvement in respiratory symptoms (e.g., cough, shortness of breath), **and**
 - Negative test results
- **Non-test-based strategy:** Exclude from work until
 - At least 3 days (72 hours) have passed *since recovery* defined as resolution of fever without the use of fever-reducing medications **and** improvement in respiratory symptoms (e.g., cough, shortness of breath); **and**,
 - At least 7 days have passed *since symptoms first appeared*



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Employer Questions About The Families First Coronavirus Response Act

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Families First Coronavirus Response Act

Effective April 1, 2020 and remains in effect until December 31, 2020
Applies to employers with fewer than 500 employees, including organizations engaged in commerce;
organizations with 50 or more employees are deemed to be engaged in commerce

Emergency Paid Sick Leave

10 DAYS (80 HOURS) OF **FULL PAY** FOR ANY EMPLOYEE:

- Subject to Government quarantine or isolation order;
- Advised by a health care provider to self-quarantine; or
- Experiencing symptoms of COVID-19 and seeking a medical diagnosis.

Caps: \$511 per day/\$5,110 aggregate

10 DAYS (80 HOURS) OF **2/3 PAY** FOR ANY EMPLOYEE:

- Caring for a person subject to a quarantine order or advised to self-quarantine;
- Caring for children if schools are closed or their regular caregiver / daycare is unavailable because of a public health emergency; or
- Experiencing substantially similar conditions.

Caps: \$200 per day/\$2,000 aggregate

Tax Credit: employer entitled to a fully refundable tax credit equal to 100% of FMLA paid leave wages
Impact on Existing Leave Policies: is additional to employer's existing sick leave. Cannot require employee to use other paid sick leave before using this leave.
Part Time Employees: instead of 10 days, average hours of work over 2 week period
Notice: We must post a notice. DOL to provide model notice w/in 7 days.

Emergency Family and Medical Leave Expansion

12 WEEKS JOB-PROTECTED PAID LEAVE FOR ANY EMPLOYEE:

- Employed at employer for at least 30 days
- Unable to work or telework, because they must care for child (under 18) as the result of closed school/daycare or unavailable childcare provider due to a public health emergency

Pay Schedule:

- Weeks 1-2 (10 days): **unpaid** (must use personal leave or FFCRA sick leave)
- Weeks 3-12: **2/3 pay**

Caps: \$200/day and \$10,000 aggregate

Tax Credit: employer entitled to a fully refundable tax credit equal to 100% of FMLA paid leave wages

- Job Restoration Requirements under FMLA apply.



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Overview

- Emergency Paid Sick Leave Act
- Emergency Family and Medical Leave Expansion Act
- Refundable Payroll Tax Credits
- Scheduled to take effect April 1, 2020



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Emergency Paid Sick Leave Act

- Amends Fair Labor Standards Act
- Employers with fewer than 500 employees
- Covers **most public employers**
- Employer may exclude
 - Health care providers
 - Emergency responders



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How Much Paid Sick Leave?

- 80 hours for full-time employees
- Part-timers: average hours worked in a two-week period
- **Cannot** force employees to use other paid leave first



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When Is An Employee Entitled To It?

1. A governmental quarantine or isolation order related to COVID-19
2. Health care provider advised self-quarantine due to COVID-19 concerns
3. Employee with symptoms of coronavirus and seeking a medical diagnosis
4. A need to care for or assist an **individual** who:
 - Is subject to a governmental quarantine or isolation order related to COVID-19
 - Has been advised by a health care provider to self-quarantine due to concerns related to COVID-19
5. A need to care for a child whose school or place of childcare is closed or unavailable due to coronavirus



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Refundable Payroll Tax Credit - Caps

- ***Cap of \$511 per day or \$5,110 in the aggregate***
 - A governmental quarantine or isolation order related to COVID-19
 - Health care provider quarantine due to COVID-19 concerns
 - The employee experiencing symptoms of coronavirus and seeking a medical diagnosis



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Emergency FMLA Leave

- Employers with **fewer** than **500 employees**
- Employees who have worked 30 days
- Gives DOL authority to exempt
 - health care providers and emergency responders
 - employers w/ fewer than 50 employees if it would jeopardize business



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When Is An Employee Entitled To It?

- Where the employee is unable to work (or telework);
- Due to a need for leave to care for child under 18 years of age;
- If the school or place of care has been closed, or unavailable;
- Due to a COVID-19 public health emergency.



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How Much Paid Leave Do They Receive?

- 12 weeks total leave like regular FLMA
- First 2 weeks unpaid, but ...
- Employee can elect to use other accrued leave or qualify for EPSLA paid leave
- Next 10 weeks: 2/3 paid, capped at \$200 per day/\$10,000 in aggregate



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Refundable Tax Credit - Caps

- ***Cap of \$200 per day or \$2,000 in the aggregate***
- A need to care for or assist an ***individual*** who:
 - Is subject to a governmental quarantine or isolation order related to COVID-19
 - Has been advised by a health care provider to self-quarantine due to concerns related to COVID-19.
- A need to care for a child whose school or place of childcare is closed or unavailable due to coronavirus



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FFCRA Guidance

- Q & A:
<https://www.dol.gov/agencies/whd/pandemic/ffcra-questions>
- Employer Overview:
<https://www.dol.gov/agencies/whd/pandemic/ffcra-employer-paid-leave>
- Employee Overview:
<https://www.dol.gov/agencies/whd/pandemic/ffcra-employee-paid-leave>
- Mandatory Posting:
https://www.dol.gov/sites/dolgov/files/WHd/posters/FFCRA_Poster_WH1422_Non-Federal.pdf
- Posting Q & A:
<https://www.dol.gov/agencies/whd/pandemic/ffcra-poster-questions>



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Impact of CARES Act

- 3.3 million applied for unemployment last week.
- CARES Act provides an *additional* \$600 per week of unemployment for four months.
- Does EPSLA and EFMCA apply to those already on layoff?



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EPSLA and Michigan EO 2020-21 – Isolation Order?

- EPSLA applies to an employee “subject to a Federal, State, or local quarantine or isolation order related to COVID-19.”
- EO 2020-21 states that it must be construed broadly to prohibit in-person work.
- And subject to exceptions, states: “all individuals currently living within the State of Michigan are ordered to stay at home or at their place of residence.”
- It also prohibits gatherings – public or private – of any number of people not part of a single household.



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FFCRA Q & A

- No. 1: Effective April 1, 2020 through December 31, 2020.
- No. 2: Measure fewer than 500 employees when employee's leave taken.
- No. 2: Parent/subsidiaries integrated employer test with long-established four factors.
- No. 4: Fewer than 50 employees/viability of business “addressed in more detail in forthcoming regulations.”



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FFCRA Q & A

- No. 5: Part-time workers paid leave based on average hours worked in a two-week period.
- No. 6: Pay for normally scheduled hours even if >40. EPSLA up to 80 in two weeks/no OT rate need be included.
- No. 7 & No. 10: Confirm how the two Acts work together for potential total 12 weeks of leave.
- No. 8: Regular rate based on earnings in the prior period of up to six months before leave.



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FFCRA Q & A

- No. 11: No credit under EPSLA for paid leave before April 1.
- No. 12: Only “EFMLA” FMLA is paid.
- No. 13: Neither Act retroactive to April 1.
- No. 14: Temporary employee assignment included in 30 day eligibility period.
- No. 15: Requirement for contemporaneous documentation for each employee leave.



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FFCRA Q & A

- No. 16: Employee required documentation.
- No. 17: Telework not compensated under the FFCRA.
- No. 19: Telework not an option if employee not able to perform it due to sickness or child care; fair to determine if telework possible despite sickness or child care.
- No. 20: Intermittent telework leave only if the employer allows it; alternative might be full-time leave.



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FFCRA Q & A

- No. 21: Paid sick leave from the worksite only in full-day increments and must continue until exhausted or no longer have qualifying reason; any balance can be taken until Dec. 31.
- No. 21: Paid sick leave for child care intermittently only if employer agrees.
- No. 22: Expanded FMLA intermittently only if employer agrees.
- No. 23: **No FFCRA if you are laid off before April 1 due to lack of work or ordered closure – unemployment only.**



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FFCRA Q & A

- No. 24: Worksite closure after April 1, but before leave – unemployment.
- No. 25: Worksite closure while on FFRCA covered leave – unemployment only after closure.
- No. 26: Layoff due to lack of work while on FFRCA covered leave – unemployment.
- No. 28: Reduced scheduled hours – no entitlement to paid FFRCA leave; but yes if qualifying reason prevents working full schedule.



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@BTLawNews

FFRCA Q & A

- No. 29: **No unemployment if on paid sick leave or expanded FMLA.**
- No. 30: Entitled to continue health coverage on EFMLA.
- No. 31: Employee must choose FFRCA paid leave or employer plan (STD or other applicable paid leave), not both (unless employer agrees to supplement).
- No. 32: Employer may, but is not required to allow employees to use available paid leave (like PTO) to supplement FFRCA leave.



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FFCRA Q & A

- No. 33: Employer may not require employee to supplement FFCRA paid leave with available PTO; employee can if employer allows.
- No. 34: No additional employer tax credit for paying more than FFCRA mandated pay.
- Nos. 35 – 37: multiemployer plans.



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Employer Guidance

- Confirms that FFCRA applies only if employee unable to work or unable to **telework**.
- Lists six reasons and confirms duration of leave for each and calculation of pay.
- Tax credits: "dollar-for-dollar reimbursement through tax credits for qualifying wages under the FFCRA."
- "Applicable tax credits also extend to amounts paid or incurred to maintain health insurance coverage."
- Direction to Treasury website.
- Temporary period of non-enforcement first 30 days after Act takes effect (USDOL notice states March 18 through April 17) – as long as reasonable, good-faith actions to comply.



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Thorny Issues

- Prior FMLA use? May impact entitlement to EFMLA, but not 10 days of EPLA time off. “Up to additional 10 weeks.”
- Site not FMLA covered? FFCRA fewer than 500 employees as of April 1 effective date; eligible employee employed at least 30 calendar days – not the regular FMLA coverage criteria.
- Employer posting: Second bullet should read “#4-6”/not “#4 and 6”; post by April 1 (and that’s all that is required).
- Employees already on layoff as of April 1 – FAQ on posting states: “No, the FFCRA requirements explained on this notice apply only to current employees.” Unclear. Unemployment increase probably makes moot.



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Questions

- Is an employee entitled to paid leave if she has come in contact with an infected person and wants to self-isolate? Should we ask for documentation from a health care provider?
- How do we handle employees that are in the higher risk category but are not sick and cannot work remotely?
- If employees can work from home but refuse to do so, must we pay them two weeks of sick leave?
- We’re an “essential business,” but some of our employees feel uncomfortable coming to work and are unable to work from home. Do they qualify for two weeks of paid leave?
- If we are paying employees under the emergency sick leave, do we take all deductions, benefits, taxes, child support etc.?
- If we are paying someone 2/3 of their pay to care for someone, can they use additional PTO to make themselves whole?



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Questions: Employee

- How should COVID-related time off be tracked?
- Can the paid leave be used intermittently?
- My company needs to close now.
 - Are paid leave benefits available?
 - Will the government reimburse me via tax benefits?
- What, if any, paid leave is an employee entitled to receive after the first two weeks of COVID-19 shutdown if he/she does not have a child at home?
- How does FFRCA interact with short-term disability? Would an employee be paid 80 hours of paid sick leave, then be eligible for STD?
- Do we have to/should we use the traditional FMLA forms for the new emergency leave?



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Questions

- If we maintain benefits to our employees on temporary layoff due to production slowdown, can we require employees to still pay their share of the premium?
 - Can the premiums be repaid upon return to work?
 - Should we specify a date when the company will no longer cover premiums, April 30 for example?
 - On May 1, if the employees are still on layoff, do we terminate the employees from the plan and offer COBRA?



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Questions

- Generally, how does benefits eligibility work with reductions in hours for employees? Will our employees continue to be eligible for benefits?
- Will we have to payout earned, but unused vacation time if we layoff employees?
- If we're only furloughing employees (i.e., reducing hours) are they entitled to unemployment compensation?
- Are they entitled to unemployment during a *temporary* layoff?



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QUESTIONS?



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