

SHRM Lunch & Learn Series

# NEW FFCRA LABOR REGULATIONS; IDAHO HOUSE BILL 6; AND A RETURN TO WORK REFRESHER

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# Disclaimer

- The information in this presentation is intended to give you an overview of important issues for human resource managers to keep in mind. It is not a substitute for individualized guidance from legal professionals you trust. In law, the details matter. Specific circumstances of your business will impact the answer to legal questions on the topics highlighted in this presentation.
- Laws, regulations, and interpretations are changing rapidly. This presentation is based on information available and research conducted up to October 14, 2020.

# Families First Coronavirus Response Act (FFCRA)

- Enacted March 18, 2020
- Temporary rules implementing the law effective April 1, 2020
- Expires on December 31, 2020
- Applies to employers with less than 500 employees
- Requires paid sick leave and paid FMLA leave under specified circumstances
- Provides tax credits to employers to offset the costs of providing the paid sick leave

# Eligibility for FFCRA Paid Sick Leave

## ■ Sick Leave

- Employee is subject to a federal, state, or local quarantine or isolation order related to covid-19
- Employee has been advised by a health care provider to self-quarantine due to concerns related to covid-19
- Employee is experiencing symptoms of covid-19 and seeking a medical diagnosis
- Employee is caring for an individual who is subject to a federal, state, or local quarantine or isolation order related to COVID-19 or who has been advised by a health care provider to self-quarantine due to concerns related to COVID-19

# Eligibility for FFCRA Paid Sick Leave & Expanded FMLA Leave

- Sick Leave & FMLA Leave
  - Employee is caring for a son or daughter because that child's school or day care has been closed or the child care provider is not available because of COVID-19 emergency declared by a federal, state, or local authority.

# DOL'S Initial Requirements & an Exception

- Leave is not available if the employer doesn't have work for the employee.
- Intermittent leave requires employer approval.
- Documentation required before an employee may take leave.
- Employers may except employees that fit the definition of a "health care provider"

## “Health Care Provider” Expansively Defined

“[A]nyone 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.”

## “Health Care Provider” Also Includes:

“[A]ny individual employed by an entity that contracts with any of these institutions described above to provide services or to maintain the operation of the facility where that individual’s services support the operation of the facility, [and] anyone employed by any entity that provides medical services, produces medical products, or is otherwise involved in the making of COVID-19 related medical equipment, tests, drugs, vaccines, diagnostic vehicles, or treatments.” - Final Rule at 19,351 (§ 826.25)

# Court Accepts New York's Legal Challenge

- On August 3, 2020, the United States District Court for the Southern District of New York invalidated:
  1. The requirement that an employer have work available as a prerequisite for leave;
  2. The requirement of employer approval of intermittent leave;
  3. The requirement of documentation before an employee may take leave.
  4. The expansive definition of health care provider under the regulations.

*New York v. U.S. Dep't of Labor*, No. 20–CV–3020 (JPO), 2020 WL 4462260 (S.D.N.Y. Aug. 3, 2020)

# Department of Labor Revised Regulations

- On September 16, 2020 the Department of Labor issued revised regulations:
  1. Reaffirming that an employer must have work for the employee to take leave under the FFCRA,
  2. Reaffirming that intermittent leave requires employer approval, and
  3. Clarifying that documentation to support employee leave must be provided to the employer “as soon as practicable.”

Revised regulations found at: <https://www.govinfo.gov/content/pkg/FR-2020-09-16/pdf/2020-20351.pdf>

# DOL Narrows Definition of Health Care Provider

- Health Care Providers now include a narrower set of employees:
  1. Doctors authorized to practice by a state;
  2. Nurses, nurses assistants, medical technicians;
  3. Lab technicians who process test results necessary to diagnosis and treatment; and
  4. Employees who are employed to provide diagnostic services, preventive services, treatment services, or other services that are integrated with and necessary to the provision of patient care.

Revised regulations found at: <https://www.govinfo.gov/content/pkg/FR-2020-09-16/pdf/2020-20351.pdf>

# Thinking Ahead

- Covid-19 is trending up and flu season is coming, the Pandemic isn't likely to end on December 31<sup>st</sup>—when the FFCRA expires.
  - What is your company's plan to encourage employees to stay away from the workplace while sick, after the tax-credit supported leave provisions expire?

# Idaho House Bill 6 – Liability Limitations

- On August 27, 2020, Governor Brad Little signed HB 6 into law providing limitations on covid-19 related liability for businesses, schools, and other entities.

Governor Little Signs: [https://magicvalley.com/news/local/govt-and-politics/little-signs-liability-immunity-bill-into-law/article\\_c23e2cca-67be-5f87-ae5e-fa7c89e1e9b8.html](https://magicvalley.com/news/local/govt-and-politics/little-signs-liability-immunity-bill-into-law/article_c23e2cca-67be-5f87-ae5e-fa7c89e1e9b8.html)

House Bill 6 Full Text: <https://legislature.idaho.gov/wp-content/uploads/sessioninfo/2020spcl/legislation/H0006.pdf>

# Who Is Covered By The Law?

1. Individuals;
2. Any entity recognized by the state (partnerships, LLCs, corporations, etc.);
3. Churches and religious organizations;
4. Cities, counties, and other units of local government; and
5. School districts, colleges, universities, and other institutions of higher education.

# Who Is Excluded?

1. Idaho public health districts;
2. The federal government and any of its agencies;
3. The State of Idaho and any of its agencies (except colleges, universities, and other institutions of higher education); and
4. Foreign governments or foreign jurisdictions.

# Scope of Liability Protection

- HB 6 provides immunity from “civil liability for damages or an injury resulting from exposure of an individual to coronavirus.”
- HB 6 immunity “does not apply to acts or omissions that constitute an intentional tort or willful or reckless misconduct as defined in section 6-1601, Idaho Code.”
- Willful or Reckless Conduct is “conduct in which a person makes a conscious choice as to the person’s course of conduct under circumstances in which the person knows or should know that such conduct both creates an unreasonable risk of harm to another and involves a high probability that such harm will actually result.” – Idaho Code § 6-1601(10).

# Practical Limits of Liability Protections

- Immunity from liability is not immunity from suit, and lawsuits, and defending a lawsuit can be costly.
- Insurance may have exclusions for willful, reckless, and intentional conduct—meaning risk is higher if a plaintiff succeeds.
- “Conscious choice,” “unreasonable risk of harm,” and “high probability” that harm results – these are standards that could be satisfied if a business is careless in its operations during the pandemic.

# Stay On Top Of The Latest Guidance

- Stay apprised of updates to national guidance from the CDC.
  - <https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/businesses-employers.html>
- Take time to assess how well you are doing at following state guidance, e.g., Idaho's business-specific protocols for opening.
  - <https://rebound.idaho.gov/business-specific-protocols-for-opening/>
- Keep up with local developments and orders for your area.
  - <https://eiph.idaho.gov/>

# ADA: Stay Even Handed, Be Accommodating & Protect Health Info

- EEOC Updated Guidance – September 8, 2020
  - <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>
- Employers may not treat individuals at higher risk differently solely because of these risk factors.
- If an employee requests an accommodation based on a higher risk of covid-19, employers should engage in the interactive process to identify potential reasonable accommodations.
- Employers may screen employees for covid-19 symptoms, but information obtained must be handled carefully and confidentially.

# OSHA: Record Keeping

- Covid-19 cases may require OSHA reporting, if
  - The case is confirmed,
  - The case is work related – did the work environment cause or contribute to the employee’s covid-19 case (see regulations at 29 CFR § 1904.5), and
  - The case is significant – involving death of an employee, days away from work, transfer to another job, medical treatment beyond first aid, or loss of consciousness (see regulations at 29 CFR § 1904.7).

<https://www.osha.gov/memos/2020-05-19/revised-enforcement-guidance-recording-cases-coronavirus-disease-2019-covid-19>

# OSHA: Maintaining A Safe Work Environment

- OSHA has published its guidance on returning to work and keeping a safe work environment during the covid-19 pandemic.
  - <https://www.osha.gov/Publications/OSHA4045.pdf>.
- OSHA also has guidance on home offices and home-based worksites.  
<https://www.osha.gov/enforcement/directives/cpl-02-00-125#policy>
  - OSHA does not inspect home offices, and OSHA generally does not hold employer's liable for employees' home offices.
  - Just don't let employees test nuclear reactors their home offices. Employers may be responsible for home office “hazards caused by materials, equipment, or work process which the employer provides or requires to be used in an employee's home.”

# Handling An Employee's Positive Covid-19 Test

- Even with good policies, you'll likely experience positive tests in your workforce. Responding appropriately takes advanced thought and planning.
  1. Show empathy. A positive diagnosis may well be a source of significant apprehension and fear. Protect the employee's confidentiality. And help the employee feel support in the important self-isolation that follows.
  2. Act quickly to avoid spread in the workplace. Be proactive in educating employees on the importance of notifying the appropriate HR person about a positive diagnosis. Have a plan for contact tracing and office cleaning. <https://www.cdc.gov/coronavirus/2019-ncov/community/disinfecting-building-facility.html>
  3. Review legal requirements – OSHA, ADA, workers compensation, FFCRA sick leave, short term disability?

For a more in-depth analysis check out my colleague Amy Lombardo's article on these issues:

<https://www.parsonsbehle.com/publications/when-the-inevitable-happens-key-questions-employers-should-ask-when-an-employee-tests-positive-for-covid-19>

# Teleworking Reminders

Many employers continue to allow, encourage, or require employees to work from home. A few reminders merit mention:

- Require Accurate Time Tracking: For hourly and non-exempt workers under the Fair Labor Standards Act, timely and accurate time records are essential to avoid unexpected overtime claims.
- Take Extra Care To Protect Confidential Data: outside the office employers have much less control over data. Coordinate with IT to make sure you have policies for protecting sensitive data, solid cyber-security training, and robust security software.
- Work Related Home-Injuries May Trigger Workers Compensation: Employers have less control over employee homes, but do all you can to encourage a safe working environment. Work-related injuries at home may trigger workers compensation obligations.
- Teleworking Out-Of-State: Teleworking in other states may trigger reporting, tax withholding, workers compensation, or unemployment insurance requirements in these other states.

Parsons Behle Attorney Sean Monson addresses these and other matters in his recent article:

<https://www.parsonsbehle.com/publications/dealing-with-remote-teleworking-employees-best-practices-for-teleworking>