

# Considerations for U.S. Employers on Returning to the Workplace Amid COVID-19

Moving Forward to the “New Normal”

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# Speakers



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- 1. Introduction**
- 2. Screening, Testing, and Guidelines for Exposure**
- 3. ADA and OSHA Compliance**
- 4. Remote Working Considerations**
- 5. Families First Coronavirus Response Act Entitlements**

## Every business must create a COVID-19 Control Plan and Compliance Attestation

- Must address mandatory safety standards for specific industry, generally including:
  - Social distancing
  - Hygiene protocols
  - Staffing & operations
  - Cleaning & disinfecting
- Detailed safety standards by business type are available at [Mass.gov](https://www.mass.gov)

- Safety standards require employers to screen workers prior to each shift by ensuring:
  - Worker not experiencing any COVID-19 symptoms
  - Worker has not had “close contact” with positive COVID-19
  - Worker has not been asked to self-isolate or quarantine by doctor or local public health official
- Many employers asking about travel as well – ok to do so

- What if an employee is showing symptoms, or has exposure to a confirmed positive case?
  - Don't come to work/go home immediately
  - Investigate close contacts
- In event of positive case, employers must:
  - Notify Local Board of Health
    - Follow LBOH guidance as to testing and quarantine of close contacts
  - Shut down site for deep cleaning and disinfecting

## **To come back to work, an employer can require:**

- Negative COVID test
- Doctor's note (discouraged by CDC)
- Time period without symptoms
- Quarantine

- Employer may require testing, etc. where it believes employee's present medical condition would:
  - Impair his ability to perform essential job functions with or without reasonable accommodation, or,
  - ***Pose a direct threat to safety in the workplace.***
- Belief must be reasonable and based on objective evidence



## **Non-Essential Critical Infrastructure Workers**

- Confirmed or suspected positive case (with symptoms) can be around others after:
  - 10 days since symptoms appeared
  - 24 hours with no fever w/o use of fever-reducing medication; and
  - Other symptoms of COVID are improving
- Test-based strategy no longer recommended
- Positive test, no symptoms can be around others
  - After 10 days have passed since positive test
- Close contact with COVID-19:
  - Quarantine for 14 days after last exposure

## Essential Critical Infrastructure Workers

- Different guidance for essential workers who have had close contact with COVID-19 positive case
  - Instructed to:
    - Take temperature prior to work
    - Monitor symptoms
    - Wear a mask and social distance
- Consult with LBOH and follow instructions

## **Medical Inquiries and Examinations**

- Limits “disability-related inquiries” or “medical examinations”
- Exception if objective evidence of “direct threat” due to medical condition

## Direct Threat

- EEOC acknowledges that COVID-19 in the workplace creates a “direct threat”
- Significant risk of substantial harm to health or safety that cannot be eliminated by reasonable accommodation
- Employer make take temperature scans and make other COVID-19 inquiries

## High-Risk Conditions

- High-risk medical conditions have not been categorically recognized as a “direct threat”
- Employers cannot single out employees with asthma, immunocompromised, etc.
- Cannot single out employees > age 65

## Confidentiality

- All employee medical information must be kept confidential
- Maintained separately from personnel records
- Limited disclosure to: supervisors who determine work restrictions; first aid and safety personnel; government officials enforcing ADA

## **COVID Requirements**

- Federal OSHA has not enacted specific COVID standards
- State OSHA laws – Virginia and Michigan

## General Duty Standard

- Employers have a “general duty” to provide a workplace free of known, serious hazards that can be feasibly mitigated
- COVID-19 is considered a serious hazard subject to the general-duty obligation
- OSHA has fined employers for failing to mitigate employees’ COVID exposure



## **General Duty Standard**

- Develop a written plan for opening/operating
- Comply with all existing industry safety rules
- Comply with state and local operating requirements (and more)
- Screening/Social Distancing/Cleaning
- Remote work where applicable
- Conform to CDC guidance

## 300 Log

- COVID-19 is OSHA recordable illness if “work-related”
- Employer determines whether exposure in work environment caused the illness
- Employer must conduct reasonable investigation into work-relatedness
- Investigation subject to ADA restrictions on medical inquiries
- Don’t have to record if reasonable, good-faith inquiry cannot determine if more likely than not to be work-related

## **Preliminary Questions Whether Employees Should/Will Return:**

- What to do when employees refuse to come back into the workplace?
- What to do about high risk employees?
- Dependent on industry

## First Steps in Establishing a Remote Working Policy

- All remote versus partially remote
- Permanent or temporary
- Establishing a remote working policy
  - Position
  - Seniority
  - Vacation/PTO
  - Health Considerations
  - Out-of-state workers
  - Issues of Precedent

## Potential Issues for Remote Workers

- Overtime/FLSA considerations
- Confidential Information
  - Protecting company information
  - Certifications relating to company data
- IT System Checks
- Restrictive Covenants: Whether to sign new agreements

## **Potential Issues for Remote Workers**

- Necessary business-related expenses
- Dress code
- Reviews and Feedback
- Employee Retention
- Termination Issues

# FFCRA: Expanded FMLA Leave

- Up to 12 weeks of job-protected leave for coronavirus-related reasons.
- The first two weeks may be unpaid.
  - Employees may use accrued paid personal, vacation, or sick time (including emergency paid sick leave).
- Up to an additional ten weeks of paid leave for an employee to care for a child whose school or place of care is closed because of COVID-19.
  - 2/3 pay rate up to cap of \$200 per day (\$10,000 in aggregate ten-week period).

# FFCRA: Emergency Paid Sick Leave

- Two weeks of paid sick leave for coronavirus-related reasons:
  - Employee subject to government quarantine or isolation order;
  - Employee advised by health care provider to self-quarantine;
  - Employee is experiencing symptoms and seeking a medical diagnosis;
  - Employee is caring for an individual who is self-isolating;
  - Employee is caring for a child whose school or place of business is closed; or
  - Employee is experiencing a “substantially similar condition” as specified by the Secretary of Health and Human Services.
- Rate of pay:
  - 1. – 3. Full pay up to cap of \$511/day (\$5,110 in aggregate two-week period).
  - 4. – 6. 2/3 pay up to cap of \$200/day (\$2,000 in aggregate two-week period).



- Healthcare worker exclusion applies to an employee who is:
  - a licensed doctor of medicine, nurse practitioner, or other specified health care provider;
  - employed to provide diagnostic services, preventative services, or treatment services; or
  - employed to provide services that are integrated with and necessary to the provision of patient care.
- FFCRA and back-to-school:
  - FFCRA is available on days when the employee's child is not permitted to attend school in person and must attend remotely.
  - FFCRA leave is not available where an employee elects to have the child attend remotely if the school is open and in-person attendance is an option.

- Other changes
  - Available Work
    - Previously, only reasons 1-3
    - Now, applicable to all reasons
  - Notice and Documentation Requirements
    - Notice of EFML: “as soon as practicable”
    - Documentation supporting need for either EPSL or EFML: “as soon as practicable”
  - Intermittent Leave
    - Employer consent still required

## **Equity and Racial Justice in the City of Boston**

*A Conversation With Mayor Martin J. Walsh and  
Dr. Karilyn Crockett, Chief of Equity for the City of Boston*

Friday, October 23, 11 AM-12 PM

## **Implementing the Massachusetts Paid Family and Medical Leave (PFML) Program**

*Featuring William Alpine, Director, Department of Family and Medical Leave,  
Commonwealth of MA*

Tuesday, October 27, 12-1 PM