PUBLIC CEMETERY ALLIANCE

News & Notes

COVID-19 EMPLOYMENT LAWS

By Lauren Orozco and Amanda Iler

EDITOR'S NOTE: ***The following article is intended to present only a few general rules as they exist as of this writing. However, every circumstance is unique, and it is impossible to predict how the application and interplay of numerous employment laws will impact any particular situation. Please consult your legal counsel for further assistance with specific situations.***

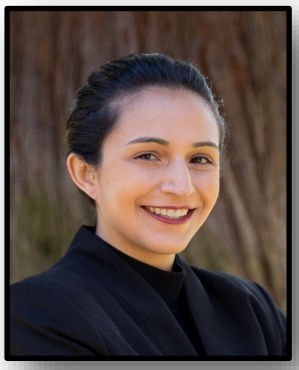
Since the onset of COVID-19, employers have had to navigate a complex, ever-changing legal landscape – one where there has often been more questions than answers. This article provides general information regarding some of the most common COVID-19 issues arising in the workplace.

COVID-Specific Legislation

Let's start with a few general rules established by the recently-enacted Federal Families First Coronavirus Response Act (FFCRA).

- The FFCRA applies to all public employers without regard to the number of employees.
- Generally speaking, it provides up to 80 additional hours of paid sick leave for qualifying employees who are:
  - Subject to a federal, state or local quarantine or isolation order related to COVID-19.
  - Advised by a health care provider to self-quarantine due to COVID-19 related concerns.
  - Experiencing symptoms of COVID-19 and seeking a medical diagnosis.
  - Caring for an individual subject to a quarantine or isolation order.
  - Caring for a child whose school or place of care is closed or whose care provider is unavailable because of COVID-19.
  - Experiencing any other substantially similar condition specified by government officials.
- The FFCRA offers up to 10 weeks of expanded FMLA leave for use only when daycare/school/child care provider is unavailable due to COVID-19 reasons.

Again, every case is factually unique and these rules must be carefully examined in light specific circumstances.



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What Can an Employer Require of an Employee?

One frequent question is – what can an employer require of employees?

For starters, employers may require employees to leave the workplace if they exhibit symptoms associated with COVID-19. (Managers and supervisors should be educated about such symptoms.) Employers cannot, however, exclude employees from the workplace in an illegally discriminatory manner. For example, an employer cannot exclude older or immuno-compromised employees from the workplace solely because those employees may be at a higher risk of becoming severely ill from COVID-19.

Employers may also require employees to submit to testing for COVID-19 or temperature checks before allowing employees to enter the workplace. *(Employer mandated medical testing is generally prohibited unless the testing falls within a defined exception and is "job related and consistent with business necessity.")* Coronavirus testing falls within this exception because the virus poses a direct threat to the health of others. Nonetheless, employers must ensure testing is consistent with the current guidelines from the CDC and other public health authorities.

Generally, employer-mandated COVID-19 testing must be accurate, reliable, and part of an objective, comprehensive plan for eliminating COVID-19 in the workplace. "Antibody" testing is generally considered to be less accurate and reliable than "viral" testing; it fails to meet the "business necessity" standard and, therefore, should not be used. Despite the fact that even viral testing is not fail-safe, it may nevertheless be an appropriate screening step to help ensure a safe work environment. Employers should continue to implement other infection-control practices as well.

EDITOR'S NOTE: CALOSHA recently issued regulations pertaining workplace safety measures, mandated actions

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when an employee tests positive for COVID-19, reporting requirements, disinfection protocols, and so forth. Those are beyond the scope of this article—please consult your Safety Specialist or Risk Manager for further guidance.

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In addition, employers may ask employees if they are experiencing symptoms associated with COVID-19, and require a doctor's note certifying an employee's "fitness for duty" before permitting a return to the workplace. Any restrictions or limitations placed on an employee's return to work by a healthcare provider may invoke the requirement to conduct an interactive process with the employee. (*Below is a short discussion of the interactive process in a specific circumstance, but a full discussion of the interactive process is well beyond the scope of this article.*)

If claiming paid sick leave or expanded FMLA under the FFCRA, the employee should provide (orally or in writing):

- The dates for which leave is being requested.
- The reason for the requested leave.
- A statement that the employee is unable to work because of the reason for the requested leave.
- If the employee is requesting leave because he/she is subject to a quarantine or isolation order or to care for a person subject to such an order, the employee should provide the name of the government entity or healthcare provider that issued the order or advice.
- If the employee is requesting leave to care for a child whose school or place of care is closed, or a child care provider is unavailable, the employee must provide:
    - The child's name,
    - The name of the school, place of care, or child care provider that has closed or is unavailable,
    - A statement that no other suitable person is available to care for the child.

Remember, this additional FFCRA leave is in addition to and separate from your agency's existing sick leave policy, and is available only under the circumstances described above. Therefore, it will be necessary for you to maintain records of the FFCRA sick leave entitlement and usage separately from your existing sick leave records.

Teleworking and Other Accommodations

Earlier in this article, we discussed what an employer might require of an employee. Now let's reverse the roles.

What if an employee insists on teleworking? Does an employer have the right to say no? In some cases, an employee may fear getting COVID-19 or simply working around others. In either case, the employer may not be required to grant an employee's request to work remotely. There are, however, many factors an employer must consider before rejecting an employee's request to work remotely.

Employers must always be sensitive as to whether a request to telework is actually a request for reasonable accommodation. An employee may seek to work remotely as an accommodation for a disability. Such a request may triggers the interactive process for evaluating the employee's claimed disability, medically-imposed restrictions or limitations, and the availability of any necessary accommodations. It is then incumbent on both the employee and employer to engage in the interactive process. If an employee does not have a cognizable disability, the employer is not required to grant a telework request or other accommodation.

Telecommuting may nevertheless be an appropriate accommodation is some cases. For circumstances that require presence at a workplace, however, telecommuting may pose an undue hardship on an employer. What may or may not constitute a reasonable accommodation will vary based on the specific facts of a situation. (***Once again, please consult your legal counsel in any case in which an employee may need accommodation for a disability***.)

Finally, it is important to keep both California and Federal guidelines regarding COVID-safe workplaces in mind, including the CDC guidance which recommends telecommuting, when possible, as a means of protecting employees and preventing the spread of COVID-19.

Stay Tuned

The workplace landscape is rapidly evolving under the COVID-19 pandemic. Nearly all of the provisions of the FFCRA are currently set to expire on December 31, 2020. However, given the recent spikes in transmission of the coronavirus, it is likely that they will be extended. In the meantime, California continues to enact additional workplace laws and issue new regulations regarding safety protocols, reporting requirements, and interpretations of employment laws.

And remember that all other laws regarding sick leave, FMLA/CRFA, Pregnancy Disability Leave and so forth, as well as your agency's policy and benefit programs, remain in full force and effect. The provisions of the FFCRA do not replace, but only expand upon, existing laws and benefits.

As we began this article—we finish it with very best advice we can offer: ***Consult your legal counsel for further assistance with specific situations***.

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Lauren Orozco is an "attorney-in-waiting," pending California Bar results which should be coming out any day. Based on the quality of her work on this article, we're sure she has nothing to worry about. We wish Lauren the very best, not only with her Bar results but throughout her future legal career!