

Updates from the Department of Labor and Centers for Disease Control and Prevention Regarding COVID-19

July 31, 2020

WHAT: The United States Department of Labor (DOL) recently issued new guidance, which seeks to clarify the rights and responsibilities of employers and employees under the Families First Coronavirus Response Act (FFCRA). Similarly, the Centers for Disease Control and Prevention issued updated guidance regarding various return-to-work concerns for healthcare workers and workers outside of healthcare settings.

WHAT DOES IT MEAN FOR INDUSTRY?

Updated DOL Guidance

On July 20, 2020, the DOL updated its “Families First Coronavirus Response Act: Questions and Answers” page, which provides guidance concerning the FFCRA. The updated guidance covers various FFCRA concerns, but we believe the following conclusions are most notable:

Returning from FFCRA Covered Leave:

As a general rule, employees returning from paid sick leave under the FFCRA have a right to be restored to the same or equivalent position. However, given the public health emergency and an employee’s potential exposure to an individual with the coronavirus (COVID-19), an employer may temporarily reinstate the employee to an equivalent position that requires less interactions with coworkers or require teleworking.

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Practice Areas

Employment & Labor

If an employer knows an employee has interacted with a “COVID-infected person,” the employer can require the employee to telework or take leave (including unpaid leave) until the employee has tested negative for the virus.

Importantly, an employer cannot require an employee to telework or require a COVID-19 test merely because the employee took leave under the FFCRA. Rather, there must be some other objective evidence that the employee may have been exposed to or infected with the virus before requiring telework or a COVID-19 test.

Caps on paid sick leave under the FFCRA for furloughed workers:

Employees are limited to a total of 80 hours of paid sick leave under the FFCRA. If, for example, an employee used all 80 hours of FFCRA paid sick leave prior to being furloughed, the employee is not entitled to additional paid sick leave under the FFCRA once the furlough ends. However, if the employee did not use their full 80 hours prior to being furloughed, they can use any remaining hours upon returning to work if they have a qualifying reason to do so.

Caps on expanded family and medical leave for furloughed workers:

Under the FFCRA, all employees are entitled to up to 12 weeks of expanded family and medical leave. If an employee used only 4 weeks of leave prior to being furloughed, the employee is entitled to up to 8 weeks of leave upon a business’ reopening. However, when the employee returns from furlough, the employee should provide a new qualifying reason to be eligible to use any remaining weeks of expanded family and medical leave.

Retaliation and discrimination prohibitions:

Employers may not retaliate or discriminate against an employee (or prospective employee) for exercising their right to take leave under the FFCRA. Under no circumstances may an employer use an employee’s request for leave as a negative factor in an employment decision, such as a decision as to which employees to rehire from furlough.

Additional information concerning private employees’ rights under the FFCRA, is available via: DOL’s Quick Benefits Tips infographic or DOL’s Employee Rights infographic.

Updated CDC Guidance

Many employers are concerned about whether to require a negative COVID-19 test result before allowing an employee to return to work after being exposed to or testing positive for COVID-19. The CDC’s updated guidance addresses this issue for both healthcare and non-healthcare workers:

As a general matter, test-based strategies (*i.e.*, requiring a negative COVID-19 test result) are not recommended by the CDC to determine when non-healthcare workers should discontinue home isolation and return to work. Instead, the CDC advises that symptom-based strategies are better suited to determine when to allow workers to return to work because that approach is believed to be more accurate in determining

whether or not an individual is infectious. The CDC's updated guidance for symptom-based strategies for returning non-healthcare workers is as follows:

- Workers with severe or critical illnesses or who are severely immunocompromised may return to work 20 days after symptom onset.
- Asymptomatic workers who tested positive for COVID-19 may return to work 10 days after their first positive test.
- Workers who are asymptomatic and severely immunocompromised may return to work 20 days after their initial positive COVID-19 diagnostic test.
- Employers should require workers to certify that "at least 24 hours," rather than the previous 72-hours recommendation, have passed since they last experienced a fever without the use of fever-reducing medications before returning to work.
- The list of COVID-19 symptoms continues to expand, so employers should inquire about a worker's "improvement in symptoms," rather than the previous guidance directing employers to inquire about an improvement in respiratory symptoms.

The updated return-to-work criteria for healthcare personnel (HCP) is largely similar to the guidance for non-healthcare workers except that HCPs with a confirmed COVID-19 positive test who were asymptomatic may return to work at least 20 days after their first positive test if they have a severe or critical illness or if they are severely immunocompromised.

BOTTOM LINE FOR EMPLOYERS

COVID-19 has created a situation where "best practices" has become something of a moving target. As we continue to learn about the disease, how it is spread, and how to stop it, the guidelines and recommendations for employers will continue to change. Every employer should review both the DOL and CDC guidance on a regular basis, and consult with counsel on how to work those guidelines into existing policies and practices.

Tiffani Kennedy, a Law Clerk at Wiley Rein LLP, contributed to this alert.

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