



Covid19 – Back To Work **An Employment Law Series**

Part 1: Overview with Updates **September 23, 2020**



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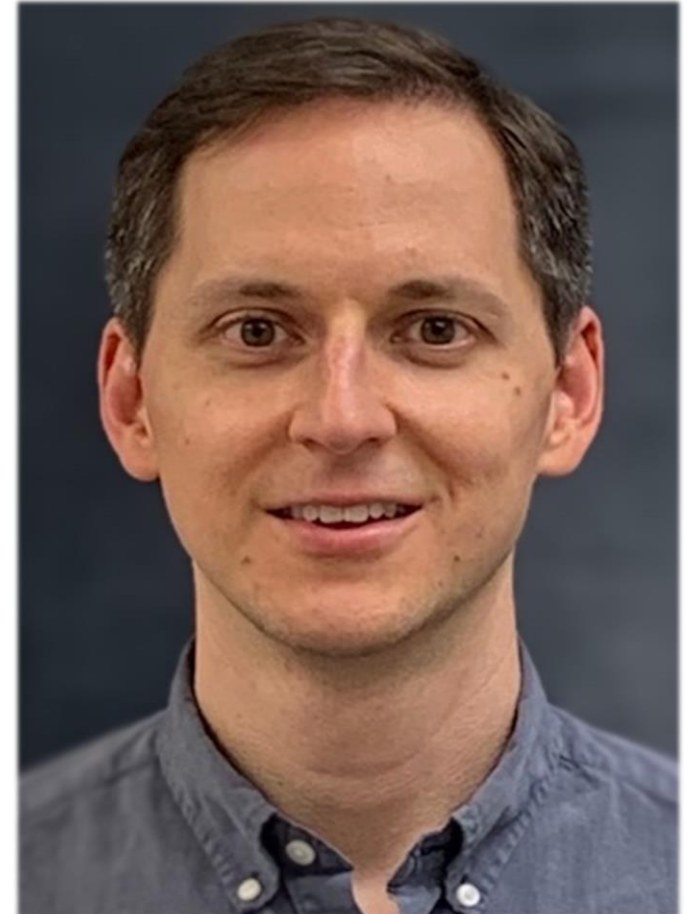


About J. Stephen Hoffman

Steve is a Senior Attorney of General Counsel, P.C., within the Practice Groups of Employment Law and Corporate Law.

Steve has led compliance efforts for rapidly scaling startups as well as for restructures at large employers with billions of dollars in their annual payrolls.

Steve has been commissioned by a few governments to offer clarity; judged and established startup competitions and accelerators; presented for an annual SHRM conference; taught at universities.



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About General Counsel, P.C.

- Offices in McLean, VA
- Founded 2004
- Serving as outside general counsel to small and medium-size businesses and non-profit organizations
- Primary Practice Areas
 - Corporate/M&A
 - Labor & Employment
 - Government Contracts
 - Dispute Resolution/Litigation



About Smart HR

- **Smart HR, founded in 2001, has been providing high-value HR outsourcing solutions to business and not-for-profit organizations for over 20 years.**
- **Our programs are designed to offer complete HR support to organizations in the Washington, DC metro area. Our clients, generally between 15 and 150 employees, receive high-level HR expertise to create programs typically costing 50% less than hiring an internal HR department.**
- HR Services include:
 - HR Outsourcing & Consulting
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Back To Work – Series Overview

Part 1 – September 23rd: Overview with Updates and Scenarios

Part 2 – October 6th: Covid Leaves and Employment Separations

Part 3 – October 20th: Remote Working Issues vs Return to Work

Part 4 – November 10th: Recap, Overview, Summary and Impact of
Election



Okay so ... Where Do I Start?



Credit – The Sound of Music



Part 1. Agenda

Laws: Pre-Covid and New Job/Income Protections

- Federal ADA, FMLA, and FFCRA
- State and Local Protections

Top Six Issues / Scenarios / Discussion

Question / Practical Counsel / Upcoming Seminar



Federal Job/Income Protections

- ✓ Americans with Disabilities Act (ADA, 1990) prevents discrimination on basis of a qualifying disability, requiring an interactive process to find a reasonable accommodation
- ✓ Family Medical Leave Act (FMLA, 1993) provides unpaid, job protection while eligible employee is out of work to care for self/family's serious health condition
- ✓ Families First Coronavirus Response Act (FFCRA, 2020) provides job and income protection to employees, and provides economic stimulus to employers through tax credits/advances
- ✓ Payroll Protection Program (PPP, 2020) provides employers with economic stimulus as a payroll loan designed to keep employees working, paid at the same rate, and insured



Americans with Disabilities Act (ADA, 1990)

- Employer covered if 15+ employees
- ADA prohibits discrimination against qualified individuals with disabilities.
- An individual with a disability is a person who:
 - has a physical or mental impairment that substantially limits one or more major life activities;
 - has a record of such impairment; or
 - is regarded as having such an impairment
- A qualified employee or applicant with a disability is an individual who, with or without reasonable accommodation, can perform essential functions of the job in question.
- COVID may be considered a disability.
- Provide interactive process to look for reasonable accommodations.



ADA and Covid: Non-invasive and Neutral

- Non-invasive infrared (forehead) temperature checks: These are considered ADA-related medical exams, but the EEOC considers these sufficiently non-invasive, when compared to the current benefit outlined by CDC/FDA and state/local health authorities to slow the spread of Covid. *We caution employers against use of any more invasive means, e.g., oral thermometers.*
- Neutral medical inquiries: EEOC again here granting narrow exception, allows employers currently to ask employees (or conditionally hired applicants) whether they or someone they know recently experienced any of a list of symptoms consistent with Covid. *Questions must be answerable Yes/No – thus not designed to induce disclosure of a specific symptom or condition.*



ADA and Covid: Antibody Testing

- An antibody test constitutes a medical examination under the ADA. In light of CDC’s Interim Guidelines that antibody test results “should not be used to make decisions about returning persons to the workplace,” an antibody test at this time does not meet the ADA’s “job related and consistent with business necessity” standard for medical examinations or inquiries for current employees.
- Therefore, requiring antibody testing before allowing employees to re-enter the workplace is not allowed under the ADA. Please note that an antibody test is different from a test to determine if someone has an active case of COVID-19 (i.e., a viral test). The EEOC has already stated that COVID-19 viral tests are permissible under the ADA.



Covid-related Accommodations

- Accommodations: Allergies to glove latex or respiratory issues that prevent wearing a mask will require an ADA dialogue to seek accommodation, such as slightly further social distancing , telework, leave, reassignment, etc.
- Employer need not provide remote work arrangement to all. Business judgment is allowed, e.g., data privacy concerns. Recall that federal courts have held that they should not act as a “super personnel department” or “second guess” an employer’s legitimate business justifications.
- Just be sure to not discriminate on protected classes – including a disability such as Covid or a condition that impacts ability to work in the Covid adjusted workplace such as PPE.



Family Medical Leave Act (FMLA, 1993)

Briefly. . . . FMLA provides **Covered Employees** (working at least 1250 hours in prior 12 months), of **Covered Employers** (at least 50 employees in 75-mile radius in 20 or more workweeks in current or preceding calendar year), up to 12 Weeks unpaid leave for qualifying circumstances.

- **For Covid-related analysis, leave allowed for Serious Health Condition of spouse, son, daughter, parent or self.**

Serious health condition is defined as "an illness, injury, impairment, or physical or mental condition that involves:

- inpatient care in a hospital, hospice, or residential medical care facility; or
- continuing treatment by a health care provider."



FMLA and Covid Basics to Remember

- Covered employers must provide employees unpaid, job-protected leave for specified family and medical reasons, which may include the flu where complications arise.
- Employees on FMLA leave are entitled to the continuation of group health insurance coverage under the same terms as existed before they took FMLA leave.
- Employer may require that employees use any unexpired sick-time balances concurrently with their unpaid FMLA leave.
- Military Exception – 26 weeks if family is a servicemember



FMLA: Leave Extension for Military Duty

A service member could catch Covid in the line of duty. This could render them unfit for the duties of their office, grade, rank, or rating.

- Eligible employees may take up to 26 weeks to care for a servicemember who incurred or aggravated a qualifying condition while in the line of duty on active duty.
- Employee must be servicemember's spouse, son, daughter, parent, or next of kin
- Maximum combined FMLA leave is 26 weeks per 12-month period. Taking 12 for another reason, employee would have 14 remaining to care for the servicemember.



FMLA: Certification of Condition

An employer may require that its employee submit medical certification from a health care provider to support the need for FMLA leave – to care for family or self (Note: Covid-unrelated exception exists).

Second Opinion

Employer may require second opinion, if reason to doubt the validity of employee's completed certification. Employer can select health care provider – if not employed regularly/routinely by employer.

Tie-Breaker

If those opinions differ, employer may require a third certification from a healthcare provider selected by both the employee and employer. Such third opinion is final and must be used by employer.

Medical Costs and FMLA Timing

Employer must pay for any such second and third opinions, plus reasonable travel expenses for employee or family member. Employee is provisionally entitled to FMLA while waiting for second/third opinion.



FMLA: Updates

Three-Day Incapacity

DOL previously had established a separate definition for an “incapacity of more than three consecutive calendar days” for the treatment and recovery. This generally made the process of certifying a condition more difficult where facing such conditions as ‘the common cold, the flu, ear aches, ulcers, migraines, etc.’ specifically because treatment and recovery would not be expected to exceed three days.

Covid-19

The CDC has recognized Covid-19 as a serious health condition with symptoms and treatment possibly exceeding three days, and the DOL recognizes that such may require family and medical leave – if the condition can be certified.



Federal Covid-related Paid Leave

Families First Coronavirus Response Act (FFCRA)

- Covers certain public employers, private employing fewer than 500 and, for sick leave, even federal employees under FMLA Title II. Note: This includes employers under 50 employees (unlike FMLA) but for these it offers exemption if paid leave would 'jeopardize viability'
- Covers all such employees immediately and, for the added 10 weeks for childcare, if already employed at least 30 days
- Provides six (6) Covid-related reasons split into two sub-Acts basically to help guide the administration for reason number five's extra ten weeks of coverage eligibility:
 1. Emergency Family and Medical Leave Expansion Act (EFMLEA) covers first two weeks
 2. Emergency Paid Sick Leave Act (EPSLA) covers extended ten weeks, eligible by reason 5



Covid-specific Federal Leave Types

FFCRA provides paid job protection, for six Covid-related reasons:

1. Subject to Federal, State, or local quarantine or isolation order related to COVID-19;
2. Advised by a health care provider to self-quarantine related to COVID-19;
3. Experiencing COVID-19 symptoms and is seeking a medical diagnosis;
4. Caring for an individual subject to an order described in (1) or self-quarantine as described in (2);
5. Caring for a child whose school or place of care is closed (or childcare provider is unavailable) for reasons related to COVID-19; or
6. Experiencing any other substantially-similar condition specified by the Secretary of Health and Human Services, in consultation with the Secretaries of Labor and Treasury.



FFCRA Covid Leave: Duration and Payment

Duration

Average weekly payrate and hour for up to two weeks (80 hours) for any reason, except that reason 5 adds ten (10) weeks – for a total of twelve (12) weeks.

Payment

Reasons 1-3: Higher of regular payrate or applicable minimum wage, but capped at \$511/day or \$5,110 for the full period.

Reasons 4,6: 2/3 of such higher rate noted above, but capped here at \$200/day or \$2,000 for the full period.

Reason 5: Same 2/3 rate as in 4 and 6 but, because extending twelve weeks, capped at commensurately higher \$12,000 for the full period



Employer Reimbursement and Duties

Reimbursement

Covered employers will be repaid dollar-for-dollar by tax credits that, if necessary, may extend to Medicare and even amounts paid to maintain health insurance coverage; and these may also be requested in advance in needed

Duties

- Post a notice conspicuously of FFCRA requirements; and
- Not discharge, discipline, or otherwise discriminate against any employee who takes paid sick leave under the FFCRA and files complaint or institutes proceeding under or related to the FFCRA.



FFCRA Fine Print for Employees

Source Options

Covered employee may elect to substitute accrued vacation leave, personal leave, or medical or sick leave for the first two weeks of partial paid leave under this section (typically so that employee can get full pay)

But – Use it or Lose it

FFCRA paid sick time does not carryover from one year to the next, and the program is set to expire all such paid leaves on December 31, 2020

This may change as may the treatment of similar programs under State and local authorities – which is a major reason for our Part 4. Post-Election Review



FFCRA Updates – Summary

Shortly after enacting this in March, the DOL was sued by the State of New York in the U.S. District Court for the Southern District of New York, which ruled in August to invalidate portions of the FFCRA.

Responding effective September 16th, the DOL has issued these updates:

Intermittent Leave – Partial Days are not allowed, unless telecommuting.

“Health Care Provider” Narrowed – Fewer employee types can be excluded from paid leave.

Work Availability Requirement – If employer has no work, then employee gets no leave.

We will discuss each now and consider scenarios in coming weeks.



Intermittent Leave – Update 9/16/2020

Because FFCRA intends “to provide such paid sick leave as necessary to keep you from spreading the virus to others,” a non-teleworking employee may not take FFCRA leave in partial-day increments. Once started for a Covid reason, FFCRA leave does not end until that reason ends.

- This does not apply if able/authorized to telework safely from home.
- This does not require 80 hours leave if only a day is needed. If employee’s qualifying reason ends before the available FFCRA paid sick leave balance reaches zero hours, such employee would return to work – and keep any remaining balance for when a FFCRA reason arises next if before the final FFCRA expiry date of December 31, 2020.



Health Care Exclusion – Update 9/16/2020

Since March, health care providers or emergency responders could be excluded from income protection rights of the FFCRA, even IT working in the back of a school teaching about health care. DOL narrowed this definition.

This exclusion is now consistent with FMLA, applicable to specifically only:

- a. Any licensed doctor of medicine, nurse practitioner, or other health care provider permitted to issue a certification for FMLA purposes; or
- b. Any other person employed to provide diagnostic services, preventive services, treatment services, or other services that are integrated with and necessary to the provision of patient care and, if not provided, would adversely impact patient care.



Work Availability – Update 9/16/2020

In March, FFCRA granted paid leave if “unable to work (or telework) due to a need for leave because of” six qualifying conditions related to COVID-19. SDNY found this ambiguous: Must the condition (i) prevent employee from working, even if the employee would have other reasons preventing work; or (ii) be the sole reason that employee cannot work?

The DOL argued the second: if employer simply had no work, then Covid was not preventing. The However, the Court invalidated this work-availability requirement because of the ambiguity flowing from such “barebones explanation.”

So, the DOL update has offered more: “[B]ecause of” calls for a “but-for” test. Employee would have work “but for” the Covid reason; and conversely if employer lacks work, then employee has “no work from which to take leave” – so leave would be unavailable. We will stay tuned for any further adjustments here.



Notifying Employer – Update 9/16/2020

- FMLA typically requires notice where possible prior to a family leave, but FFCRA casts Covid-symptoms akin to an ADA disability, which typically allows for notification as soon as practicable after an episode (ADAAA);
- Where as some have been suggesting that Covid-related family care would require notice to employer prior to taking leave; and where FFCRA’s own “unambiguous notice provision” had required notice only “after the first workday” of leave;
- Now DOL has come out to clarify that such notice should be made to employers only as soon as practicable.



State/Local Job and Income Protections

State/Local laws can add protections/stimulus to federal provisions – and vary widely

Virginia: Only federal protections – unless employer adds policy, contract, etc.

Maryland

- ✓ Parental Leave Act (MPLA, 2014) – does not apply to Covid
- ✓ Healthy Working Families Act (2018) – may apply to Covid

District of Columbia

- ✓ DC Family Medical Leave Act (DCFMLA, 1990)
- ✓ DC Accrued Sick and Safe Leave Act (ASSLA, 2008)
- ✓ DC Universal Paid Leave Act (DCUPLA, 2016)
- ✓ DC Paid Family Leave (DCPFL, 2020)
- ✓ COVID-19 Response Emergency Amendment Act (CREA – 3/17 + 90 days)
- ✓ COVID-19 Support Emergency Amendment Act (CSEA) replaces CREA, retro from 3/11 and thru 8/25, adding 2 more weeks to ASSLA for specifically FFCRA reasons

Note: These are just some of the laws/regulations. It is important that you consult an attorney about what laws apply to your company size, location(s), industry, etc. The next slides cover just a few of these laws.



Top Six Issues

1. Childcare / school constraints.
2. Fairness – employees in office doing extra work.*
3. What to do if employee is sick or tests positive for Covid.
4. Employee(s) not comfortable returning to work.
5. Handling employee requests for special accommodations.
6. Scheduling / Approach*



Scenarios / Discussion

1. Job/Income Protection and Employer Hardship
2. Telecommuting and Childcare Coverage
3. Return to Work and Medical Exams/Inquiries
4. Reporting Obligations within a Small Employer



Scenario 1. Facts

14 months ago, small Virginia-based company, Acme, hired a new comptroller, Cary. Soon after Cary gave notice and quit but, gone only 3 months, Cary needed income and returned.

Quarantined once at home for three days due to Covid symptoms, Cary was out 3 days until the Covid test came back as negative. But this week since Monday, Cary has been out again.

Wednesday morning a doctor called to say that Cary is quite ill with Covid – and might be out – beyond fiscal quarter close! Unfortunately, Cary used all paid sick time from the usual sources.

So, what can Cary do now without such usual leave benefits?

How will Acme be able to close its fiscal quarter without its comptroller?



Scenario 1. Discussion. Job/Income Protection and Employer Hardship

Cary's benefits

Facts mention no company policy/contract providing job/income protection, and Virginia does not add protections beyond the Federal laws.

Unpaid FMLA job protection would be option for this serious health condition, but Cary's months of service total 11 because of a three-month break. So, FMLA is also not available to Cary.

Paid FFCRA is available for this Covid-related reason, up to 80 hours but minus 3 days of earlier quarantine.

Acme's options

If no other employee can close fiscal quarter at this small employer, Acme may need to replace Cary.

1. Pursue an ADA Interactive Process because Covid is a qualifying disability: Telework may be a reasonable accommodation here. But are data security and technology costs an undue hardship?
2. Pay remaining FFCRA only if this small employer can manage to hire a temporary replacement, for example, without jeopardizing viability. Remember FFCRA paid leave is reimbursable as tax credits and may be received as an advance if necessary
3. Liability. Be sure to slow the spread - workforce, customers, etc .. VES



Scenario 2. Telecommuting and Childcare Coverage

All employees were telecommuting until recently when foot traffic increased enough to re-open the company's office. Ruby is a receptionist and office manager, who was able to handle the calls from home – but now needs to head back to the office to assist on office-manager duties.

Ruby has a six-year-old child, whose school has offered students to option to either come back to school or stay at home. Fearing Covid risks at the school, Ruby elects to keep the child home.

Options?

Ruby may be without any job/income protection options because fear is not recognized as an ADA qualified disability (unless severe anxiety?), FMLA reason or FFCRA Covid-related reason.

FFCRA does not cover this situation where a parent has the option and voluntarily elects to keep a child home.

Compare: If the school had made the decision not to re-open due to Covid, then FFCRA would kick in – providing 2/3 payrate up to 12 weeks (with certain dollar caps).



Scenario 3. Return to Work and Medical Exams/Inquiries

Employees are returning to work, and Acme notices that Frank is sweating heavily. Frank says that his alarm did not go off, the busses were on a changed schedule, and he was forced to run a ways to get to work on time. Acme has not tested everyone – but wants to temperature test Frank and ask if a family member has had Covid symptoms. Is this okay?

EEOC Guidance under the ADA

Temperature check for one employee can be okay. Although employers must administer medical examinations and inquiries uniformly to all employees, the EEOC has provided that an employer may temperature check a single employee – if there is a “reasonable belief based on objective evidence that this person might have the disease.” Maybe he ran, and maybe he also has Covid.

Asking for family symptoms is prohibited. We will not dive into great detail here, but it is important to note that the Genetic Information Nondiscrimination Act (GINA, 2008) prohibits employers from asking employees medical questions about family members. You can ask if an employee came into contact with anyone experiencing symptoms – but cannot specify family.



Scenario 4. Reporting Obligations within a Small Employer

Suppose that manager Mary learns that an employee has COVID-19 and is now on leave. The manager knows that she must report it to the employer’s designated representative – but is worried about violating ADA confidentiality because coworkers in this small company will be able to figure out who it is. What should she do?

EEOC Guidance

ADA does not interfere with employer’s designated representative interviewing the employee to get a list of people with whom the employee possibly had contact through the workplace, so that employer can take action to notify those who may have come into contact with the employee.

Without revealing the employee’s identity, manager and representative should use a generic descriptor, such as telling employees that “someone at this location” or “someone on the fourth floor” has COVID-19. This provides notice and does not violate ADA’s prohibition of disclosure of confidential medical information, even if coworkers can figure out who is the employee.



Practical Counsel

- Covid has been a moving target. So, Local/State/Federal stimulus programs may continue to adjust in the coming months into 2021.
- We are a Virginia employer, and we have returned to our workplace.
- Many of our attorneys have worked in-house at companies – growing them, restructuring and managing diverse teams.
- That’s why we can advise employers crisply on practical policies within your control today ... to prevent liabilities tomorrow.



Our Next Back-To-Work Webinar

Part 2. Covid Leaves and Employment Separations

- Diving deeper into leave laws
 - Federal laws and regulations
 - State and local requirements
 - May I permit only some employees to telecommute?
- Employment separations
 - At Will employment (performance measures, expired leaves, and Covid-related misconduct)
 - Updating the handbook, policies, and procedures
 - Calculating final payment amounts and timing



Thank You & Questions

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