

U.S. COVID-19: MY EMPLOYEE HAS COVID-19 - WHAT LEAVE ENTITLEMENTS APPLY?

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The call to HR is becoming more common: I have COVID-19. Should I go on a leave of absence, and if so, will I be paid while I am out?

It is clear that an employee who has tested positive for COVID-19 (or who is likely positive based on symptoms and/or exposure) should remain away from the workplace so as to avoid spreading the disease. What can sometimes be less clear is what leave entitlements apply to the employee, and whether the employee will be paid for all or some portion of the leave. When faced with these questions, employers should consider the following:

Leave Entitlements Under Federal Law

For employers covered by the new **Families First Coronavirus Response Act** (“FFCRA”), an eligible employee may be entitled to up to 80 hours of Paid Sick Leave, if the employee is unable to work (including telework) due to either:

- Having COVID-19 and being advised by a healthcare professional to self-quarantine; or
- Having symptoms of COVID-19 and seeking a diagnosis from a healthcare professional.

Importantly, this leave is both job-protected and paid (subject to caps, although employers may permit employees to supplement these wages with other available accrued paid leave). Of course, some employees who have COVID-19 are asymptomatic or have only mild symptoms and are able to keep working (remotely). In these cases, the FFCRA does not apply. Click [here](#) for our latest blog posts on the FFCRA.

The federal **Family and Medical Leave Act** (“FMLA”) may also come into play, such as when:

- The employee works for a private employer covered by the FMLA (i.e., has 50+ employees), but the employer has 500+ employees, such that the employer is not covered by the FFCRA; or
- The employee works for an employer that is covered by both the FMLA and the FFCRA, but the employee has exhausted his or her FFCRA Paid Sick Leave entitlement, and continues to need

leave due to COVID-19.

For an employee to be entitled to leave under the FMLA, the employee must be eligible for FMLA leave, have FMLA leave available, and the employee's illness due to COVID-19 must meet the definition of a "serious health condition." FMLA leave is job-protected, but unpaid (subject to the potential substitution of paid leave under the employer's policies).

Finally, if an employee with COVID-19 develops other serious, long-term health conditions as a result of the virus, the employee may be entitled to an unpaid leave of absence (or other accommodation) under the federal **Americans with Disabilities Act** ("ADA"). However, a COVID-19 diagnosis alone may not trigger entitlement to such leave.

Leave Entitlements Under State and Local Law

Some states and cities have enacted **new sick leave laws, or amended existing sick leave laws**, specifically in response to COVID-19. For example, the state of New York adopted the [Paid Quarantine Leave Law](#), which provides for sick leave (job protected and, in some circumstances, paid) when an employee is subject to a mandatory or precautionary governmental quarantine or isolation order due to COVID-19. Other states and cities which have adopted new (or amended) sick leave requirements include, but are not limited to, Colorado, Michigan, Washington, Seattle, and multiple cities in California (e.g., Los Angeles, San Jose, San Francisco).

Employers must also be aware of **previously-existing state and local leave laws** that entitle employees to leave (often paid and job-protected) in certain circumstances, often including circumstances involving public health emergencies. Employers tend to work such entitlements into their existing paid leave policies, and assume that so long as they provide sufficient hours or days of leave to cover the legal requirement, then they've met their obligation. However, these state and local laws typically include provisions that conflict with common provisions in employer policies, such as provisions relating to eligibility, approval, notice, and documentation. For example, the Chicago Paid Sick Leave Ordinance, which went into effect in 2017, requires employers to provide paid sick leave to all employees for a variety of reasons, including when the employee's place of business (or child's school) is closed due to a public health emergency. Unlike other qualifying reasons for leave under the law, employees do not need to seek advanced approval in order to take leave under the Chicago Ordinance. Employers subject to these types of laws should review their policies to ensure they are legally-compliant and that, if required, leave is available to employees who develop COVID-19.

Leave Entitlements Under Employer Policy

Finally, employers must review their own leave policies (and practices) to ensure that they are appropriately and consistently applying such policies to the situation. Employers often offer a combination of paid and unpaid leave, available for certain reasons and subject to certain

requirements. Employers should ensure that employees understand their options under these policies, and that the policies are applied in a non-discriminatory manner.

Employers may also wish to amend their existing leave policies, such as to provide employees with additional leave options in light of the challenging circumstances presented by COVID-19. Unless otherwise specified in applicable collective bargaining agreements or handbooks, employers typically have the right/ability to amend their policies, although federal, state, and local laws may currently prohibit amendments that *reduce* the amount of leave available to employees. When amending policies, employers should be sure to take all of the above considerations into account and clearly communicate any changes to all employees.

The COVID-19 pandemic and its impact on the workplace is rapidly evolving. Employers should regularly consult with legal counsel, the CDC website, and state and local government “shelter-in-place” and related public health orders to ensure they have the most up-to-date information and guidance.

BCLP has assembled a COVID-19 HR and Labor & Employment taskforce to assist clients with labor and employment issues across various jurisdictions. You can contact the taskforce at: COVID-19HRLabour&EmploymentIssues@bclplaw.com. You can also view other thought leadership, guidance, and helpful information on our dedicated COVID-19 / Coronavirus resources page at <https://www.bclplaw.com/en-GB/topics/covid-19/coronavirus-covid-19-resources.html>

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