



Coronavirus (COVID-19) Update

March 19, 2020

The Coronavirus (COVID-19) is impacting businesses of all sizes, industries and locales. Our goal is to provide you information that is currently available regarding COVID-19's impact to leave of absence programs, but please be advised that this information is subject to change as the situation continues to evolve.

This update memo covers the following:

- 1) Update: Is Temperature Testing Allowable?
- 2) Update: Proposed Expansion of New York Disability, Paid Family Leave and Paid Sick Leave
- 3) Families First Coronavirus Response Act (HR 6201) – Emergency Expansion of FMLA and Paid Sick Leave

Update: Is Temperature Testing Allowable?

Previously, we cautioned employers about implementing mandatory temperature testing as the EEOC considers taking an employee's temperature as a "medical examination." The ADA prohibits employers from requiring medical examinations of disability-related decisions unless (1) the employer could clearly demonstrate that the exam is "job related and consistent with business necessity," and/or (2) there is an objective, reasonable belief that the employee(s) pose(s) a "direct threat" to the health and safety of themselves or others that cannot be dealt with via any other reasonable accommodation.

Today, the EEOC issued updated guidance on this topic:

"The ADA and Rehabilitation Act rules continue to apply, but they do not interfere with or prevent employers from following the guidelines and suggestions made by the CDC or state/local public health authorities about steps employers should take regarding COVID-19. **Employers should remember that guidance from public health authorities is likely to change as the COVID-19 pandemic evolves. Therefore, employers should continue to follow the most current information on maintaining workplace safety.**

When may an ADA-covered employer take the body temperature of employees during the COVID-19 pandemic?

Generally, measuring an employee's body temperature is a medical examination. Because the CDC and state/local health authorities have acknowledged community spread of COVID-19 and issued attendant precautions, employers may measure employees' body temperature. However, employers should be aware that some people with COVID-19 do not have a fever."

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https://www1.eeoc.gov//eeoc/newsroom/wysk/wysk_ada_rehabilitaion_act_coronavirus.cfm?renderforprint=1

Employers continue to be encouraged to work with state/local health authorities to get the most up-to-date information on potential exposures.

Update: Proposed Expansion of New York Disability, Paid Family Leave and Paid Sick Leave

New York has announced COVID-19 protections for employees. **Please note:** the bill still needs formal legislative approval and will be effective upon the governor's signature. Highlights of the proposed bill include paid and unpaid leave for employees subject to quarantine or isolation due to COVID-19; expansion of New York Disability Benefits (DBL) and Paid Family Leave (PFL) benefits; and job protection entitlements. The proposed bill does contemplate the Federal Emergency FMLA and Emergency Paid Sick Leave Bill and how New York's changes would interact with the Federal program. We are monitoring this and will provide an update once final details become available.

Families First Coronavirus Response Act (HR 6201) – Emergency Expansion of FMLA and Paid Sick Leave

Since its original iteration, Families First Coronavirus Response Act (HR 6201) has undergone changes that have been approved by the Senate and signed by President Trump. The leave provisions under this Federal program will go into effect on April 2, 2020. We have developed a visual illustration of this Federal program to, hopefully, make it easier to understand the details of the final program. Please be advised that this illustration is (1) intended to be high-level in nature, and (2) covers the leave of absence portions of Families First Coronavirus Response Act.

Notable Changes to Original Proposed Bill

Summarized on the next page are notable changes made to the original proposed bill HR 6201.

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Emergency FMLA

- Clarified that an employee is eligible for Emergency FMLA if they are unable to work or telework.
- Originally had three (3) qualifying reasons for leave.
Now, only one (1) qualifying reason for leave: to care for a child whose school or childcare facility is closed due to public health emergency.
- Originally provided 14 days of unpaid leave at beginning of Emergency FMLA.
Now, provides 10 days of unpaid leave at beginning of Emergency FMLA.
- Clarified that employers of healthcare providers or emergency responders may exclude such employees from Emergency FMLA.

Emergency Paid Sick Leave

- Clarified that an employee is eligible for Emergency FMLA if they are unable to work or telework.
- Within qualifying reasons:
 - Originally provided for care of a family member.
Now, provides care of an “individual” subject to ordered quarantine, which seemingly covers all familial relationships, as well as non-familial relationships.
 - Added a “catch all” provision that allows the Secretary of Health and Human Services, in consultation with the Secretary of the Treasury and the Secretary of Labor, to expand Emergency Paid Sick Leave and add additional qualifying absence reasons as COVID-19 continues to evolve.
- Clarified that employers of healthcare providers or emergency responders may exclude such employees from Emergency FMLA.

For specific questions related to the tax credits, please consult your tax attorney(s).

Summary of COVID-19 Impacts to Absence Management

Topic	Status	Notes
FMLA	Updated	NEW – HR 6201 has undergone changes that has been approved by the Senate and signed by President Trump. Please refer to the visual illustration we have put together (separate attachment to this memo) that provides an overview of this program.
ADA	Updated	NEW – Employers <i>may</i> test employees’ temperatures because the CDC and state/local health authorities have acknowledged community spread of COVID-19.
Short Term Disability (group insurance)	No change	<ul style="list-style-type: none"> Nearly all STD insurance carriers are remaining status quo in claims handling procedures; will review each claim submitted on a case-by-case basis. Need to satisfy definition of disability under the plan. Carriers have noted that they are willing to work with ASO/self-funded STD clients to expand STD benefits to include quarantine if the client desires. However, this process would require employers to clearly establish parameters for how to handle this.
Statutory Disability and Paid Family Medical Leave	No change	<ul style="list-style-type: none"> California – SDI and PFL expansion, SDI 1-week elimination period waived Washington – PFML expansion New Jersey – TDB and FLI expansion Rhode Island – TDI and TCI expansion, including waiver of 1-week elimination period
Paid Sick Leave (state or municipal required)	Updated	<ul style="list-style-type: none"> NEW – HR 6201 has undergone changes that has been approved by the Senate and signed by President Trump. Please refer to the visual illustration we have put together (separate attachment to this memo) that provides an overview of this program. Generally entitles employees to use paid sick leave for own health condition, family health condition, as well as being away from work due to child’s school or childcare facility closure. Colorado – emergency sick leave mandate for select industries
Paid Time Off (employer programs)	No change	<p>Different employers are approaching this in different ways: <i>(not an exhaustive list)</i></p> <ol style="list-style-type: none"> Do not provide more paid time off; employees use paid time off they currently have access to Provide paid sick time to those who currently do not have access to paid sick time – may be in addition to other paid time off the employee currently has access to Provide “relief pay” or “pandemic pay” – largely akin to #2 above