



LEHR MIDDLEBROOKS
VREELAND & THOMPSON, P.C.

LABOR • EMPLOYMENT • BENEFITS

COVID-19 FAQs: RETURN TO WORK, TRAVEL, TESTING, PTO AND WORK FROM HOME ISSUES

April 21, 2020

As the COVID-19 pandemic wears on, many employers are handling the challenges of new workspaces, responding to novel employee work restriction requests, and navigating hurriedly packaged work legislation and regulations. The following FAQs range from questions arising when employers need to decide which employees to return to work to questions based on leave and work-at-home arrangements; the questions also address employees refusing available work. Do not hesitate to email us or give us a call if you have any questions.

RECALL/RETURN TO WORK

Once shelter in place restrictions are eased, employers may determine that they do not need or want everyone back, thus converting a layoff to a termination. These decisions have potential EEO and other legal implications.

1. I do not need to recall everyone from layoff. How do I decide whom to recall without ending up with a discrimination claim?

There are several approaches to consider for a recall decision, and you may use a combination of approaches:

- A. Length of service (seniority). The advantage to this is that it's objective and predictable—there are no subjective performance, behavior, or attitude-related factors to consider. The advantage is also the disadvantage: the employer gives up its right to recall employees based on job-related performance, skill, or behavior factors. One approach that may blunt this is that to modify the length-of-service approach to include the requirement that no disciplinary actions must have occurred within a certain period of time; if they have, the employee moves to the bottom of the list.
- B. What is the skill set needed moving forward? You may have concluded that you were able to combine functions and do not need as many employees as prior to the reduction. Treat the recall decision as a hiring decision. Identify the skillset and ability needed moving forward. Consider prior performance, but a prior good performer who has a narrow skill set may not be as desirable a hire as someone with a broader skillset.

C. Compare overall work records, attendance, attitude, and length of service. Evaluate candidates based on those factors, where differences are based on facts. Be careful about emphasis placed on prior performance appraisals, especially when comparing employees working for different supervisors. An inflated prior appraisal may lead to returning someone who is not as strong as another employee. Rather than relying exclusively on prior performance appraisals, evaluate the candidates now using those job-related metrics needed for the future.

2. How do I respond if an employee I am calling back to work refuses because they just want to stay home and collect unemployment benefits?

Unless the reason for staying home is related to the employee's COVID-19 illness or a particular susceptibility to COVID-19, care for another with COVID-19, or loss of childcare due to COVID-19, an employee who declines a return to work request should no longer be eligible for unemployment benefits. Some employees say they are "afraid" to return to work, even though nothing medically predisposes them to either COVID-19, anxiety disorders, or other potentially disabling conditions (those situations will need to be evaluated under traditional FMLA and/or ADA). We recommend telling those employees that while the company will consider them eligible for rehire if they present themselves, they will be regarded as a resigning employee and/or they will be replaced. At this point, their unemployment benefits should terminate.

3. What if the employee exhausts the Emergency FMLA expansion and still cannot find arrangements for child care?

If Emergency FMLA is exhausted, the employer's obligation to continue with 2/3 pay ends. An employer may tell the employee (1) the job will remain open for a specific period of time and if the employee cannot return to work, the job will be filled; or (2) the employer will fill the job now. In either situation, you may tell the employee that if the child care situation is resolved, the employee should notify you and you will evaluate what positions are available, if any.

APPLICATION OF PAID LEAVE TO SUPPLEMENT UNPAID OR PARTIALLY PAID FFCRA LEAVES

On April 10, the DOL quietly revised its "final" rule regarding the FFCRA to substantively change when employers can require concurrent use of accrued paid leave. Those changes were not reflected in the Federal Register version of the rules but can be seen at [eCFR.gov](https://www.eCFR.gov). We updated our [forms](#) (Word document), [policy](#) (Word document), and [instructional letter](#) (PDF) to reflect those changes. The DOL has also continuously updated its Q&A page. Please be sure you are checking our links and DOL, IRS, OSHA, and CDC resources regularly.

- 1. An employee has requested leave to care for a family member with COVID-19. We are covered by the Families First Coronavirus Response Act (FFCRA) provisions for Emergency Paid Sick Leave (EPSL) and Emergency FMLA Expansion (EFMLA). May we require the employee to use accrued vacation leave to supplement his 2/3 EPSL payment?**

No. The DOL's Q&A (#32, if you are checking references) indicates that an employer cannot require an employee to supplement any EPSL paid leave with accrued available employer-provided paid leave.

- 2. An employee has requested leave due to lack of childcare and school closure. We are covered by the FFCRA. May I require the employee to use their available EPSL or available vacation leave to “cover” the unpaid first two weeks of EFMLA?**

No. The statutory language indicates that EPSL is something the employee “may” use in this situation. No guidance from the DOL gives the employer the right to force EPSL on an employee in weeks 1-2 of EFMLA, though we believe most employees will want to use EPSL if they still have it available in this circumstance.

The DOL's final rule and Q&A suggest that only the employee can choose to use available accrued paid leave the unpaid first two weeks of EFMLA if EPSL is not available. The employee can only apply accrued paid leave in this circumstance if the leave would be available for the employee to provide childcare (ex: to care for a sick child, spend time with a child, etc.).

- 3. An employee has requested leave due to lack of childcare and school closure. We are covered by the FFCRA. May I require the employee to use available vacation leave to “cover” the remaining 1/3 pay during the partially-paid weeks (weeks 3-12) of EFMLA?**

Yes, as long as employees could generally use vacation for the purpose of providing childcare. The April 10 revision to the “final” rule on the FFCRA leaves removed language that seemed to prohibit this action and kept language indicating that the employer could “require” such accrued paid leave use.

TEMPERATURE, OTHER ON-SITE TESTING, TRAVEL RESTRICTIONS

- 1 Can we take employees' temperatures before each shift?**

Yes. If there is an elevated temperature, you have the right and arguably the duty under OSHA to refuse the employee to report on to work absent a negative COVID-19 test, doctor's release, and/or the employee's satisfying current CDC

advice, which is that employees recovering from COVID-19 symptoms can return to daily life when they are fever and cough-free for 72 hours without the assistance of medication AND seven days after the onset of symptoms. Employers should also be aware and ready to accommodate an employee who can establish that their elevated temperature is an effect of a disability or medication taken due to a disabling condition. For employers of fewer than 500 employees, employees with symptoms of COVID-19 seeking a medical diagnosis/testing will qualify for up to two weeks of full pay, subject to a \$510/day cap under the Emergency Paid Sick Leave Act of the Families First Coronavirus Response Act. You can use this “carrot” to encourage an employee to leave the worksite with a stated intent to seek diagnosis and have them complete the Request form available in the link above.

2 May we ask an employee or applicant “Are you experiencing symptoms of COVID-19, like fever, cough, fatigue, difficulty breathing?”

Yes, those are permissible questions. If the answer is yes, you should advise the employee consistently with the above response, ideally turning the employee into an individual seeking a COVID-19 diagnosis and eligible for Emergency Paid Sick Leave.

3 What can I do if an employee has a cough but no other symptoms, and other employees do not want to work with the coughing employee?

An employee with a cough may be required to wear PPE on company premises. If other employees refuse to come to work because of their concerns about safety, that is protected activity under the National Labor Relations Act and the Occupational Safety and Health Act. This means that you may replace them, but they may not be terminated. Also, they should not qualify for unemployment compensation benefits.

4 With some states opening up their economies, including recreation areas, we’re concerned that employees may travel and become exposed to COVID-19. May we restrict such travel?

Yes. if your state is still shelter in place, you may without compensation require employees to follow that directive. If shelter in place is lifted and you are still concerned about employee travel, such as to densely populated or high-risk areas, you may prohibit such travel. If you require an employee to remain at home—literally—when shelter in place is lifted, that may be considered compensable time under the Fair Labor Standards Act, and you should seek legal counsel specific to the exact situation.

PAY AND EXPENSE QUESTIONS WITH WORK FROM HOME ARRANGEMENTS

1. Am I required to reimburse employees for an estimated cost of the company's use of employee internet and cell phone service?

In most states, no, such reimbursement is not specifically required. In a few states, such as Illinois and California, an employer is required to pay an employee for the value of the employee's internet/cell phone use for company purposes.

If an employee earning at or close to minimum wage is required to provide their own at-home internet, cell phone service, or other equipment/accounts in a manner that is unique or additional to personal use, you should review potential FLSA concerns with counsel.

2. If an exempt employee works part-time from home, may the employer reduce the exempt employee's salary?

According to wage and hour minimum wage and exemption requirements for administrative, executive, and professional employees, the employee must receive a recurring guaranteed salary, where the salary is not reduced due to a decline of work. Thus, if the employee works at all during the week, the employee will receive the salary. If there is a full day absence for personal reasons, that may be deducted. If the employer maintains a sick leave policy (including a general PTO policy that can be used in case of illness) and the employee exhausts such leave, then deductions may be made in full day increments provided no work is done during that day. The employer may convert the exempt employee to hourly during the period the employee works at home. If the employee is paid hourly and works over 40 hours during a week, the employee must receive overtime compensation.

3. How do we keep a record of hours worked from home?

That requirement is for non-exempt employees, only. Whatever approach works for the employer and which is an accurate record of hours worked is permissible.

WORK FROM HOME CONSIDERATIONS

1. May employers require a private, quiet work area for work-from-home arrangements?

Employers may require that employees work in a private area, where confidentiality is protected. Employers also may require that any cell phone conversations occur in a private area, without background noise from children, television or pets.

2. If an employee works from home and is injured, is that a worker's compensation incident?

Likely, yes. If during employment an injury occurs, it is compensable, even if it occurs at home.

3. Am I required to continue to permit the employee to work from home?

No, that is solely up to the employer. Under the Americans with Disabilities Act, or possibly the Pregnancy Discrimination Act, work from home may be one form of reasonable accommodation. Other than the ADA or PDA, there is no requirement to consider work from home for a specific period of time or at all. We recommend that employers clearly communicate to employees that work-at-home arrangements are a response to extraordinary circumstances, and that work-at-home arrangements may in some cases result in employees being temporarily unable to complete essential job functions. Making this part of a written telework agreement or notice covering expectations for data security, confidentiality, timekeeping (if applicable), scheduling/availability, and other factors is the best practice. Proactively managing expectations and communicating will lessen the potential for confusion about whether COVID-19-response measures can be used as examples of future "reasonable accommodation."

672940