



# The Next Chapter of COVID-19 Leave Regulation

Your Questions Answered

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**Karen Joseph, Regional Practice Leader**

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# Today's Presenters

**Marti Cardi, Esq**

**Vice President, Product Compliance**

**Matrix Absence Management**

Marti Cardi has leveraged a legal career of studying, interpreting, and indeed shaping US employment law to inspire and drive forward Matrix's market leading product development and service delivery.

As Vice President, Product Compliance, Marti ensures Matrix clients and their employees are informed, advised and - most importantly - well served by Matrix's services and business processes in the face of ever-changing industry regulation. A nationally known speaker and author, Marti is the founder, lead author, and executive editor of *Matrix Radar*, an industry blog bringing commentary and clarity to employers and absence and benefits professionals nationwide.



**Karen Joseph**

**Practice Leader**

**Reliance Standard Life Insurance Company**

Karen Joseph is an experienced Absence Management Practice Leader with a demonstrated history of working in the absence management industry. Utilizing her passion and skills with Federal FMLA, State Leave, ADA, and Employee Handbooks compliance, she has worked with many large and small employers helping them with navigating the absence world. Karen earned her MBA focused in Project Management from Southern New Hampshire University as well as her MS in Organizational Leadership and MS in Human Resources from Mercy College.



**The new state and federal laws relating to COVID-19 are complex and evolving. This presentation provides our best information and interpretations as of publication, but amendments to the laws and interpretations may vary over time. Always check a direct source for the most up-to-date information.**



# Today's Agenda

**01** Answers to Your Questions

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**02** The ADA in a COVID-19 World

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**03** Other Federal Law Developments

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**04** State COVID-19 Leave Laws

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**05** Municipal COVID-19 Leave Laws

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**06** Lawsuits and Claims – Real & Imagined

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**07** Questions

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**01**

# Answers to Your Questions



## The Big Questions from Our Last Session

- If someone chooses not to telework due to having a small child with no childcare, do they qualify [for FFCRA or EFMLA]?



## The Big Questions From our Last Session

If someone chooses not to telework due to having a small child with no childcare, do they qualify?

- If a doctor provides a note saying, the employer should self-quarantine because of high risk, would the employee qualify for benefits under EPSL reason #2 (advised by a healthcare provider to self-quarantine due to concerns related to COVID-19)?



## The Big Questions From our Last Session

If someone chooses not to telework due to having a small child with no childcare, do they qualify?

If a doctor provides a note saying, the employer should self-quarantine because of high risk, would the employee qualify for benefits under EPSL reason #2?

- Are there situations where the emergency paid sick leave act (EPSL) and the expanded FMLA act (EFML) both apply?



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If a doctor provides a note saying, the employer should self-quarantine because of high risk, would the employee qualify for benefits under EPSL reason #2?

Are there situations where the emergency paid sick leave act (EPSL) and the expanded FMLA act (EFML) both apply?

- An employee's healthcare provider indicated the employee "probably" has COVID-19. Does FFCRA apply so the employer should pay the employee for the first 14 days?



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- Following a COVID-19 related absence, can an employer require an employee to provide a return to work note from their doctor?



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An employee's healthcare provider indicated the employee "probably" has COVID-19. Does FFCRA apply so the employer should pay the employee for the first 14 days?

Following a COVID-19 related absence, can an employer require an employee to provide a return to work note from their doctor?

- What process can or should an employer follow for documentation of FMLA leave for an employee's or family member's serious health condition?



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What process can or should an employer follow for documentation of FMLA leave for an employee's or family member's serious health condition?

- Which applies first, state paid sick leave or FFCRA EPSL?



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What process can or should an employer follow for documentation of FMLA leave for an employee's or family member's serious health condition?

Which applies first, state paid sick leave or FFCRA EPSL?

- If a member qualifies for both FFCRA and WA PFML, will either of them offset with the other?



02

# The ADA in a COVID-19 World



*ADA in a  
COVID-19 World*

The ADA is still  
the ADA

The usual rules all still apply:

- Nondiscrimination
- Duty to accommodate
  - Reasonable
  - Effective
  - No undue hardship
- Interactive process
- Limited medical inquiries
- Confidentiality

All employees, no exemptions



## *ADA in a COVID-19 World*

### Medical Exams & Inquiries

Employers can:

- Ask employees if they are experiencing symptoms of COVID-19
- Test employees for COVID-19 prior to entering workplace
- Take employees' temperature
- Require a fitness-for-duty note to return to work

Based on “direct threat”

Nondiscriminatory application



## *ADA in a COVID-19 World*

Infection  
control  
practices

Employers can:

- Enforce infection control practices in workplace
- Direct employee to go home if ill

Risk of not doing so?



## *ADA in a COVID-19 World*

Existing  
Disabilities

Continue to provide existing accommodations

- Modifications may be needed
- Additional accommodations may be needed



## *ADA in a COVID-19 World*

### High-Risk Employees

High risk categories, per CDC

These are likely ADA-protected disabilities

Employee may be working WITH or WITHOUT a current accommodation

Then may need an accommodation due to COVID-19:

- Avoidance of exposure
- Possible accommodations: separate work space, remote work, personal protective equipment, modified work hours
- Temporary is OK!



## *ADA in a COVID-19 World*

### Undue hardship

“Significant difficulty or expense” may look different now

Increased difficulty due to the pandemic:

- Obtaining special equipment
- Covering duties of absent workers
- Removing marginal functions

Increased expense due to the pandemic:

- Sudden loss of some or all of an its income stream
- Weigh the cost of an accommodation against current budget and current constraints



## *ADA in a COVID-19 World*

### Resources

Job Accommodation Network

<https://askjan.org/topics/COVID-19.cfm>

What You Should Know About COVID-19 and the ADA

[https://www.eeoc.gov/eeoc/newsroom/wysk/wysk\\_ada\\_rehabilitation\\_act\\_coronavirus.cfm?utm\\_content=&utm\\_medium=email&utm\\_name=&utm\\_source=govdelivery&utm\\_term](https://www.eeoc.gov/eeoc/newsroom/wysk/wysk_ada_rehabilitation_act_coronavirus.cfm?utm_content=&utm_medium=email&utm_name=&utm_source=govdelivery&utm_term)



# 03

## Other Federal Law Developments



## *OSHA*

# Employer's Obligation to Provide a Safe Workplace

General Duty Clause: Provide a place of employment “free from recognized hazards that are causing or are likely to cause death or serious physical harm”

Protective equipment: Provide gloves, eye and face protection, and respiratory protection when job hazards warrant it

Get ready for employees to return to workplace with infection control practices: [Guidance on Preparing Workplaces for COVID-19](#)

[OSHA COVID-19 website](#)



## *OSHA*

# Employer's Obligation to Provide a Safe Workplace

Good news for employers with remote workers!

OSHA will not:

- Conduct inspections of employees' home offices
- Hold employers liable for employees' home offices
- Expect employers to inspect employees' home offices

OSHA's Directive on [Home-Based Worksites](#).



## *OSHA*

# Right to Refuse Dangerous Work

Employee has right to refuse to work if ALL of these conditions are met:

- Employee has asked employer to eliminate the danger, and employer failed to do so
- Employee refused to work in "good faith" – genuine belief that imminent danger exists
- A reasonable person would agree that there is a real danger of death or serious injury
- There isn't enough time, due to the urgency of the hazard, to get it corrected through regular enforcement channels

<https://www.osha.gov/right-to-refuse.html>



## *USERRA*

# Reserves Helping with COVID-19

Governors in all 50 states, the District of Columbia, & territories have activated components of their Army and Air National Guard, the reserve component of the U.S. military

As many as 44,500 troops have been activated:

- Supporting community-based testing sites
- Creating enhanced medical capacity
- Facilitating logistical support and transportation of key supplies
- Packaging and distributing food and other supplies
- Cleaning and disinfecting common spaces



## *USERRA*

# Reserves Return to Work

USERRA covers National Guard members or Reservists called to duty under federal authority

- Job protection & reinstatement upon return
- No discrimination because of service

Call to duty under state orders, most states have similar protections

Servicemembers still subject to furlough, layoff due to business reasons

Can't refuse to reinstate promptly because of concerns about COVID-19 exposure

[National Guard Assists Response to the COVID-19 Pandemic](#)



# 04

## State COVID-19 Leave Laws



## *State COVID-19 Leave Laws*

### California Executive Order – Food Sector Workers

Effective 4/16/2020 through  
state-wide stay-at-home  
orders

[Executive Order](#) provides supplemental paid sick leave related to COVID-19 to “Food Sector” workers

- Covers employers with 500 or more workers total, at start of leave
- “Food Sector Worker” wide definition (e.g., agricultural, food manufacturing),

Supplemental paid sick leave available when worker is:

- unable to work due to federal, state, or local quarantine or isolation orders due to COVID-19;
- Advised to self-quarantine or self-isolate by a health care provider due to COVID-19 related concerns; or
- Sent home by the employer over concerns of possible COVID-19 transmission

80 hours/2 weeks of leave paid at employee’s regular rate of pay or highest applicable minimum wage (capped at \$511 per day and \$5,110 in total per employee)

Comparison of CA COVID-related leave laws:

<https://www.dir.ca.gov/dlse/Comparison-COVID-19-Paid-Leave.html>



## *State COVID-19 Leave Laws*

### Colorado – Wage Order Expansion

Phased in 3/11/20 thru  
4/27/20

Expires 5/27/20 or later

#### [Health Emergency Leave with Pay \(HELP\)](#)

Covered industries, no employer size limit:

- leisure and hospitality, retail, real estate, office work, elective health services, personal care services, food and beverage manufacturing and services, education, and various elder or community care services

Leave available to an employee:

- with flu-like or respiratory illness symptoms and
- who is (1) being tested for COVID-19 or (2) under instructions from a health care provider or authorized government official to quarantine or isolate due to a risk of having COVID-19.

Paid at 2/3 salary for up to 2 weeks (max 80 hours), no dollar cap; employer gets credit for available & unused paid sick leave

Employer must comply with FMLA procedures for the leave (HELP indeed?????)



## *State COVID-19 Leave Laws*

### District of Columbia – Expansion of DC FMLA

Effective 3/12/20 thru  
6/15/20

D.C. COVID-19 Response [Emergency Amendment Act](#) amends DC FMLA

New leave reason:

- Employee has been recommended or ordered to self-quarantine by a medical professional or governmental authority
- Interpreted to include school closures due to COVID-19

All employers with employees in D.C. covered

Employee eligibility requirements waived (1000 hours, 1 year of service)

Duration of leave is as needed, not limited by usual 16 weeks of DC FMLA  
Unpaid; employee may telework if available and employer agrees

Unpaid, but job protected

No change to DC Universal Paid Leave (leaves beginning July 1, 2020)



## *State COVID-19 Leave Laws*

### Maine – Extreme Public Health Emergency Effective 2005

<http://legislature.maine.gov/statutes/26/title26sec875.html>

Covers all employers, all employees

“Reasonable and necessary leave,” with or without pay

Available when employee is unable to work because, in connection with an extreme public health emergency, the employee is:

- Under individual public health investigation, supervision or treatment
- Acting in accordance with an order
- In quarantine or isolation
- Directed by employer due to concern that employee may expose other workers, or
- Needed to provide care or assistance to the employee's spouse, domestic partner, parent, child or legal ward

"Extreme public health emergency" means the occurrence or imminent threat of widespread exposure to a highly infectious or toxic agent that poses an imminent threat of substantial harm to the population of the State.



## *State COVID-19 Leave Laws*

### Minnesota – Quarantine Leave Effective 2005

Covers all employers, all employees

Protection against discharge, discipline, threats, penalties, or discrimination because the employee, due to a communicable disease:

- Has been in isolation or quarantine; or
- Has responsibility for the care of a person in isolation or quarantine who is a minor or an adult family member who is a disabled or vulnerable adult;

Quarantine or isolation must be based on:

- A commissioner's (or designee's) directive or recommendation
- Order of a federal quarantine officer; or
- State or federal court order

Up to 21 consecutive work days of absence, paid or unpaid



## *State COVID-19 Leave Laws*

### New York – Paid Sick/Quarantine Leave

Effective March 18, 2020

- All employees working in New York, all private & public employers
- Leave Reasons: Employee or employee’s minor dependent child is the individual subject of a “mandatory or precautionary order of quarantine or isolation issued by the state of New York, the department of health, local board of health, or any governmental entity duly authorized to issue such order due to COVID-19”
- Sliding scale of benefits depending on employer size
  - 0, 5 or 14 days of paid sick leave for employee’s own quarantine
  - Followed by enhanced and combined PFL and disability benefits for employees of small employers (under 100 employees)
  - Regular PFL benefits available to all employees for child quarantine

More info:

[Matrix Radar Blog](#)

[New York PFL COVID-19 website](#)



## *State COVID-19 Leave Laws*

### South Carolina – Mandatory Quarantine

Effective 2002

[Emergency Health Powers Act](#), aka the South Carolina Homeland Security Act

"Public health emergency" means the occurrence or imminent risk of a qualifying health condition. Includes

- an illness or health condition caused by epidemic or pandemic disease, or a novel infectious agent
- that poses a substantial risk of a significant number of human fatalities, widespread illness, or serious economic impact

During a public health emergency, Department of Health and Economic Control may isolate or quarantine an individual or groups of individuals

- Includes individuals or groups who have not been vaccinated, treated, tested, or examined
- Violation of order can result in criminal penalties

Employers cannot fire, demote, or otherwise discriminate against an employee complying with an isolation or quarantine order

Can require employee to use available paid time off



## *State COVID-19 Leave Laws*

### Washington Proclamation – Workers at High Risk

Effective 4/13/20  
thru 6/12/20

[Governor's Proclamation](#) protects employees who are at a heightened risk for complications with COVID-19, as defined by the [CDC](#):

- Try to keep high risk employees working by providing alternative work assignments, telework, or remote work locations
- If unable to keep employee working: Allow employee to take leave as an accommodation, using accrued paid leave or unemployment

Maintain employer-provided health benefits during any accommodation leave until employee returns to work



05

# Municipal COVID-19 Leave Laws



## *Municipal COVID-19 Leave Laws*

### Key City Ordinances

San Francisco [Public Health Emergency Leave Ordinance](#)

- In effect April 17 through June 16, or when Public Health Emergency is terminated, whichever is first
- [Guidance from the Office of Labor Standards Enforcement](#)

Los Angeles ordinance for Supplemental Paid Sick Leave

- Superseded by an [Emergency Order](#) signed by Mayor Garcetti April 7, cutting back on the scope of the ordinance
- In effect until 2 calendar weeks after the expiration of the COVID-19 local emergency period

San Jose [Urgency Ordinance](#)

- In effect April 7 through December 31, 2020. [Guidance](#) and additional resources from the San Jose Office of Equality

Paid sick leave laws: Likely to cover a variety of COVID-related needs for time off. A Better Balance for a [chart](#) of paid sick leave laws across the country.



## *Municipal COVID-19 Leave Laws*

### Commonalities

- Employer coverage picks up where FFCRA left off – most apply to employers with 500 or more employees.
- Leave reasons mimic FFCRA. Some new leave reasons:
  - Closure of a family member’s senior care facility or
  - Employee is High risk due to age 65 or older or an underlying high-risk health condition
- Typical: 80 hours of paid leave for full-time employees and the equivalent of two weeks’ pay for part-time employees
  - Often capped at \$511 per day or \$5,110 total per employee
- Health care workers are often exempted (but not for employee’s own COVID-19 diagnosis or quarantine)



# 06

## Lawsuits and Claims – Real & Imagined



## *Lawsuits*

Here They  
Come!

## **The Washington Post**

Headline May 1, 2020:

**771 lawsuits — and counting: Wave of virus litigation hits businesses across the U.S.**

Hospitals  
Senior living facilities  
Prisons  
Fitness chains  
Entertainment & hospitality & ticket vendors  
Travel industry (airlines & cruise lines)  
Insurance companies

McConnell: “[T]he biggest trial lawyer bonanza in history.”



## *Lawsuit*

# Public Policy Wrongful Discharge

Reggio's boss ordered her to come to work in violation of shelter-in-place order

Fired! Sued!

“Public policy wrongful discharge:”

- Employer required employee to commit an illegal act that carries criminal penalties
- Employee refused
- Employee was discharged
- Sole reason for the employee's discharge was her refusal to commit the unlawful act

Asking for \$1 million in damages. Settlement, anyone?

*Reggio v. Tekin & Assoc., LLC (Dallas County Court, Texas No. CC-20-01986 B)*



## *Lawsuits*

## FFCRA Retaliation

March 23: Jones asked for flexible schedule due to child's school closure

Eastern chief HR official "responded in a fashion that showed open hostility" toward her request to take leave

March 27: Terminated; Eastern never responded to leave request

Sued! Requesting reinstatement to \$125,000/yr position, lost wages, etc.

*Jones v Eastern Airlines, LLC, Case No. 2-20-cv-09127, E.D.Pa.*



## *Lawsuits*

## What to Expect

### Wage Claims

- Failure to pay FFCRA or other paid leave
- Time tracking
- Reimbursement of Expenses
- Testing, temperature checks, donning equipment before work

### FFCRA

- Failure to pay sick leave or expanded FMLA
- Failure to provide leave
- Retaliation, interference, wrongful discharge

### Safety

- OSHA – actions by agency
- OSHA “refusal to work” terminations
- Workers’ comp claims & lawsuits

Mass Layoffs – failure to provide advance notice (WARN Act)

ADA – failure to accommodate – now and after pandemic



# 07

# Questions



**Thank You!**

**Questions on this or future topics?**

**Email [SalesandMarketingHQ@rsli.com](mailto:SalesandMarketingHQ@rsli.com)**