



COVID-19 Employment Update: What Has Changed & Practical Tips for Employers

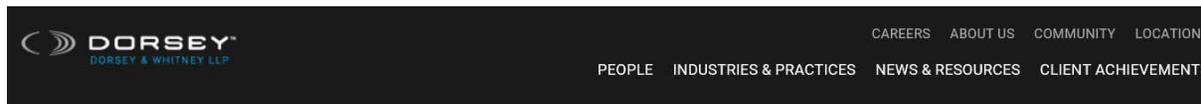
April 14, 2020

Drew James
Attorney
Labor & Employment

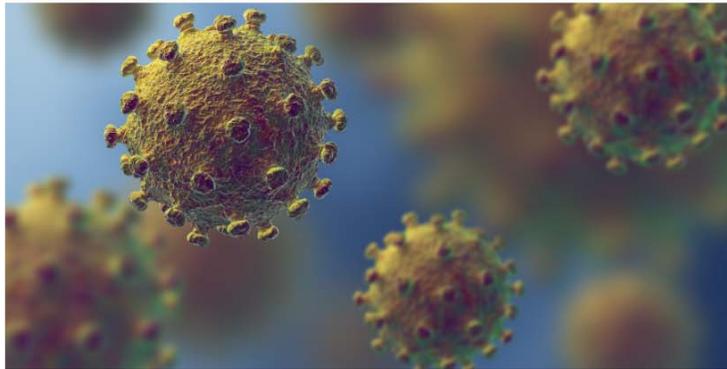
Agenda

- 1. COVID-19 Paid Leave Benefits**
- 2. Shelter/Stay-in-Place Orders**
- 3. Practical Advice on Frequently Asked Employment Questions**
 - 1. Suspected cases of COVID-19**
 - 2. Hourly Employees**
 - 3. Wage and Hour Issues**
 - 4. WARN Act**
 - 5. OSHA Guidance**
 - 6. COVID-19 and Equal Employment Opportunity Laws**

Stay updated about Coronavirus.
The law is changing hourly.
Do not rely on these materials without
checking with counsel.



PUBLICATIONS



Coronavirus Resource Center

March 2020

As the 2019 Novel Coronavirus (COVID-19) outbreak continues to unfold governments, economies, businesses, and countries are being adversely affected. Many companies are therefore also facing significant and urgent business and legal challenges so we have created a resource center to provide information that may be helpful in decision making.

RELATED INDUSTRIES & PRACTICES

- [China](#)
- [Class Action Litigation](#)
- [Commercial Litigation](#)
- [Construction & Design](#)
- [Construction Litigation](#)
- [Development & Infrastructure](#)
- [Energy & Natural Resources](#)
- [Europe](#)
- [Food, Beverage & Agribusiness](#)
- [Government Contracts Counseling & Litigation](#)
- [Government Enforcement & Corporate Investigations](#)
- [Healthcare](#)

www.Dorsey.com/Coronavirus

Two Statutes to Know

- **Families First Coronavirus Response Act (“FFCRA”)**
 - Enacted March 18, 2020
 - Effective April 1, 2020
 - Creates two types of paid-leave benefits:
 - Emergency Paid Sick Leave Act (“EPSLA”)
 - Emergency Family and Medical Leave Expansion Act (“EFMLEA”)
- **Coronavirus Aid, Relief, and Economic Security (“CARES”) Act**
 - Enacted March 27, 2020
 - Most topics I won’t cover (PPP loans/unemployment)
 - One topic I will briefly cover (EFMLEA amendment)

Emergency Paid Sick Leave

- Applies to smaller employers (1-499 employees)
- Applies to **all** employees
- Two weeks (80 hours) of paid sick leave for COVID-19
- Employee cannot work (or telework) due to a need for leave for **six** possible reasons:
 - **First Three:**
 - subject to a Federal, State, or local quarantine or isolation order related to COVID-19;
 - advised by a health care provider to self-quarantine due to concerns related to COVID-19; or
 - experiencing symptoms of COVID-19 and seeking medical diagnosis
- For these three categories, 100% of regular rate of pay, capped at \$511/day (\$5,110 aggregate)

Emergency Paid Sick Leave

- **Three Final Reasons for Eligibility:**
 - Caring for an individual who is subject to a quarantine or isolation order, or who was advised by health care provider to self-quarantine due to COVID-19-related concerns;
 - Caring for son or daughter due to school or child care closures or unavailability; **or**
 - Experiencing a “substantially similar condition” as specified by the Secretary of Health and Human Services
 - Unclear what this means
- **For *these* three categories, 100% of regular rate of pay, capped at \$200/day (\$2,000 aggregate)**

Emergency FMLA Expansion (EFMLEA)

- Applies to smaller employers (1-499 employees)
- Employee must be employed for 30 calendar days
 - Bill pending in U.S. House could eliminate this requirement (HR 6379), but has stalled
- Adds one new reason for FMLA leave
- Two weeks of unpaid family leave; ten weeks paid (12 total)
 - Can use two weeks of emergency paid sick leave in place of unpaid leave
- **2/3s of an employee's regular rate of pay**, capped at \$200 per day (\$10,000 aggregate)
- **Only One Reason for Eligibility:**
 - Caring for son/daughter whose school / care is closed, or child care provider unavailable, due to COVID-19 related reasons

Emergency FMLA Expansion (EFMLEA)

- **CARES Act creates new obligation upon rehiring:**
 - If employee worked for at least 30 of past 60 days; **AND**
 - If laid off on or after March 1, 2020; **AND**
 - If subsequently rehired...
- **“Eligible Employee” for purposes of EFMLEA leave**
- **Practical Tip: If rehiring furloughed or laid off employees, could be immediately eligible for EFMLEA leave**

10 Practical Tips: EPSLA and EFMLEA

1. Stay of enforcement through April 17 (This Friday!)
2. Applies only to employers with fewer than 500 employees
3. Small businesses (under 50 employees) may be eligible for exemption, **but only from EFMLEA leave benefits**
4. *Generally* leave only available if employee **unable to work or telework**

10 Practical Tips: EPSLA and EFMLEA

5. Documentation for EPSLA Leave

- Employee name
- Date(s) of leave
- Qualifying reason for leave
- Statement that employee cannot work or telework due to qualifying reasons

6. Documentation for EFMLEA Leave

- Employee name
- Name of child cared for
- Name of school/place of care/child care provider
- Statement that no other suitable person is available to care for the child

7. Health care providers and emergency responders **may exclude employees** from certain leave requirements

10 Practical Tips: EPSLA and EFMLEA

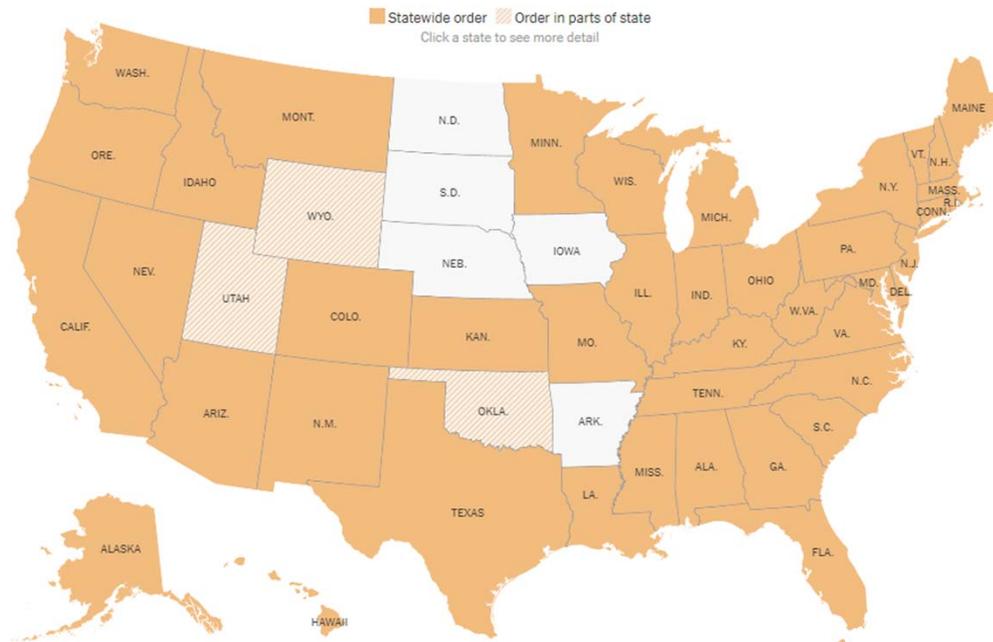
8. Can take leave intermittently if both employer and employee agree
 - Otherwise, employee may be required to take leave in full-day increments, especially if reporting to a worksite
 - Highly fact-specific
9. Employee may request, and employer may require, use of **accrued paid leave** to care for child
10. Employer eligible for payroll tax credit up to 100% of paid leave...**BUT, only for eligible leave** and only up to caps. (So it's important to get it right!)

Shelter/Stay in Place Orders

The New York Times

See Which States and Cities Have Told Residents to Stay at Home

By Sarah Mervosh, Denise Lu and Vanessa Swales Updated April 7, 2020



<https://www.nytimes.com/interactive/2020/us/coronavirus-stay-at-home-order.html>

Shelter/Stay in Place Orders

- **Be aware of the essential business **and minimum basic operations** exemptions for your jurisdiction**
 - **Essential businesses should issue a letter to employees who will be required to travel to get to work including contact information for the employer**
- **Employees who are unable to work (or telework) because of a shelter in place or stay at home order may be eligible for EPSLA paid leave benefits**

What to do if suspected case of COVID-19:

- You can (and should!) require employees who exhibit COVID-19 symptoms to **go home immediately**.
- You can require employees with symptoms to be tested or wait 14 days before returning to work.
 - New CDC Interim Guidance: If “essential,” you can require asymptomatic employees to return to work (and with employer precautions)
 - But...should you?
- CDC General Guidance for Return to Work:
 - No fever for 72 hours **AND**
 - Other symptoms have improved **AND**
 - At least seven days passed since symptoms first appeared
- Employees generally **cannot** refuse to come to work.
 - However, they may be able to refuse to travel to affected areas (e.g. China), or to work with or near people who are or are likely to be infected (such as patients) without personal protective equipment.
 - Fear of getting sick from public transportation is insufficient.

A Practical Tip for Hourly Employees

- **Reports: many COVID-19 cases are mild, especially among young, healthy people**
- **Employees need to make rent; may be afraid to stay away from work if they run out of sick leave/PTO**
- **May want to save sick leave to care for parents or children**
- **Consider a temporary program of unlimited sick leave**
 - **At the very least, allowing employees to accrue a negative sick leave balance.**

Wage and Hour Issues

- **Exempt employees must be paid if they work any part of a week.**
 - Unless the absence is FMLA covered.
- **First- and last-weeks of furlough should be in full workweeks for exempt employees**
- **Beware the “just a quick email” issue.**

Plant closings and Mass Layoffs

- You may need to provide advance notice of any “plant closing” or mass layoff
 - “WARN Act”
 - Definitions vary by state
 - (E.g., MN: Employer has at least 100 employees; 50 or more affected)
- WARN Act does provides exceptions where a plant closing or mass layoff is caused by **“unforeseeable business circumstance”**
 - Call Dorsey if anticipating plant closing or mass layoff

OSHA General Duty

- **“Each employer ... shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees.”**
 - **The employer fails to keep the workplace free of a hazard to which its employees were exposed.**
 - **The hazard was recognized.**
 - **The hazard was causing, or was likely to cause, death or serious physical harm,**
 - **There was a feasible and useful method to correct the hazard.**

<https://www.osha.gov/SLTC/covid-19/standards.html>

OSHA Duties

- **Allow high risk individuals to preemptively begin working from home if the COVID-19 virus starts spreading widely.**
- **Provide hand sanitizer and encourage employees to wash hands frequently and to use hand sanitizer throughout work areas.**
- **If someone reports becoming ill, close the office for a day for disinfection and require those who work closely with the ill worker to stay home for 14 days.**
- **New (as of 4/10): COVID-19 only a recordable illness if (1) confirmed case; (2) case is work-related; and (3) case satisfies at least one general recording criteria.**

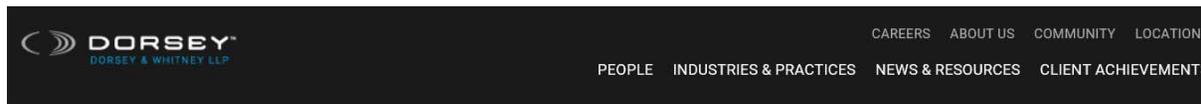
COVID-19 and Equal Employment Opportunities Laws

- **Guidance is changing **rapidly**, so the DOL encourages employers to stay up to date on most current information**
- **OKAY to ask employees if they are experiencing symptoms of COVID-19**
 - **Fever, chills, shortness of breath, sore throat**
- **May take employees' body temperatures**
 - **Beware: Fever is not always a symptom**

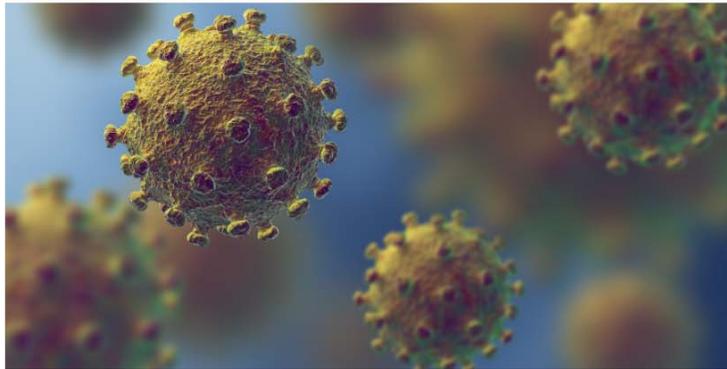
COVID-19 and Equal Employment Opportunity Laws

- If you keep a medical record, must be **confidential** and must **comply with ADA requirements**
- **OKAY** to screen applicants for COVID-19, or to delay start date for symptomatic individuals
 - **NOT OKAY** to do so for individuals who are elderly or pregnant (i.e. higher risk), but asymptomatic

One more time: The only guarantee is that this guidance will change quickly. If specific questions, call your counsel (hopefully, Dorsey!).



PUBLICATIONS



Coronavirus Resource Center

March 2020

As the 2019 Novel Coronavirus (COVID-19) outbreak continues to unfold governments, economies, businesses, and countries are being adversely affected. Many companies are therefore also facing significant and urgent business and legal challenges so we have created a resource center to provide information that may be helpful in decision making.

RELATED INDUSTRIES & PRACTICES

- [China](#)
- [Class Action Litigation](#)
- [Commercial Litigation](#)
- [Construction & Design](#)
- [Construction Litigation](#)
- [Development & Infrastructure](#)
- [Energy & Natural Resources](#)
- [Europe](#)
- [Food, Beverage & Agribusiness](#)
- [Government Contracts Counseling & Litigation](#)
- [Government Enforcement & Corporate Investigations](#)
- [Healthcare](#)

www.Dorsey.com/Coronavirus



Thank you and contact information



Drew James
Dorsey & Whitney LLP
Labor & Employment
James.Andrew@Dorsey.com
(612) 492-6142