

AR HMFA Summer Conference
Legal Implications of COVID-19

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Topics

- What are the legal implications of COVID-19?
 - In a word: **MANY!!**
 - But here are a few that we are seeing with our clients.
- Topics:
 1. Employee Leave Issues
 2. Return-to-Work Criteria for Healthcare Personnel
 3. Liability Risks
 4. Mitigation Initiatives for Healthcare Organizations

Employee Leave Issues

How can employers manage leave requests for employees related to COVID-19?

- Before deciding whether leave is necessary/required employers must first decide to what degree they can be flexible with employees.
- Teleworking;
- Restructuring job duties to permit employees to work remotely;
- Adjusting existing leave policies;

Employee Leave Issues

How can employers manage leave requests for employees related to COVID-19?

A. Existing Leave Policies

- i. Vacation;
- ii. PTO;
- iii. Sick Leave;
- iv. Supplemental Leave (provided for COVID-19 purposes).

Employee Leave Issues

How can employers manage leave requests for employees related to COVID-19?

B. Families First Coronavirus Response Act Paid Leave – three buckets of leave:

- i. *Two weeks (up to 80 hours) of **paid sick leave** at the employee's regular rate of pay where the employee is unable to work or telework because:*
 - 1. the employee is quarantined (pursuant to Federal, State, or local government order or advice of a health care provider)
 - 2. and/or experiencing COVID-19 symptoms and seeking a medical diagnosis;

Employee Leave Issues

How can employers manage leave requests for employees related to COVID-19?

B. Families First Coronavirus Response Act Paid Leave – three buckets of leave:

ii. *Two weeks (up to 80 hours) of **paid sick leave** at two-thirds the employee's regular rate of pay because:*

1. the employee is unable to work because of a bona fide need to care for an individual subject to quarantine (pursuant to Federal, State, or local government order or advice of a health care provider);
2. to care for a child (under 18 years of age) whose school or child care provider is closed or unavailable for reasons related to COVID-19;
3. the employee is experiencing a substantially similar condition as specified by the Secretary of Health and Human Services, in consultation with the Secretaries of the Treasury and Labor;

Employee Leave Issues

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B. Families First Coronavirus Response Act Paid Leave – three buckets of leave:

iii. *Up to an additional 10 weeks of **paid expanded family and medical leave** at two-thirds the employee's regular rate of pay* where an employee, who has been employed for at least 30 calendar days, is unable to work due to a bona fide need for leave to care for a child whose school or child care provider is closed or unavailable for reasons related to COVID-19.

Employee Leave Issues

How can employers manage leave requests for employees related to COVID-19?

B. Families First Coronavirus Response Act Paid Leave – **Qualifying Reasons for Leave:**

- Under the FFCRA, an employee qualifies for paid sick time if the employee is unable to work (**or unable to telework**) due to a need for leave because the employee:
 1. is subject to a Federal, State, or local quarantine or isolation order related to COVID-19;
 2. has been advised by a health care provider to self-quarantine related to COVID-19;
 3. is experiencing COVID-19 symptoms and is seeking a medical diagnosis;
 4. is caring for an individual subject to an order described in (1) or self-quarantine as described in (2);
 5. is caring for a child whose school or place of care is closed (or child care provider is unavailable) for reasons related to COVID-19; or
 6. is experiencing any other substantially-similar condition specified by the Secretary of Health and Human Services, in consultation with the Secretaries of Labor and Treasury.

Employee Leave Issues

How can employers manage leave requests for employees related to COVID-19?

B. Families First Coronavirus Response Act Paid Leave – **Calculation of Pay:**

- For leave reasons (1), (2), or (3): employees taking leave are entitled to pay at either their regular rate or the applicable minimum wage, whichever is higher, up to \$511 per day and \$5,110 in the aggregate (over a 2-week period).
- For leave reasons (4) or (6): employees taking leave are entitled to pay at 2/3 their regular rate or 2/3 the applicable minimum wage, whichever is higher, up to \$200 per day and \$2,000 in the aggregate (over a 2-week period).
- For leave reason (5): employees taking leave are entitled to pay at 2/3 their regular rate or 2/3 the applicable minimum wage, whichever is higher, up to \$200 per day and \$12,000 in the aggregate (over a 12-week period)

Employee Leave Issues

How can employers manage leave requests for employees related to COVID-19?

B. Families First Coronavirus Response Act Paid Leave:

- Covered Employers - the paid sick leave and expanded family and medical leave provisions of the FFCRA apply to **private employers with fewer than 500 employees**.
- Eligible Employees - *All employees* of covered employers are eligible for two weeks of paid sick time for specified reasons related to COVID-19. *Employees employed for at least 30 days* are eligible for up to an additional 10 weeks of paid family leave to care for a child under certain circumstances related to COVID-19.
- But there is an exception for Health Care Providers.

Employee Leave Issues

How can employers manage leave requests for employees related to COVID-19?

B. Families First Coronavirus Response Act Paid Leave:

- Health Care Provider & Emergency Responder Exceptions - DOL's Final Rule implementing the FFCRA adopted a much broader definition of health care provider as it applies to the health care provider employees who are not entitled to emergency paid sick leave.
- The broader definition of a "health care provider" includes any employee employed anyone employed at "any doctor's office, hospital, health care center, clinic, post-secondary educational institution offering health care instruction, medical school, local health department or agency, nursing facility, retirement facility, nursing home, home health care provider, any facility that performs laboratory or medical testing, pharmacy, or any similar institutions, Employer, or entity."

Employee Leave Issues

How can employers manage leave requests for employees related to COVID-19?

B. Families First Coronavirus Response Act Paid Leave:

- Health Care Provider Exception & Emergency Responder Exemptions - The exemption also includes emergency responders who are defined as employees who “interact with and aid individuals with physical and mental health issues, including COVID-19; ensure the welfare and safety of our communities; specialized training relevant to emergency response; and provide essential services relevant to people’s health and well-being.”
- But at least one court has already vacated the broad definition of “Health Care Provider” in the DOL’s Final Rule.
 - Due to uncertainties left in the district court’s opinion as to its geographic scope, employers need to monitor the DOL’s next steps, which could include anything from seeking a stay, appealing the decision, or creating new rules or interim guidance.

Employee Leave Issues

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B. Families First Coronavirus Response Act Paid Leave:

- But at least one court has already vacated the broad definition of “Health Care Provider” in the DOL’s Final Rule.
- As a result, the only current regulatory definition for “health care provider” for purposes of both FFCRA paid sick leave and paid FMLA leave is contained in the Family and Medical Leave Act regulations which includes a narrower scope of health care professionals.
- Much uncertainty about the scope and effect of the district court’s opinion remains:
 - Will the DOL appeal or issue a new rule or guidance?
 - Does the district court’s opinion apply nationwide or only to those employers in its district (S.D.N.Y)?

Return to Work Criteria for Healthcare Personnel

The CDC has published guidance addressing Return-to-Work Criteria for Healthcare Personnel.

- To whom does the guidance apply?
 - Healthcare personnel (“HCP” with confirmed COVID-19 infection, or who have suspected COVID-19 infection (e.g., developed symptoms of COVID-19) **but were never tested for COVID-19.**
- In general, a symptom-based strategy should be used to make return to work decisions for healthcare personnel. The time period used depends on the HCP’s severity of illness and if they are severely immunocompromised.
- A test-based strategy is no longer recommended because, in the majority of cases, it results in excluding from work HCP who continue to shed detectable SARS-CoV-2 RNA but are no longer infectious.

Return to Work Criteria for Healthcare Personnel

The CDC has published guidance addressing Return-to-Work Criteria for Healthcare Personnel.

- HCP with mild to moderate illness who are not severely immunocompromised.
 - At least 10 days have passed since symptoms first appeared **and**
 - At least 24 hours have passed since last fever without the use of fever-reducing medications **and**
 - Symptoms (e.g., cough, shortness of breath) have improved
- **Note:** HCP who are **not severely immunocompromised** and were **asymptomatic** throughout their infection may return to work when at least 10 days have passed since the date of their first positive viral diagnostic test.

Return to Work Criteria for Healthcare Personnel

The CDC has published guidance addressing Return-to-Work Criteria for Healthcare Personnel.

- HCP with severe to critical illness or who are severely immunocompromised:
 - At least 10 days and up to 20 days have passed since symptoms first appeared
 - At least 24 hours have passed since last fever without the use of fever-reducing medications and
 - Symptoms (e.g., cough, shortness of breath) have improved
 - Consider consultation with infection control experts
- **Note:** HCP who are **severely immunocompromised** but who were **asymptomatic** throughout their infection may return to work when at least 10 days and up to 20 days have passed since the date of their first positive viral diagnostic test.

Return to Work Criteria for Healthcare Personnel

The CDC has published guidance addressing Return-to-Work Criteria for Healthcare Personnel.

- Return to Work Practices and Restrictions:
 - After returning to work, HCP should:
 - Wear a facemask for source control at all times while in the healthcare facility until all symptoms are completely resolved or at baseline. A facemask instead of a cloth face covering should be used by these HCP for source control during this time period while in the facility. After this time period, these HCP should revert to their facility policy regarding [universal source control](#) during the pandemic.
 - A facemask for source control does not replace the need to wear an N95 or equivalent or higher-level respirator (or other recommended PPE) when indicated, including when caring for patients with suspected or confirmed SARS-CoV-2 infection.
 - Self-monitor for symptoms, and seek re-evaluation from occupational health if symptoms recur or worsen.

Liability Risk Management

- Types of Claims
 - Negligent treatment of COVID+ patients
 - Negligent treatment of non-COVID+ patients
 - Failure to notify of COVID-related issues
 - Failure to following CDC/local guidance

Liability Risk Management

- Types of Claims (cont'd)
 - Lack of preparation
 - Infection protocols
 - Transmission by asymptomatic workers
 - Staffing/equipment shortages
 - Chain of command protocols
 - Visitor policies

Liability Risk Management

- Immunity Protections
 - *EO 20-18* – 4/14/20, Gov, Hutchinson issued EO-20-18, which provided immunity for healthcare workers from liability in order to equip these professionals with the tools necessary to combat the COVID-19 emergency.

Liability Risk Management

- EO 20-18 authorized and requested emergency responders, as defined in the Arkansas Emergency Services Act—virtually any personnel with special skills, qualifications, training, knowledge, or experience that would be beneficial to combatting COVID-19—to provide medical and health care, assistance, and advise in response to the pandemic

Liability Risk Management

- EO 20-18 allowed for the development or modification of emergency medical treatment protocol, which may include:
 - Triage, diagnostic testing, and/or treatment to patients with known or suspected COVID-19;
 - Services provided in response to personnel shortages caused by COVID-19;
 - Cancelling, postponing or denying elective surgeries or procedures or other routine care;

Liability Risk Management

- Redeploying or cross training staff not typically assigned to such duties, to the extent necessary to respond to the COVID-19 outbreak;
- Planning to or enacting crisis standard of care measures, such as modifying numbers of beds, preserving personal protective equipment, and triaging access to services or equipment; and
- Reducing recordkeeping requirements to the extent necessary for health care providers and facilities to perform tasks as may be necessary to respond to the COVID-19 outbreak.

Liability Risk Management

- EO 20-18 provided immunity from liability to physicians, physician assistants, specialist assistants, nurse practitioners, licensed registered nurses, and licensed practical nurses for any act or omission alleged to be the cause of any injury or death sustained as a result of an act or omission by such medical professionals in the course of providing medical services in support of the State's response to the COVID-19 outbreak or the implementation of measures to control the causes of the COVID-19 epidemic.

Liability Risk Management

- EO 20-18 further provides that liability for healthcare workers applies to those working outside of his or her normal scope of practice only if their institution redeploys them to meet the state's need of increased COVID-19 cases.
- Further, the order does not give a blanket protection as medical professionals acting in gross negligence, with willful misconduct, or in bad faith can still be held liable.

Liability Risk Management

- The Secretary of Health subsequently issued a directive, enacting the portions of EO 20-18 requiring ADH action

Liability Risk Management

- On June 15, 2020, Governor Hutchison expanded liability protections for healthcare workers under EO 20-34.
- EO 20-18, focused on healthcare staffing and scope of care.
- The new EO focused on protecting providers from liability for administering drugs and medical devices to COVID-19 patients.

Liability Risk Management

- Limitations to Immunity Executive Orders
 - Untested in court
 - Bad faith and gross negligence exceptions provide a loophole for Plaintiffs to stay in court
 - May be challenged if no legislative action by the general assembly

Liability Risk Management

- Proactive steps to protect the institution
 - Create a general timeline of COVID-related events
 - First patient
 - Efforts to obtain PPE and testing materials
 - CDC/local guidance (and changes)
 - Public-facing communications
- Be prepared to tell your story!

Liability Risk Management

- Proactive steps to protect the institution
 - Collect relevant documents
 - COVID-related policies
 - Timeline
 - Identify who is responsible for maintaining relevant documents
 - Be prepared to tell your story
 - Develop clear lines of internal communication for protocol questions
 - Use checklists for gathering information

Liability Risk Management

- Proactive steps to protect the institution
 - Document policy decisions and basis for them
 - What does the guidance say?
 - What are peer institutions doing?
 - Use resources
 - CDC
 - State and national trade associations
 - Insurance carrier

Liability Risk Management

- Miscellaneous issues
 - Visitor policies and waivers
 - Changes to standard medical care to mitigate risk of spread
 - Compliance with healthcare laws and regulations
 - HIPAA
 - EMTALA
 - Stark/AKS

Questions

