Hot Topics in Labor and Employment Law

September 23-24, 2020

Bob Riegel & Katie Rudderman

ROGERS | TOWERS
ATTORNEYS AT LAW

Presented to:

FECA
Florida Electric Cooperatives Association, Inc.

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Wishing we were at the Sandpearl!

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Hot Topics

- U.S. Supreme Court
  - Recent Happenings
  - Sexual Orientation and Gender Identity
- Families First Coronavirus Response Act and COVID-19
- Drug-Free Workplace Program and Medical Marijuana
- Independent Contractor vs. Employee Misclassification
- Leaves of Absence
- Social Media Postings

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And then… give us your questions!

- You may email Michell Hershel (mhershel@feca.com) with questions **during** our presentation.
- You may send "chat" messages to Alisia **during** our presentation.
- For tomorrow, you can submit questions by emailing CCassidy@RTLAW.com by 4:00 p.m. today.
  - *Please indicate in the subject line: FECA Conference*

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Justice Ruth Bader Ginsburg

March 15, 1933 – September 18, 2020

- Appointed by President Jimmy Carter to the U.S. Court of Appeals for the District of Columbia in **1980**.
- Appointed by President Bill Clinton to the U.S. Supreme Court in **1993**.
  - "In 1996, Ginsburg wrote the majority opinion in *United States v. Virginia*, holding that qualified women could not be denied admission to Virginia Military Institute."
  - "She dissented in *Ledbetter v. Goodyear Tire & Rubber Co.* where the plaintiff, a female worker being paid significantly less than males with her same qualifications, sued under Title VII but was denied relief under a statute of limitations issue."
  - "She also called for Congress to undo this improper interpretation of the law in her dissent, and then worked with President Obama to pass the very first piece of legislation he signed, the Lilly Ledbetter Fair Pay Act of 2009, a copy of which hangs proudly in her office."

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See: https://www.oyez.org/justices/ruth_bader_ginsburg

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U.S. Supreme Court Justices

October 2018 to September 2020

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Photo: https://www.supremecourt.gov/about/justices.aspx

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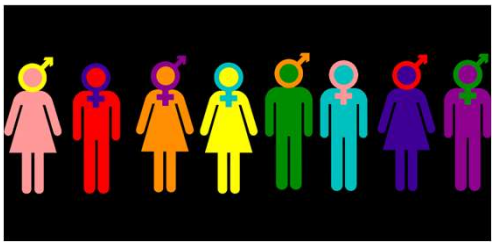

Are sexual orientation and gender identity protected under Title VII?

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Looking Back…

- 2018 Spilt Among the Circuits
  - 2nd Circuit: Sexual orientation is protected under Title VII.
  - 6th Circuit: Transgender status is protected under Title VII.
  - 11th Circuit: Sexual orientation is not protected under Title VII.
- 2019 Supreme Court
  - **April:** The U.S. Supreme Court accepted review of the above three cases.
  - **October:** The U.S. Supreme Court held oral argument on the three cases.
- *How did the Supreme Court rule?*

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Bostock v. Clayton County, Georgia (2020)

- June 15, 2020
  - The United States Supreme Court ruled that discrimination because of **"sex" includes discrimination because of homosexuality and transgender status.**
  - "When an employer fires an employee for being homosexual or transgender, it necessarily and intentionally discriminates against that individual in part because of sex. And that is all Title VII has ever demanded to establish liability."
- Related Issues Not Before the Court:
  - Effect on other federal and state laws;
  - Freedom of religion;
  - Employee bathroom, locker room, and dress code issues.

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Opinion located here: https://www.supremecourt.gov/opinions/19pdf/17-1618_hfci.pdf

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Justice Alito's Dissent: *Transgender Status vs. Gender Identity*

- *Footnote 6:* **"The Court does not define what it means by 'transgender status,'** but the American Psychological Association describes 'transgender' as '[a]n umbrella term encompassing those whose gender identities or gender roles differ from those typically associated with the sex they were assigned at birth.' A Glossary: Defining Transgender Terms, 49 Monitor on Psychology 32 (Sept. 2018), https://www.apa.org/monitor/2018/09/cecorner-glossary. It defines 'gender identity' as '[a]n internal sense of being male, female or something else, which may or may not correspond to an individual's sex assigned at birth or sex characteristics.' *Ibid.* **Under these definitions, there is no apparent difference between discrimination because of transgender status and discrimination because of gender identity."**

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Opinion located here: https://www.supremecourt.gov/opinions/19pdf/17-1618_hfci.pdf

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OSHA: Best Practices for Restroom Access for Transgender Workers

- **"Core principle: All employees, including transgender employees, should have access to restrooms that correspond to their gender identity."**
- "For example, a person who identifies as a man should be permitted to use men's restrooms, and a person who identifies as a woman should be permitted to use women's restrooms. The employee should determine the most appropriate and safest option for him- or herself."

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OSHA Guidance: https://www.osha.gov/Publications/OSHA3795.pdf

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OSHA: Restroom Best Practices *(continued)*

- "The **best policies also provide additional options**, which employees may choose, but are not required, to use. These include:
  - Single-occupancy gender-neutral (unisex) facilities; and
  - Use of multiple-occupant, gender-neutral restroom facilities with lockable single occupant stalls."
- "Under these best practices, **employees are not asked to provide any medical or legal documentation** of their gender identity in order to have access to gender-appropriate facilities. In addition, **no employee should be required to use a segregated facility apart from other employees because of their gender identity or transgender status.** Under OSHA standards, employees generally may not be limited to using facilities that are an unreasonable distance or travel time from the employee's worksite."

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What else has happened in 2020?

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EMPLOYEE RIGHTS

PAID SICK LEAVE AND EXPANDED FAMILY AND MEDICAL LEAV
UNDER THE FAMILIES FIRST CORONAVIRUS RESPONSE ACT

The **Families First Coronavirus Response Act (FFCRA or Act)** requires certain employers to provide the employees with paid sick leave and expanded family and medical leave for specified reasons related to C These provisions will apply from April 1, 2020 through December 31, 2020.

PAID LEAVE ENTITLEMENTS

Generally, employers covered under the Act must provide employees:

Up to two weeks (80 hours, or a part-time employee's two-week equivalent) of paid sick leave based on their regular rate of pay, or the applicable state or Federal minimum wage, paid at:

- 100% for qualifying reasons #1-3 below, up to $511 daily and $5,110 total;
- ⅔ for qualifying reasons #4 and 6 below, up to $200 daily and $2,000 total; and
- Up to 12 weeks of paid sick leave and expanded family and medical leave paid at ⅔ for qualifyin below for up to $200 daily and $12,000 total.

A part-time employee is eligible for leave for the number of hours that the employee is normally sche over that period.

ELIGIBLE EMPLOYEES

In general, employees of private sector employers with fewer than 500 employees, and certain publ employers, are eligible for up to two weeks of fully or partially paid sick leave for COVID-19 related re *Employees who have been employed for at least 30 days* prior to their leave request may be eligib additional 10 weeks of partially paid expanded family and medical leave for reason #5 below.

QUALIFYING REASONS FOR LEAVE RELATED TO COVID-19

An employee is entitled to take leave related to COVID-19 if the employee is unable to work, incl **telework**, 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 his or her child w place of care is closed (or ch unavailable) due to COVID-1
6. is experiencing any other su condition specified by the U Health and Human Service

ENFORCEMENT

The U.S. Department of Labor's Wage and Hour Division (WHD) has the authority to investig with the FFCRA. Employers may not discharge, discipline, or otherwise discriminate a lawfully takes paid sick leave or expanded family and medical leave under the FFCRA, file proceeding under or related to this Act. Employers in violation of the provisions of the FFCF and enforcement by WHD.

For additio or to fil **1-86** TTY: 1-

WAGE AND HOUR DIVISION
UNITED STATES DEPARTMENT OF LABOR

Families First Coronavirus Response Act

Currently in effect until December 31, 2020

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DOL Poster: https://www.dol.gov/sites/dolgov/files/WHD/posters/FFCRA_Poster_WH1422_Non-Federal.pdf

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Some History…

- March 18, 2020: President signed into law the Families First Coronavirus Response Act with three key portions impacting employers:
  - Division C: Emergency Family and Medical Leave Expansion Act
  - Division E: Emergency Paid Sick Leave Act
  - Division G: Tax Credits for Paid Leaves under Divisions C and E
- March 24, 2020: DOL began issuing its Questions and Answers regarding the FFCRA and has continued to expand and update its Q&A's as recently as September 11, 2020.
- March 25, 2020: DOL published a poster with a model of the notice that covered employers must post pursuant to the FFCRA.
- April 1, 2020: IRS issued guidance on what records employers should obtain from their employees who request FFCRA paid leave to later provide support for obtaining tax credits.

Please note that the FFCRA does not apply to employers with 500 or more employees.

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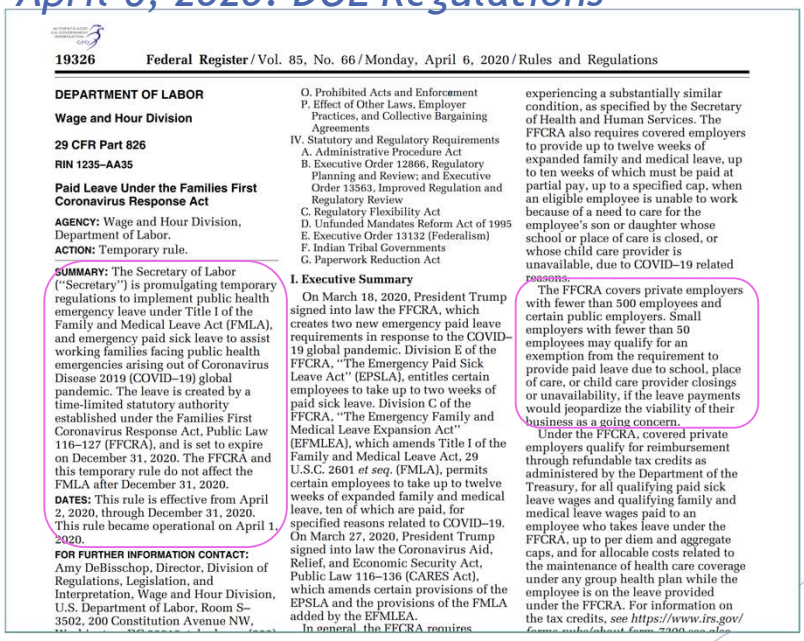
April 6, 2020: DOL Regulations



19326 **Federal Register** / Vol. 85, No. 66 / Monday, April 6, 2020 / Rules and Regulations

DEPARTMENT OF LABOR

Wage and Hour Division

29 CFR Part 826

RIN 1235–AA35

Paid Leave Under the Families First Coronavirus Response Act

AGENCY: Wage and Hour Division, Department of Labor.

ACTION: Temporary rule.

SUMMARY: The Secretary of Labor ("Secretary") is promulgating temporary regulations to implement public health emergency leave under Title I of the Family and Medical Leave Act (FMLA), and emergency paid sick leave to assist working families facing public health emergencies arising out of Coronavirus Disease 2019 (COVID–19) global pandemic. The leave is created by a time-limited statutory authority established under the Families First Coronavirus Response Act, Public Law 116–127 (FFCRA), and is set to expire on December 31, 2020. The FFCRA and this temporary rule do not affect the FMLA after December 31, 2020.

DATES: This rule is effective from April 2, 2020, through December 31, 2020. This rule became operational on April 1, 2020.

FOR FURTHER INFORMATION CONTACT: Amy DeBisschop, Director, Division of Regulations, Legislation, and Interpretation, Wage and Hour Division, U.S. Department of Labor, Room S–3502, 200 Constitution Avenue NW,

I. Executive Summary

On March 18, 2020, President Trump signed into law the FFCRA, which creates two new emergency paid leave requirements in response to the COVID–19 global pandemic. Division E of the FFCRA, "The Emergency Paid Sick Leave Act" (EPSLA), entitles certain employees to take up to two weeks of paid sick leave. Division C of the FFCRA, "The Emergency Family and Medical Leave Expansion Act" (EFMLEA), which amends Title I of the Family and Medical Leave Act, 29 U.S.C. 2601 *et seq.* (FMLA), permits certain employees to take up to twelve weeks of expanded family and medical leave, ten of which are paid, for specified reasons related to COVID–19. On March 27, 2020, President Trump signed into law the Coronavirus Aid, Relief, and Economic Security Act, Public Law 116–136 (CARES Act), which amends certain provisions of the EPSLA and the provisions of the FMLA added by the EFMLEA.

In general, the FFCRA requires experiencing a substantially similar condition, as specified by the Secretary of Health and Human Services. The FFCRA also requires covered employers to provide up to twelve weeks of expanded family and medical leave, up to ten weeks of which must be paid at partial pay, up to a specified cap, when an eligible employee is unable to work because of a need to care for the employee's son or daughter whose school or place of care is closed, or whose child care provider is unavailable, due to COVID–19 related reasons.

The FFCRA covers private employers with fewer than 500 employees and certain public employers. Small employers with fewer than 50 employees may qualify for an exemption from the requirement to provide paid leave due to school, place of care, or child care provider closings or unavailability, if the leave payments would jeopardize the viability of their business as a going concern.

Under the FFCRA, covered private employers qualify for reimbursement through refundable tax credits as administered by the Department of the Treasury, for all qualifying paid sick leave wages and qualifying family and medical leave wages paid to an employee who takes leave under the FFCRA, up to per diem and aggregate caps, and for allocable costs related to the maintenance of health care coverage under any group health plan while the employee is on the leave provided under the FFCRA. For information on the tax credits, *see https://www.irs.gov/*

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August 3, 2020: *New York v. Scalia*
Some DOL Regulations Invalid

- "The ongoing COVID-19 pandemic has visited unforeseen and drastic hardship upon American workers. In response to this extraordinary challenge, Congress passed the Families First Coronavirus Response Act, which, broadly speaking, entitles employees who are unable to work due to COVID-19's myriad effects to federally subsidized paid leave. Congress charged the Department of Labor ('DOL') with administering the statute, and the agency promulgated a Final Rule implementing the law's provisions. See 85 Fed. Reg. 19,326 (Apr. 6, 2020) ('Final Rule').

- The State of New York brings this suit under the Administrative Procedure Act, claiming that several features of DOL's Final Rule exceed the agency's authority under the statute … the Court concludes that New York has standing to sue and that several features of the Final Rule are invalid."

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SDNY: Some DOL Regulations Invalid

1. The FFCRA's very broad definition of health care provider "cannot stand."
2. The requirement that work be available for an employee to receive FFCRA paid leave for some reasons but not others "is entirely unreasoned."
3. The DOL did not sufficiently justify the requirement of employer consent for intermittent FFCRA leave.
4. The requirement that an employee provide documentation before being granted FFCRA leave "is inconsistent with the statute's unambiguous notice provisions."
   - But: We continue to recommend obtaining such documentation as it helps to document the tax credit the employer is entitled to receive.

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DOL: Changes to Regulations

1. The definition of "health care provider" has been revised.
2. The DOL continues to assert that "an employee is not eligible for paid leave unless the employer would otherwise have work for the employee to perform."
3. An employee must still obtain employer consent for intermittent leave (if the employee is not teleworking).
4. Employers cannot require documentation as a precondition to taking FFCRA leave.

- Employers are not required to provide FFCRA paid leave if an employee determines on his/her own that it is unsafe for them to work, or if the employer requires the employee to self-isolate, unless the employee:
  - (1) has symptoms of COVID-19 that will be reviewed by a health care provider; or
  - (2) is subject to a health care provider's or governmental order to self-quarantine.

- No change was made to the cap on the amount of paid leave available to employees in 2020, and the law is **still set to expire this December 31.**

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September 16, 2020: Revised Regulations

Check out DOL Q&As #101-103

101. **When were the invalidated provisions of the Department's FFCRA paid leave regulations vacated?** (added 09/11/2020) August 3, 2020. The Department first issued its FFCRA paid leave regulations on April 1, 2020. Only certain provisions of those regulations were at issue in the lawsuit New York v. Scalia, Civ. No. 20-3020-JPO (S.D.N.Y.). The challenged provisions were vacated when the District Court issued its opinion and order on August 3, 2020. As of August 3, 2020, the work availability requirement provisions, the provision requiring an employee to obtain his or her employer's approval before taking FFCRA leave intermittently, the provision defining "health care provider" for purposes of employees whose employer may exclude them from FFCRA leave, and the provision requiring documentation of a need for leave prior to taking leave were vacated. The remainder of the FFCRA paid leave regulations were unaffected.

102. **Where did the District Court's order vacating certain provisions of the FFCRA paid leave regulations apply?**(added 09/11/2020 Nationwide. Based on the specific circumstances in the case and language of the District Court's order, the Department considers the invalidated provisions of the FFCRA paid leave regulations vacated nationwide, not just as to the parties in the case.

103. **When do the revisions to the Department's FFCRA paid leave regulations become effective?** (added 09/11/2020) September 16, 2020. The revised explanations and regulatory text become effective immediately upon publication in the Federal Register on September 16, 2020. This means they are effective from September 16, 2020 through the expiration of the FFCRA's paid leave provisions on December 31, 2020.

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See: hhttps://www.dol.gov/agencies/whd/pandemic/ffcra-questions

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FFCRA: Emergency Paid Sick Leave

- Under the FFCRA, an employee may receive up to two weeks of paid sick leave if the employee is unable to work or telework 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 who is either subject to an order described in (1) above or subject to self-quarantine as described in (2) above;
  5) is caring for the employee's own child whose school, place of care, or childcare provider is closed or unavailable for reasons related to COVID-19; or
  6) is experiencing any other substantially-similar condition specified by the Secretary of U.S. Department of Health and Human Services.
- *No. 6 has no applicability yet because the Secretary of Health and Human Services has not specified any "substantially-similar condition."*

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FFCRA: Emergency Paid Sick Leave *(continued)*

- For reasons (1), (2), and (3), the employee receives of his/her normal pay for up to two weeks, with a maximum of $511 daily and $5,110 total.
- For reasons (4), (5), and (6), the employee receives two-thirds of his/her normal pay for up to two weeks, with a maximum of $200 daily and $2,000 total.
  - *For Reason #5, the employee may be eligible for another 10 weeks of paid leave - to be discussed shortly.*
- Employees cannot be required to use other types of paid leave before using their FFCRA paid sick leave.

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Telework and the FFCRA

- When is an employee **able to telework** under the FFCRA?
  - When the employer allows the employee to perform work at home or at another location away form the normal workplace.
  - *If an employee is able to telework, then he/she is not eligible for paid leave under the FFCRA.*
- When is an employee **unable to telework** under the FFCRA?
  - When an employee is not able to perform his/her normal job duties at home or at another location away from the employee's normal worksite.
    - For example: A lineman is unable to telework because he/she cannot perform his/her job duties from home.
    - For example: A payroll manager is likely able to telework if he/she can perform his/her job duties from a computer at home.
  - When an employee falls under one of the FFCRA's six qualifying reasons and that reason prevents the employee from being able to telework.
  - *If an employee is unable to telework and falls under one of the FFCRA's six reasons, then he/she will be eligible for paid leave.*

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FFCRA: Emergency Paid Family and Medical Leave

- Under the FFCRA, beyond the two weeks of paid sick leave, the employee may receive up to 10 weeks of emergency paid family and medical leave if the employee is unable to work or telework because the employee:
  - is caring for the employee's own child whose school, place of care, or childcare provider is closed or unavailable for reasons related to COVID-19.
- The employee must have been employed for at least 30 days before the leave request.
- The employee receives two-thirds of his/her normal pay for up to 10 weeks, with a maximum of $200 daily and $10,000 total.
- All other provisions of the FMLA still apply to the employee's leave of absence.

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FFCRA: When is a school, place of care, or childcare provider closed or unavailable?

- When a school or place of care is closed due to Covid-19.
  - For example, students tested positive for Covid-19 and the school is closed for two weeks for sanitation and quarantine.
- On normal school days when a child cannot (and does not have the option to) attend school in person.
  - For example, because a child's school is rotating when students may attend school in person.
  - For example, because a child's school is opening for distance learning only at this point.
- *For the reasons listed above, an employee may be eligible for FFCRA paid leave.*

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See DOL Questions and Answers 98-100: https://www.dol.gov/agencies/whd/pandemic/ffcra-questions#98

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FFCRA: A school, place of care, or childcare provider is <u>not</u> closed or unavailable when:

In-person attendance is available to the employee's child, but the employee instead decides to keep his/her child home and enrolls the child in online or distance learning classes.

The employee is <u>not</u> eligible for FFCRA paid leave in these circumstances.

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Additional Telework Issues

- Discrimination
  - Treat similarly-situated employees the same when deciding whether you will permit the employees to telework.
    - For example: Make the determination on a position basis or other legitimate business reason, not on an individual basis.
    - For example: Do not consider age when determining whether an employee should be permitted to telework. *(Caveat: Unless the employee has provided a doctor's note expressing a need for an accommodation.)*
- Disability
  - If an employee has been provided a reasonable accommodation for a disability at his/her normal work location, consider whether that accommodation needs to be provided to the employee if he/she is approved to telework.
  - If an employee requests to telework due to a medical reason, consult with legal counsel on whether the accommodation would be reasonable and/or consistent with your Cooperative's policy and practice.

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Additional Telework Issues *(continued)*

- Quality Control
  - Make sure that work schedules and expectations are clearly established.
  - Implement employee monitoring controls such as requiring daily or weekly check-ins and updates on pending work tasks.
- Fair Labor Standards Act ("FLSA")
  - Remember that all non-exempt employees must accurately record and report all hours worked.
  - Ensure that no non-exempt employees are working "off the clock."
  - Make sure that IT can remotely monitor and access employee computers if necessary.

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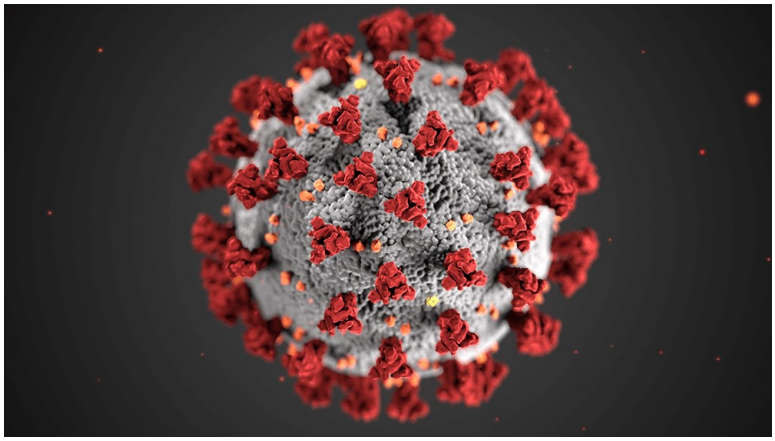

Coronavirus Disease 2019 -- CDC Guidance

Please check the CDC website frequently for changes in guidance being issued: https://www.cdc.gov/

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CDC Guidance: Employee Health Checks

Summary of Changes to the Guidance:

Below are changes as of May 6, 2020

- Updated strategies and recommendations for employers responding to COVID-19, including those seeking to resume normal or phased business operations:
  - Conducting daily health checks
  - Conducting a hazard assessment of the workplace
  - Encouraging employees to wear cloth face coverings in the workplace, if appropriate
  - Implementing policies and practices for social distancing in the workplace
  - Improving the building ventilation system
- A table outlining the engineering controls, administrative controls, and personal protective equipment (PPE) that employers may use to help prevent the spread of COVID-19 in the workplace

Actively encourage sick employees to stay home:

- Employees who have symptoms should notify their supervisor and stay home.
- Sick employees should follow CDC-recommended steps. Employees should not return to work until the criteria to discontinue home isolation are met, in consultation with healthcare providers.
- Employees who are well but who have a sick family member at home with COVID-19 should notify their supervisor and follow CDC recommended precautions.

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See: https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html

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CDC Guidance: Cleaning Recommendations

Separate sick employees:

- Employees who appear to have symptoms upon arrival at work or who become sick during the day should immediately be separated from other employees, customers, and visitors, and sent home.
- Have a procedure in place for the safe transport of an employee who becomes sick while at work. The employee may need to be transported home or to a healthcare provider.

Take action if an employee is suspected or confirmed to have COVID-19 infection:

In most cases, you do not need to shut down your facility. If it has been less than 7 days since the sick employee has been in the facility, close off any areas used for prolonged periods of time by the sick person:

- Wait 24 hours before cleaning and disinfecting to minimize potential for other employees being exposed to respiratory droplets. If waiting 24 hours is not feasible, wait as long as possible.
- During this waiting period, open outside doors and windows to increase air circulation in these areas.

If it has been 7 days or more since the sick employee used the facility, additional cleaning and disinfection is not necessary. Continue routinely cleaning and disinfecting all high-touch surfaces in the facility.

Follow the CDC cleaning and disinfection recommendations:

- Clean dirty surfaces with soap and water before disinfecting them.
- To disinfect surfaces, use products that meet EPA criteria for use against SARS-Cov-2, the virus that causes COVID-19, and are appropriate for the surface.
- Always wear gloves and gowns appropriate for the chemicals being used when you are cleaning and disinfecting.
- You may need to wear additional PPE depending on the setting and disinfectant product you are using. For each product you use, consult and follow the manufacturer's instructions for use.

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See: https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html

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CDC Guidance: When to Quarantine

Who needs to quarantine?	**People who have been in close contact with someone who has COVID-19—excluding people who have had COVID-19 within the past 3 months.** People who have tested positive for COVID-19 do not need to quarantine or get tested again for up to 3 months as long as they do not develop symptoms again. People who develop symptoms again within 3 months of their first bout of COVID-19 may need to be tested again if there is no other cause identified for their symptoms. **What counts as close contact?** • You were within 6 feet of someone who has COVID-19 for a total of 15 minutes or more • You provided care at home to someone who is sick with COVID-19 • You had direct physical contact with the person (hugged or kissed them) • You shared eating or drinking utensils • They sneezed, coughed, or somehow got respiratory droplets on you
Steps to take	**Stay home and monitor your health** • Stay home for 14 days after your last contact with a person who has COVID-19 • Watch for fever (100.4◦F), cough, shortness of breath, or other symptoms of COVID-19 • If possible, stay away from others, especially people who are at higher risk for getting very sick from COVID-19

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See: https://www.cdc.gov/coronavirus/2019-ncov/if-you-are-sick/quarantine.html

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What does OSHA say?

Control and Prevention

Measures for protecting workers from exposure to, and infection with, SARS-CoV-2, the virus that causes Coronavirus Disease 2019 (COVID-19), depend on the type of work being performed and exposure risk, including potential for interaction with people with suspected or confirmed COVID-19 and contamination of the work environment. Employers should adapt infection control strategies based on a thorough hazard assessment, using appropriate combinations of engineering and administrative controls, safe work practices, and personal protective equipment (PPE) to prevent worker exposures. Some OSHA standards that apply to preventing occupational exposure to SARS-CoV-2 also require employers to train workers on elements of infection prevention, including PPE.

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See: https://www.osha.gov/SLTC/covid-19/controlprevention.html

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OSHA: General Guidance for All Workers and Employers

General Guidance for All Workers and Employers

For all workers, regardless of specific exposure risks, it is always a good practice to:

- Frequently wash your hands with soap and water for at least 20 seconds. When soap and running water are unavailable, use an alcohol-based hand rub with at least 60% alcohol. Always wash hands that are visibly soiled.
- Avoid touching your eyes, nose, or mouth with unwashed hands.
- Practice good respiratory etiquette, including covering coughs and sneezes.
- Avoid close contact with people who are sick.
- Stay home if sick.
- Recognize personal risk factors. According to U.S. Centers for Disease Control and Prevention (CDC), certain people, including older adults and those with underlying conditions such as heart or lung disease or diabetes, are at higher risk for developing more serious complications from COVID-19.

U.S. Department of Defense

Regardless of specific exposure risks, following good hand hygiene practices can help workers stay healthy year round.

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See: https://www.osha.gov/SLTC/covid-19/controlprevention.html

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What has your Cooperative been doing to deal with COVID-19?

What are the risks of not doing anything to address COVID-19 concerns?

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Workplace Social Distancing Considerations

- Consider **staggering shifts** or normal **arrival** and **departure** times to limit the number of employees entering and leaving the workplace at the same time.
- **Increase** physical **space** between employee workstations as much as possible.
- Implement **one-way paths** in larger workplaces to reduce the number of employees coming into contact with each other during the day.
- **Use signs, tape marks, or other visual cues** such as decals or colored tape on the floor, placed at least six feet apart, to indicate where employees (and customers) should stand when physical barriers are not possible.

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Workplace Social Distancing Considerations *(continued)*

- **Close or restrict access** to employee common areas where employees usually like to congregate and interact (e.g. remove tables and seats in employee **breakrooms**).
- For meetings and other employee gatherings:
  - Use **videoconferencing** or **teleconferencing** whenever possible.
  - Cancel, adjust, or postpone large work-related meetings or gatherings that can only occur in-person in accordance with state and local regulations and guidance.
  - When videoconferencing or teleconferencing is not possible, hold meetings in open, well-ventilated spaces, maintaining at least six feet between each person, and require that face coverings be worn.
- **Prohibit handshaking.**

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If an employee tests positive for COVID-19, is the employee eligible for **workers' compensation benefits?**

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Workers' Compensation: Fla. Stat. § 440.151

- Generally, **NO** unless the employee is a first responder.
- Greater burden of proof under **occupational disease** standards.
- "…the term 'occupational disease' shall be construed to mean **only a disease which is due to causes and conditions which are characteristic of and peculiar to a particular trade, occupation, process, or employment,** and to exclude all ordinary diseases of life to which the general public is exposed, **unless the incidence of the disease is substantially higher** in the particular trade, occupation, process, or employment **than for the general public.** 'Occupational disease' means only a disease for which there are epidemiological studies showing that exposure to the specific substance involved, at the levels to which the employee was exposed, may cause the precise disease sustained by the employee."

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See: leg.state.fl.us/statutes/index.cfm?App_mode=Display_Statute&Search_String=&URL=0400-0499/0440/Sections/0440.151.html

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COVID-19 Employment Policy Considerations

- Prohibit employees from coming to work when they:
  - Are exhibiting COVID-19 symptoms;
  - Have tested positive for COVID-19 (regardless of symptoms);
  - Have a household member who has tested positive for COVID-19 (regardless of symptoms);
  - Have been exposed* to someone who tested positive for COVID-19 (regardless of symptoms);
  - Are in similar situations where reporting to work would risk exposing others to the virus.
- Employees should still be required to follow all normal call-out procedures.
- Managers should know when to contact HR for help.
- HR should periodically review and update policy language as the pandemic and agency guidance, such as from the CDC, are continuing to evolve.

**Exposure includes being within six feet for 15 minutes or more.*

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Possible COVID-19 Policy Requirements for Employees

- Wash your hands often with soap and water for at least 20 seconds. If soap and water are not available, use an alcohol-based hand sanitizer comprised of at least 60-95% alcohol.
- Wash your hands or use hand sanitizer each time you enter or leave a work facility, each time you clock in and out, and frequently during the workday.
- Additional key times to clean your hands include after using the restroom facilities, before eating or preparing food, after blowing your nose, coughing or sneezing, and after putting on, touching or remove face coverings.
- Clean and disinfect frequently touched objects and surfaces using appropriate cleaning sprays or wipes. This includes workstations, doorknobs, desks, keyboards, handrails, remote controls, phones, tables, countertops, and similar objects and surfaces.
- Do not use other employees' phones, desks, offices or other work tools and equipment.
- Do not go beyond the threshold of the door when speaking to other employees in their offices.
- Wear face coverings, such as masks, whenever you travel through the office or anticipate being in the same space as another employee.
- Do not touch your face with unwashed hands or after touching potentially contaminated surfaces.
- Use proper respiratory etiquette (including only coughing and sneezing into one's upper sleeve, not hands), and then promptly sanitize hands after coughs or sneezes.

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Possible COVID-19 Policy Requirements for Employees *(continued)*

- Do not shake hands with others and do not engage in other greetings involving touching, such as hugs.
- Practice social distancing at all times and avoid gatherings with other employees; Remain six feet or more away from others wherever possible.
- Avoid all non-essential work travel.
- Utilize telephonic and web-based conferences instead of in-person meetings whenever possible.
- Only when an in-person meeting becomes essential, limit the meeting to a maximum of 10 people and practice social distancing (six feet or more away from others).
- Contact HR if you anticipate engaging in any personal travel more than 100 miles away.
- Engage in proper social distancing practices, remaining six feet or more from others, during and outside of work hours to help eliminate the spread of COVID-19 in our communities.
- Follow all governmental orders and guidance applicable to you during the COVID-19 pandemic.

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How to Address Employee Fears about Returning to Work

Caveat: Let's talk about the "reasonable" person…

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Addressing Employees Afraid to Return to Work

- Reassure with Preparation and Action:
  - Increase Sanitary Procedures
    - Engage in extra sanitation procedures, including disinfecting office surfaces, equipment, doorknobs, handles, and other commonly touched items.
    - Consult with a medical professional, such as an epidemiologist, about the proper sanitation procedures for your workplaces.
    - Have additional sanitation specialists, such as a fumigation company, on standby in the event you need to quickly engage them due to an outbreak.
  - Ensure sure that appropriate PPE, wash stations, and hand sanitizer is available.

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Addressing Employees Afraid to Return to Work
(continued)

- Communicate!
  - Maintain communication with your employees about the Cooperative's requirements and expectations for a safe and healthy workplace.
  - Provide (general) updates on what your Cooperative is doing to protect its employees.
  - Implement policies and procedures for COVID-19 related issues.
  - Educate employees about the steps they can take to protect themselves at work and outside of work.
  - Provide face masks and hand sanitizer for employees and advise employees about where such items are located.

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Addressing Employees Afraid to Return to Work
(continued)

- Positive Reinforcement
  - Thank employees for complying with your Cooperative's policies on safety, sanitation, and social distancing.
  - Remind employees how (and encourage employees) to contact HR with any questions or concerns.
- Manager Consistency
  - Reach out to managers who may be reluctant to follow the rules and remind them your Cooperative's expectations.
  - Make sure your managers are consistently enforcing COVID-19 related policies.

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Employees Refusing to Return to Work

- Assuming the employee does not have a sufficient reason to be out, the Cooperative can require that the employee report to work onsite. This may be a condition of the employee's continued employment with the Cooperative.
- Consider whether you have ever permitted employees to remain home or away from the worksite in the past. Does your Cooperative have a Personal Leave of Absence policy? If so, in the past, what sort of reasons have qualified for such leave? For how long was leave granted?
- Consider providing a date by which the employee must provide documentation supporting a need to remain home or report to work. Otherwise, if neither will be met, consider telling the employee that you will accept his/her voluntary resignation on that date.

Remember: Consistency is key! You should treat similarly-situated employees the same.

Caveat: Concerted activity under the NLRA.

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Masks and Face Coverings

Can you require your employees to wear masks or other face coverings during work?

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YES! But… Important Considerations

- Safety
  - Consider whether wearing a mask would jeopardize the safety of an employee working in a safety sensitive position.
  - Are there other alternatives?
  - Can the employee wear the mask *except for* when performing certain safety-sensitive tasks?
- Medical Excuse
  - It is uncommon but possible that an employee will say he/she cannot wear a mask or face covering due to a medical condition.
  - If this occurs, contact legal counsel for guidance.

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Requiring Masks and Face Coverings: Considerations

- Are there any local executive orders or other requirements requiring your employees to wear masks or other face coverings indoors or in the workplace?
- Implementing a policy with restrictions regarding employees and when they are required to wear face masks, such as when:
  - Employees are traveling to/from and throughout the workplace;
  - Employees are traveling for work (personal or company vehicle) with other employees inside the vehicle;
  - Six-feet social distancing cannot be maintained;
  - Employees are working in areas that are not well ventilated;
  - Employees are interacting with customers, vendors, and other non-employees.
- The employer can issue face masks or approved face coverings, or the employer can permit employees to utilize their own face masks, so long as they meet the employer's preferred standards.

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U.S. EEOC – Coronavirus Resources

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EEOC's COVID-19 Resources: https://www.eeoc.gov/coronavirus

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> **Coronavirus is a hazard in the workplace.** But it is not unique to the workplace or (with the exception of certain industries, like health care) caused by work tasks themselves. This by no means lessens the need for employers to address the virus. **But it means that the virus cannot be viewed in the same way as other workplace hazards.**
>
> *U.S. Secretary of Labor Eugene Scalia*

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COVID-19 and the Americans with Disabilities Act

Medical Inquiries – EEOC says yes you can ask!

- Employers **can** ask employees questions about COVID-19, for example, if an employee is experiencing COVID-19 symptoms such as fever, cough, shortness of breath, sore throat, loss of taste or smell, etc.
- Employers **can** take employees' temperatures.
  - If you document employee temperatures, consider indicating "yes" or "no" of a temperature of 100.4°F or above as opposed to writing down each employee's temperature.
- Employers **can** require employees to stay home from work if the employees are experiencing COVID-19 symptoms.
- Employers **can** require employees to provide doctor's notes before returning to work after experiencing COVID-19 symptoms. *(Caveat: Discuss possible issues.)*
- Remember to maintain all employee medical information as confidential and to put any medical documentation in a separate, confidential medical file for the employee.

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See: https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws

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Possible Emergency Responder Exception to FFCRA Requirements

What does this mean? Does the exception still apply?

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Employers May Exclude Emergency Responders from FFCRA Leave Provisions

- "The EFMLEA and the EPSLA both provide that an employer may exclude employees who are health care providers or emergency responders from leave requirements under the Acts … An employer's exercise of this option does not impact an employee's earned or accrued sick, personal, vacation, or other employer-provided leave under the employer's established policies. Further, an employer's exercise of this option does not authorize an employer to prevent an employee who is a health care provider or emergency responder from taking earned or accrued leave in accordance with established employer policies.
- Because an employer is not required to exercise this option, if an employer does not elect to exclude an otherwise-eligible health care provider or emergency responder from taking paid leave under the EPSLA or the EFMLEA, such leave is subject to all other requirements of those laws and this Part, and should be treated in the same manner for purposes of the tax credit created by the FFCRA. To minimize the spread of COVID-19, the Department encourages employers to be judicious when using this definition to exempt health care providers and emergency responders from the provisions of the FFCRA."

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See DOL Regulations: https://www.govinfo.gov/content/pkg/FR-2020-04-06/pdf/2020-07237.pdf

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DOL "Emergency Responder" Definition

- "For the purposes of Employees who may be excluded from Paid Sick Leave or Expanded Family and Medical Leave by their Employer under the FFCRA, an emergency responder is anyone necessary for the provision of transport, care, healthcare, comfort and nutrition of such patients, or others needed for the response to COVID-19. This includes but is not limited to military or national guard, law enforcement officers, correctional institution personnel, fire fighters, emergency medical services personnel, physicians, nurses, public health personnel, emergency medical technicians, paramedics, emergency management personnel, 911 operators, child welfare workers and service providers, public works personnel, and persons with skills or training in operating specialized equipment or other skills needed to provide aid in a declared emergency, as well as individuals who work for such facilities employing these individuals and whose work is necessary to maintain the operation of the facility. This also includes any individual whom the highest official of a State or territory, including the District of Columbia, determines is an emergency responder necessary for that State's or territory's or the District of Columbia's response to COVID-19."

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See DOL Q&A #57: https://www.dol.gov/agencies/whd/pandemic/ffcra-questions

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Are any of your Cooperative employees "emergency responders" for purposes of FFCRA?

- *If yes, who?*
- *And what is the significance?*
- *Could DOL's definition of "emergency responder" be challenged ion the same way that "health care provider" has been challenged?*
- *If so, what would be the ramifications?*

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Tread carefully!

Consult with legal counsel if you plan to exclude certain employees from the FFCRA's paid leave provisions.

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COVID-19 makes us appreciate the issues that existed *before* March 2020!

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Florida Drug-Free Workplace

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Are you a "Florida Drug-Free Workplace"?

(for workers' compensation insurance purposes)

If YES:

- Must comply with all requirements outlined in Florida Statutes § 440.102, including:
  - Providing notice and the written policy statement to all applicants and employees;
  - Conducting pre-hire, reasonable suspicion, fitness-for-duty, and follow-up testing;
  - Meeting various requirements for utilization of a Medical Review Officer ("MRO") and other procedures.

If NO:

- May (but is not required to) perform pre-hire and post-hire drug testing.
- Not required to comply with § 440.102 requirements but can use those as guidance in formulating drug-testing policies and procedures.

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Fla. Stat. § 440.102: http://www.leg.state.fl.us/statutes/index.cfm?App_mode=Display_Statute&URL=0400-0499/0440/Sections/0440.102.html

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Written Policy must Include:

- "A **list of the most common medications**, by brand name or common name, as applicable, as well as by chemical name, **which may alter or affect a drug test.** A list of such medications as developed by the Agency for Health Care Administration shall be available to employers through the department."
- "A **list of all drugs for which the employer will test**, described by brand name or common name, as applicable, as well as by chemical name."

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Fla. Stat. § 440.102: http://www.leg.state.fl.us/statutes/index.cfm?App_mode=Display_Statute&URL=0400-0499/0440/Sections/0440.102.html

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Florida Drug-Free Workplace Standards: Florida Administrative Code § 59A-24

(f) The form shall also contain the following list of over-the-counter and prescription drugs which could alter or affect a test result. Due to the large number of obscure brand names and constant marketing of new products, this list, as follows, is not intended to be all-inclusive.

Alcohol	All liquid medications containing ethyl alcohol (ethanol). Please read the label for alcohol content. As an example, Vick's Nyquil is 25% (50 proof) ethyl alcohol, Comtrex is 20% (40 proof), Contact Severe Cold Formula Night Strength is 25% (50 proof) and Listerine is 26.9% (54 proof).
Amphetamines	Obetrol, Biphetamine, Desoxyn, Dexedrine, Didrex, Ionamine, Fastin.
Cannabinoids	Marinol (Dronabinol, THC).
Cocaine	Cocaine HCl topical solution (Roxanne).
Phencyclidine	Not legal by prescription.
Methaqualone	Not legal by prescription.
Opiates	Paregoric, Parepectolin, Donnagel PG, Morphine, Tylenol with Codeine, Empirin with Codeine, APAP with Codeine, Aspirin with Codeine, Robitussin AC, Guiatuss AC, Novahistine DH, Novahistine Expectorant, Dilaudid (Hydromorphone), M-S Contin and Roxanol (morphine sulfate), Percodan, Vicodin, Tussi-organidin, etc.
Barbiturates	Phenobarbital, Tuinal, Amytal, Nembutal, Seconal, Lotusate, Fiorinal, Fioricet, Esgic, Butisol, Mebaral, Butabarbital, Butalbital, Phrenilin, Triad, etc.
Benzodiazepines	Ativan, Azene, Clonopin, Dalmane, Diazepam, Librium, Xanax, Serax, Tranxene, Valium, Verstran, Halcion, Paxipam, Restoril, Centrax.
Methadone	Dolophine, Metadose.
Propoxyphene	Darvocet, Darvon N, Dolene, etc.

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Fla. Admin. Code § 59A-24: https://www.flrules.org/gateway/ChapterHome.asp?Chapter=59A-24

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Florida Drug-Free Workplace Standards: Florida Administrative Code § 59A-24

1. Levels on initially screened urine specimens which are equal to or exceed the following shall be considered to be presumptively positive and submitted for confirmation testing:

Amphetamines	1,000 ng/mL
Cannabinoids (11-nor-Delta-9- tetrahydrocannabinol-9-carboxylic acid)	50 ng/mL
Cocaine (benzoylecgonine)	300 ng/mL
Phencyclidine	25 ng/mL
Methaqualone	300 ng/mL
Opiates	2,000 ng/mL
Barbiturates	300 ng/mL
Benzodiazepines	300 ng/mL
Methadone	300 ng/mL
Propoxyphene	300 ng/mL

The only specimen for alcohol testing shall be blood and the intially screened specimen shall be considered presumptively positive and submitted for confirmation testing if the level is equal to or exceeds 0.04 g/dL.

2. Levels which exceed the following for hair specimens shall be considered presumptively positive on initial screening and submitted for confirmation testing:

Marijuana	10 pg/10 mg of hair
Cocaine	5 ng/10 mg of hair
Opiate/synthetic narcotics and metabolites	5 ng/10 mg of hair
Phencyclidine	3 ng/10 mg of hair
Amphetamines	5 ng/10 mg of hair

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Fla. Admin. Code § 59A-24: https://www.flrules.org/gateway/ChapterHome.asp?Chapter=59A-24

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Remember! Medical Marijuana…

- **Is still illegal under federal law.**
  - For U.S. Department of Transportation ("DOT") drivers, you must follow all federal laws regarding DOT drug-testing.
  - "The [DOT's] Drug and Alcohol Testing Regulation … does not authorize 'medical marijuana' under a state law to be a valid medical explanation for a transportation employee's positive drug test result."
- **Florida** has strong protections in favor of employers who want to maintain a zero-tolerance policy.

Remember that consistency is key!

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See: *https://www.transportation.gov/odapc/medical-marijuana-notice*

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Florida Statutes § 381.986:

(15) APPLICABILITY.—

(a) This section does not limit the ability of an employer to establish, continue, or enforce a drug-free workplace program or policy.

(b) This section does not require an employer to accommodate the medical use of marijuana in any workplace or any employee working while under the influence of marijuana.

(c) This section does not create a cause of action against an employer for wrongful discharge or discrimination.

(d) This section does not impair the ability of any party to restrict or limit smoking or vaping marijuana on his or her private property.

(e) This section does not prohibit the medical use of marijuana or a caregiver assisting with the medical use of marijuana in a nursing home facility licensed under part II of chapter 400, a hospice facility licensed under part IV of chapter 400, or an assisted living facility licensed under part I of chapter 429, if the medical use of marijuana is not prohibited in the facility's policies.

(f) Marijuana, as defined in this section, is not reimbursable under chapter 440.

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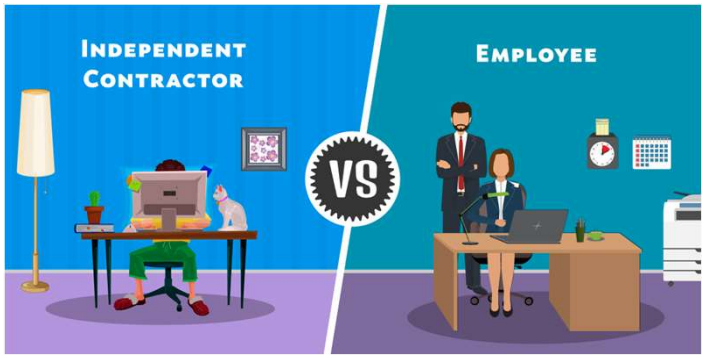
Independent Contractor or Employee?



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GET THE FACTS ON

MISCLASSIFICATION

UNDER THE FAIR LABOR STANDARDS ACT

Employee or Independent Contractor?

The Fair Labor Standards Act (FLSA) provides minimum wage and overtime pay protections to nearly all workers in the U.S. Some employers incorrectly treat workers who are employees under this federal law as independent contractors. We call that "misclassification." If you are misclassified as an independent contractor, your employer may try to deny you benefits and protections to which you are legally entitled.

Please refer to **Fact Sheet 13** for more information on the factors used to determine whether you're an employee or an independent contractor.

WAGE AND HOUR DIVISION
UNITED STATES DEPARTMENT OF LABOR

1-866-4US-WAGE
dol.gov/whd

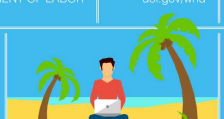
Receiving a 1099 does not make you an independent contractor under the FLSA.

Even if you are an independent contractor under another law (for example, tax law or state law), you may still be an employee under the FLSA.

Signing an independent contractor agreement does not make you an independent contractor under the FLSA.

Having an employee identification number (EIN) or paperwork stating that you are performing services as a Limited Liability Company (LLC) or other business entity does not make you an independent contractor under the FLSA.

Employers may not misclassify an employee for any reason, even if the employee agrees.



You are not an independent contractor under the FLSA merely because you work offsite or from home with some flexibility over work hours.

Whether you are paid by cash or by check, on the books or off, you may still be an employee under the FLSA.

"Common industry practice" is not an excuse to misclassify you under the FLSA.

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Taken from: https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/misclassification-facts.pdf

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U.S. Department of Labor Fact Sheet #13

The U.S. Supreme Court has on a number of occasions indicated that there is no single rule or test for determining whether an individual is an independent contractor or an employee for purposes of the FLSA. The Court has held that it is the total activity or situation which controls. Among the factors which the Court has considered significant are:

1) The extent to which the services rendered are an integral part of the principal's business.

2) The permanency of the relationship.

3) The amount of the alleged contractor's investment in facilities and equipment.

4) The nature and degree of control by the principal.

5) The alleged contractor's opportunities for profit and loss.

6) The amount of initiative, judgment, or foresight in open market competition with others required for the success of the claimed independent contractor.

7) The degree of independent business organization and operation.

There are certain factors which are immaterial in determining whether there is an employment relationship. Such facts as the place where work is performed, the absence of a formal employment agreement, or whether an alleged independent contractor is licensed by State/local government are not considered to have a bearing on determinations as to whether there is an employment relationship. Additionally, the Supreme Court has held that the time or mode of pay does not control the determination of employee status.

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See: https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/whdfs13.pdf

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September 22, 2020: DOL Proposed Rule

Once published in the Federal Register, the public will have 30 days to submit comments.

In this rulemaking, the Department proposes to:

- Adopt an "economic reality" test to determine a worker's status as an FLSA employee or an independent contractor. The test considers whether a worker is in business for themselves (independent contractor) or is economically dependent on a putative employer for work (employee);
- Identify and explain two "core factors," specifically: the nature and degree of the worker's control over the work; and the worker's opportunity for profit or loss based on initiative and/or investment. These factors help determine if a worker is economically dependent on someone else's business or is in business for themselves;
- Identify three other factors that may serve as additional guideposts in the analysis including: the amount of skill required for the work; the degree of permanence of the working relationship between the worker and the potential employer; and whether the work is part of an integrated unit of production; and
- Advise that the actual practice is more relevant than what may be contractually or theoretically possible in determining whether a worker is an employee or an independent contractor.

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See: https://www.dol.gov/agencies/whd/flsa/2020-independent-contractor-nprm

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Misclassification Risks

- Misclassification in this context means when an employer **treats a worker as an independent contractor** when really the employer **should be** treating the worker as an **employee**.

- Some Risks:
  - Failing to pay the worker minimum wage and overtime compensation (FLSA).
  - Failing to pay appropriate employment-related taxes (IRS).
  - Failing to offer group health insurance benefits (PPACA).

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Leave of Absence Issues

Non-FMLA Leaves of Absence

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Considerations for:
Non-FMLA Personal Leave of Absence

- These are generally:
  - Unpaid.
  - Only granted for significant personal or medical reasons.
  - Capped at a maximum number of weeks or months. *(Caveat: ADA reasonable accommodation when definite in duration)*
- Require use of any accrued paid time off, vacation time, and/or sick time.
  - Considerations for offering paid time off vs. vacation/sick time.
  - Considerations for implementing a leave donation program.
- Apply leave consistently based on Cooperative policy and past practice.

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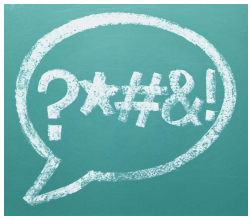

Inappropriate Social Media Posts

Can an employer discipline an employee for what he/she posts on social media sites such as Facebook, Instagram, and Twitter?

What if the employee's spouse is posting inappropriate material?

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National Labor Relations Act

The NLRB and Social Media

The National Labor Relations Act protects the rights of employees to act together to address conditions at work, with or without a union. This protection extends to certain work-related conversations conducted on social media, such as Facebook and Twitter.

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See: https://www.nlrb.gov/about-nlrb/rights-we-protect/your-rights/the-nlrb-and-social-media

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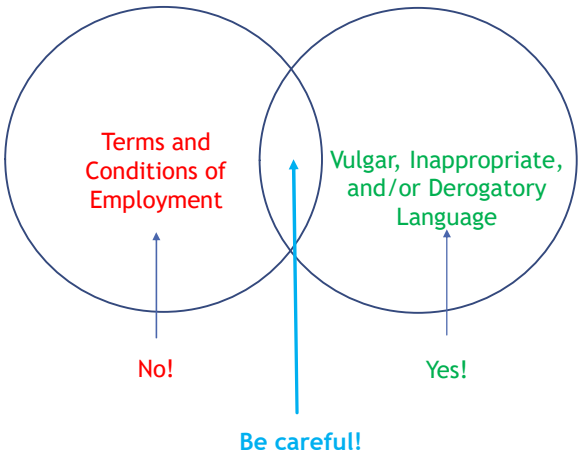
Social Media Postings:
When can an employer act?



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Now, let's turn to **your questions** for discussion.

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Your questions…

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THANK YOU!

Bob Riegel

- rriegel@rtlaw.com
- (904) 473-1383
- Ponte Vedra Beach

Katie Rudderman

- krudderman@rtlaw.com
- (904) 346-5791
- Jacksonville

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Please note that our presentation materials are not intended to provide legal advice concerning specific matters within your Cooperative. Please seek the assistance of legal counsel to address any particular legal issues that exist or may arise within your Cooperative.

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