



Mental Health in the Workplace
Session 4
Employer Legal Considerations

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Disability Laws & Mental Illness

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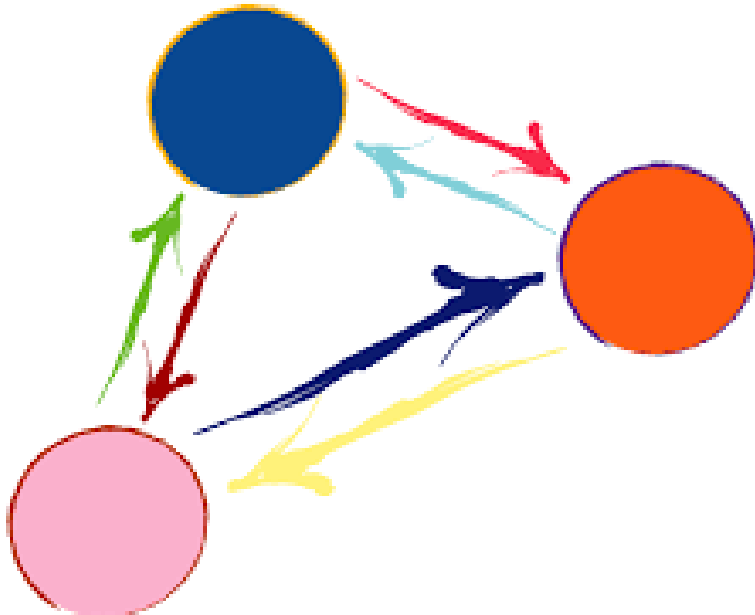
Disability Laws – The Big Three

ADA –
Americans with
Disabilities Act

FMLA – Family
and Medical
Leave Act

Workers
Compensation

The Laws Interact



- The majority of unscheduled and scheduled absences are related to the illness of employees or their family members. One, both, or all three of these laws may be involved.
- Violations of these laws may result in lost wages, back pay, reinstatement, retroactive benefits, compensatory damages, and punitive damages.
- Employers have a duty to ensure that employees receive the benefits and protections these laws provide.

Brief Overview of the Laws

- ❑ ADA – protects applicants and employees who are “qualified individuals with a disability.”
- ❑ FMLA – sets minimum leave standards for employees for the birth and newborn care of a child, placement of a child for adoption or foster care, to care for an immediate family member with a serious health condition, and for the employee’s serious health condition. New Military component.
- ❑ Workers’ Compensation - provides for payment of compensation and rehabilitation for workplace injuries and minimizes employer liability.

Applicability

Employee Eligibility

- ADA – Employee (or applicant) who is disabled as defined by the ADA; qualified for the position; can perform the essential functions of the position, with or without a reasonable accommodation.
- FMLA – Employee who has worked at least 12 months and 1250 hours prior to the start of the leave; works at a worksite where there are 50 or more employees within a 75-mile radius.
- Workers Compensation – Employee who has an injury arising out of or in the course of employment - state law exceptions possible for willful misconduct or intentional self-inflicted injuries, willful disregard of safety rules, or intoxication from alcohol or illegal drugs.

Length of Leave

- ADA – No specific limit for the amount of leave that would be provided as a reasonable accommodation that does not create an undue hardship on the employer – no indefinite leave, however.
- FMLA – 12 weeks in the 12-month period as defined by the employer.
- Workers' Compensation – No specific limit for the amount of leave an injured worker may have.

Medical Documentation



ADA – Only medical examinations or inquiries regarding an employee’s disability that are job-related and limited to determining ability to perform the job and whether an accommodation is needed and would be effective.



FMLA – Medical certification of the need for the leave not to exceed what is requested in the Department of Labor (DOL) Medical Certification Form.



Workers’ Compensation – Medical information that pertains to the employee’s on-the-job injury.

Return to Work Certification

ADA – Permitted as long as the medical examination and inquiry is job-related and necessary to determine whether the employee can perform the essential functions of the job.

FMLA – Can only be required under a policy or practice that requires employees who have been on a similar type of leave of absence.

Workers' Compensation – May be and is typically required.

Benefits While On Leave

ADA –No specific requirements but cannot discriminate and must provide same benefits as those provided to employees on non-ADA leave of absence.

FMLA – Health coverage must be continued at same level as prior to the leave.

Workers' Compensation – Not required to continue unless run concurrently with FMLA leave.

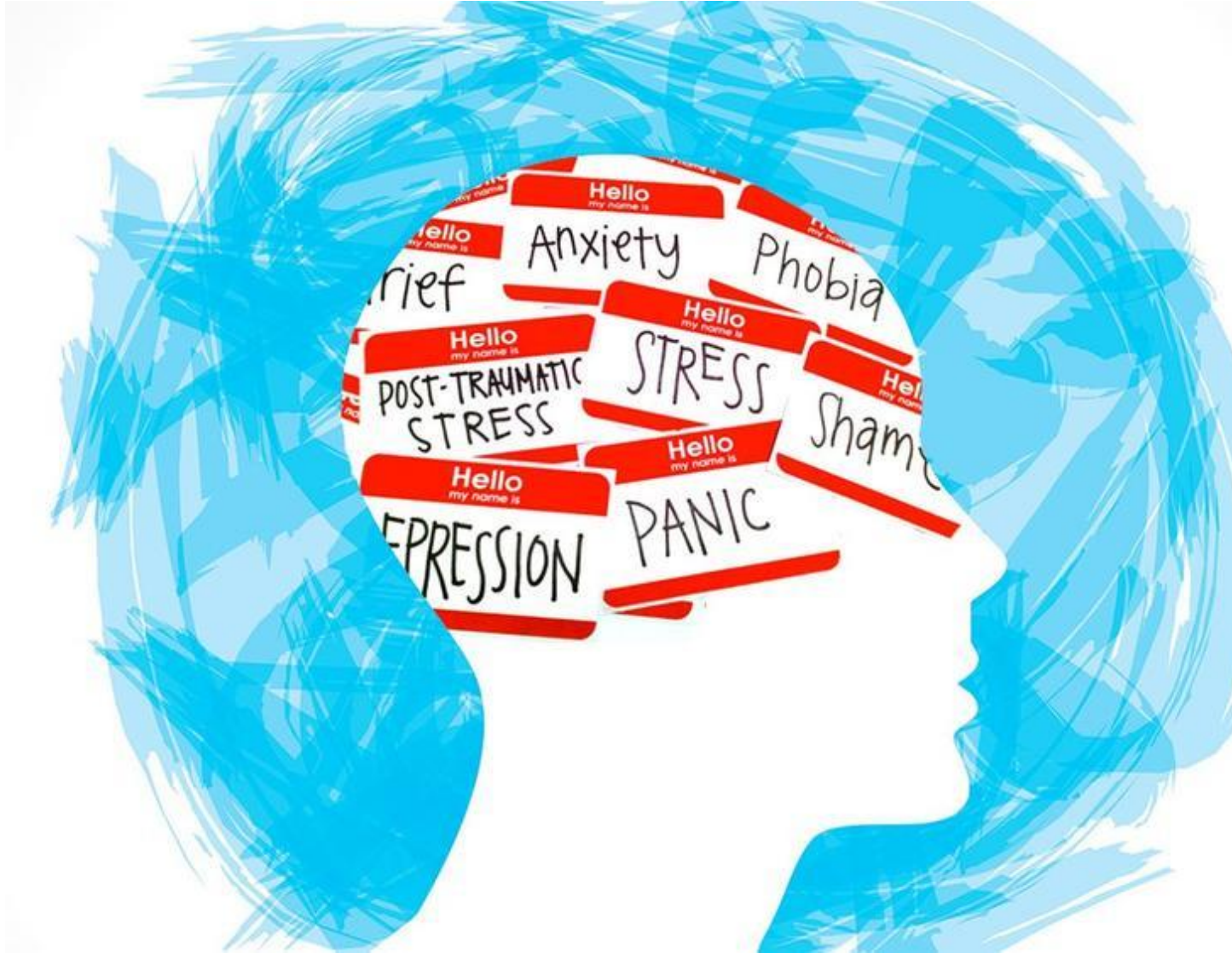
Reinstatement

ADA – Required reinstatement to previous job unless doing so would create an undue hardship on the employer.

FMLA – Required reinstatement to the same or an equivalent job. NO undue hardship exception.

Workers' Compensation – No reinstatement rights, except for retaliatory discharges.





Mental Health

- ☐ Depression, post-traumatic stress disorder and other mental health conditions are disabilities.
- ☐ Employees with mental health conditions are protected against discrimination and harassment because of the condition.
- ☐ Also have privacy rights and reasonable accommodation rights.

ADA Overview



Americans with Disabilities Act

What is the ADA

The Americans with Disabilities Act, effective July 26, 1992, established a clear and comprehensive prohibition of discrimination on the basis of disability in employment.



Who Is Protected By ADA

People who currently
have a disability

People who have a
history of disability

People who are perceived
as disabled by others

ADA Employment Prohibitions

- Employers must provide qualified individuals with disabilities an equal opportunity to benefit from the full range of employment-related opportunities available to non-disabled persons . It prohibits discrimination in:
 - job application procedures
 - hiring
 - advancement
 - employee compensation
 - job assignment/classification
 - job training
 - other terms, conditions, or privileges of employment

Qualified Individual With Disability

“Qualified individual with disability” means an individual with a disability who satisfies the requisite skill, experience, education and other job-related requirements of the employment position such individual holds or desires and who with or without reasonable accommodation, can perform the essential functions of such position





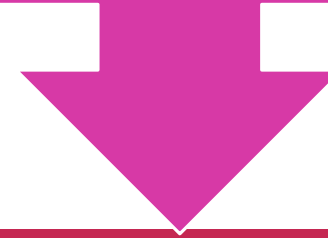
Reasonable Accommodation

☐ Reasonable accommodations may include but are not limited to:

- Modifying the job application process
- Leave of Absence
- Making facilities accessible
- Job restructuring part-time or modified work schedules
- Acquiring or modifying of equipment/devices
- Modifying policies
- Providing readers/interpreters/notetakers/CART
- Educating co-workers

Undue Hardship

Reasonable accommodation may not be provided if such accommodation results in undue hardship on the employer.



“Undue hardship” means:

An action requiring significant difficulty or expense

One that is costly, extensive, substantial or disruptive

One that will fundamentally alter the nature of employment

Essential Job Functions

Fundamental job duties of the position

Employers can establish job-related qualification standards (e.g., education, skills, experience, physical/mental standards)

Need clear job descriptions





Absenteeism and Sleeping

Rules of Conduct – Accommodations



Known Disabilities - Accommodation



Mental Health – Adverse Actions

- ❑ It is illegal for an employer to **discriminate** against an employee and simply because the employee has a mental health condition. This includes termination, rejecting someone for a job or promotion, or forcing the employee to take leave.
- ❑ An employer doesn't have to hire or keep people in jobs they can't perform, or employ people who pose a "direct threat" to safety (a significant risk of substantial harm to self or others).
- ❑ But an employer cannot rely on myths or stereotypes about mental health conditions when deciding whether an employee can perform a job or whether the employee poses a safety risk.
- ❑ Before rejecting an employee for a job based on a mental health condition, the employer must have objective evidence that employee can't perform job duties, or that the employee would create a significant safety risk, even with a reasonable accommodation.

Disclosing A Mental Health Condition

- ❑ In most situations an employee can keep a mental health condition private.
- ❑ An employer is only allowed to ask medical questions (including questions about mental health) in four situations:
 1. When employee asks for a reasonable accommodation.
 2. After making a job offer, but before employment begins, as long as everyone entering the same job category is asked the same questions.
 3. When engaging in affirmative action for people with disabilities (such as an employer tracking the disability status of its applicant pool in order to assess its recruitment and hiring efforts, or a public sector employer considering whether special hiring rules may apply), in which case an employee may choose whether to respond.
 4. On the job, when there is objective evidence that an employee may be unable to do the job or may pose a safety risk because of the mental health condition.

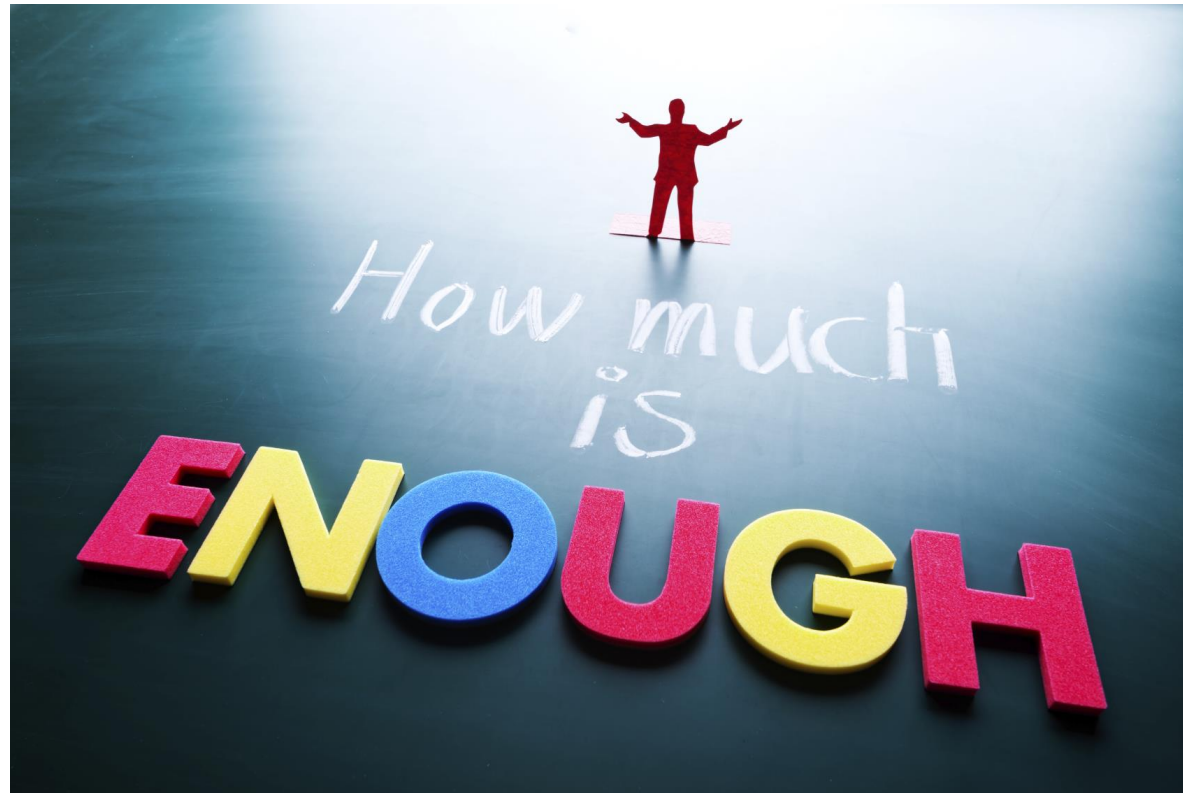
Reasonable Accommodation Process

- ☐ Ask for written request and for employee to generally describe the condition and how it affects work.
- ☐ Ask for a letter from the employee's health care provider documenting that the employee has a mental health condition and that the employee needs an accommodation because of it.
- ☐ Ask the health care provider what particular accommodations would meet the employee's needs.
- ☐ Engage in an interactive process with the employee.
- ☐ Employers must provide a reasonable accommodation but not one that involves significant difficulty or expense.
- ☐ If more than one accommodation would work, the employer can choose which one to provide.
- ☐ Don't terminate, refuse to hire/promote or discipline because of a request or the need for accommodation.
- ☐ Employer must pay for the accommodation.

Accommodation Can't Help?

If an employee can't perform all the essential functions of the job to normal standards, with or without accommodation, and has no paid leave available, he/she may be entitled to unpaid leave as a reasonable accommodation.

Indefinite Leave





Disability Harassment

Harassment based on a disability is not allowed under the ADA.

If an employee reports the harassment, an employer is legally required to take action to prevent it from occurring in the future.

MA Paid Family/Medical Leave

- ❑ PFML is a state-offered paid benefit for anyone who works in Massachusetts.
- ❑ PFML is funded through a Massachusetts tax, and is separate from both the federally mandated benefits offered by the Family Medical Leave Act (FMLA) and from employer leave benefits.

MA Paid Family/Medical Leave

Family leave

Up to 12 weeks of family leave may be taken to:

- Care for a family member with a serious health condition
- Bond with a child within the first 12 months after its birth
- Bond with a child within the first 12 months after adoption or foster care placement
- Manage family affairs when a family member is on active duty in the armed forces

Up to 26 weeks of family leave may be taken to care for a family member who serves in the armed forces.

MA Paid Family/Medical Leave

Medical leave

Up to 20 weeks of medical leave may be taken:

- While an employee is unable to work due to his/her own serious health condition

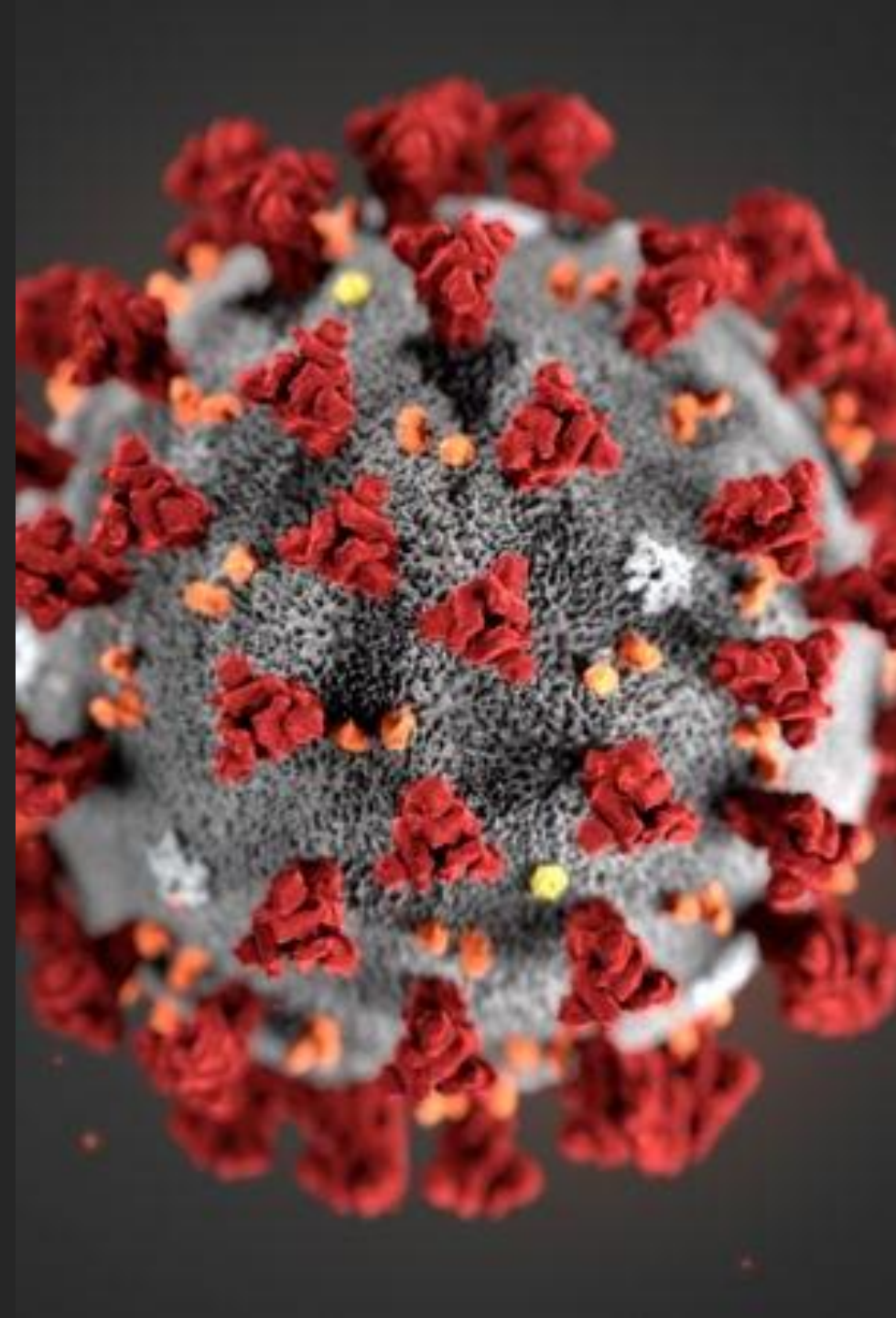
The maximum amount of combined family and medical leave that an individual may take is capped at 26 weeks per benefit year.

COVID-19 and Mental Health

- ADA

If an employee has a preexisting mental illness or disorder that has been exacerbated by the COVID-19 pandemic, for example, anxiety disorder, obsessive-compulsive disorder, or post-traumatic stress disorder, the employee may have more difficulty handling the disruption to daily life that has accompanied the COVID-19 pandemic.

If the employee asks for an accommodation, employers may: ask questions to determine whether the condition is a disability; discuss with the employee how the requested accommodation would assist and enable the employee to keep working; explore alternative accommodations that may effectively meet the employee's needs; and request medical documentation if needed.



COVID-19 and Mental Health - FMLA

An employee is concerned about contracting COVID-19 and has requested access to FMLA job-protected leave. Is the employer required to provide the employee with leave benefits pursuant to the FMLA?

Generally, no. The FMLA provides employees with job-protected leave benefits for their “serious health condition.” Fear of contracting COVID-19 is likely not a “serious health condition” in most circumstances which would trigger application of the FMLA. An employee’s concern for contracting COVID-19, while not an absence protected by the FMLA, may nonetheless warrant an employer allowing the employee to access other leave provided to employees pursuant to the employer’s policies.

An employee with an underlying mental health condition or anxiety may be entitled to leave under the traditional FMLA if the concern or anxiety exacerbate an existing condition. In such instances, an employer should require the necessary health care provider certification under the traditional FMLA.

COVID-19 and Workers' Comp.

Is COVID-19 compensable under state workers compensation acts?

Maybe. While workers compensation laws provide compensation for “occupational diseases” that arise out of and in the course of employment, traditionally the common cold and flu are not covered. COVID-19 may be different. However, even if COVID-19 is covered by workers' compensation, it may be difficult to prove that transmission happened in the workplace.

COVID-19 CONFIDENTIALITY

- ❑ Based on current COVID-19-related CDC and EEOC guidance, employers cannot disclose the name of an employee who has tested positive for COVID-19.
- ❑ The ADA requires employers that collect medical information from employees to keep such information confidential.
- ❑ Employers may communicate to non-exposed employees generally that there has been a potential COVID-19 exposure, without sharing additional identifying information.
- ❑ Employers may be able to communicate to appropriate non-employees (e.g., customers, vendors, and others with whom the employee may have come in contact while working) that there was a potential COVID-19 exposure, again without sharing identifying information.

COVID-19 Travel Questions

- ☐ Employers may ask about employee travel to high-risk locations.
- ☐ Employers can keep asymptomatic employees home or require them to work from home if they have traveled to a high-risk location.
- ☐ CDC guidance recommends that an individual who is asymptomatic remain at home (i.e., may be excluded from the workplace) for a period of 14 days after arrival from a high-risk location.



The **Family First Coronavirus Response Act** (FFCRA)

FFCRA

Requires certain employers to provide their employees with paid sick leave or expanded family and medical leave for specified reasons related to COVID-19.

FFCRA

Eligible employees may be entitled to:

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

FFCRA

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 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.

FFCRA – Regular Sick Time

- Leave under the FFCRA is in addition to any paid sick leave already offered by an employer (including paid sick leave available under state and local laws).
- Even if an employer has a generous paid sick leave policy offering more than the 80 hours required by the act, the act requires employers to offer employees additional FFCRA leave for COVID-19 purposes.



Furloughs & Layoffs

JOB MARKET

UNEMPLOYMENT

EMPLOYMENT

Inventory	107
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Legal Employment/Maintenance/R	129
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ALL:

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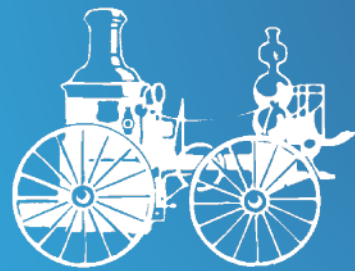
Q&A

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Thank You!



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