# Employers Receive New Guidance from Three Agencies on COVID-19 Issues

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Three agencies have provided updated guidance for employers on essential COVID-19 issues:

The Department of Labor (DOL) addressed how new leave laws apply to these situations:
Domestic workers;

Those working through temporary agencies;

Employees who previously were working from home without the need for leave, but now need leave to care for children;

Handling employees absent for symptoms of COVID-19; and

Leave to care for children as schools close for the summer rather than due to COVID-19.

The Equal Employment Opportunity Commission (EEOC) clarified how to handle the return of high risk employees to the workplace.

The North Carolina Department of Health and Human Services (NCDHHS) provided key resources for employers for Phase I re-openings, including checklists, signage, and employee screening questions.

The DOL updated its Q & A for the Families First Coronavirus Response Act (FFCRA) with new FAQs 89 through 93.

Question 89—**Domestic Workers**: This new FAQ addresses whether or not domestic workers are entitled to

FFCRA. Essentially, a person who hires workers to perform tasks at their home (e.g. gardener, cook, cleaning, and childcare) may be required to provide paid sick leave or expanded family and medical leave, if the person hiring is an employer under the Fair Labor Standards Act (FLSA), regardless of whether the person is an employer for federal tax purposes. Whether or not the hiring person is an employer under the FLSA will depend on whether the domestic service workers are economically dependent on the hiring person for the opportunity to work. If, however, the domestic service worker is in business for themselves and not economically dependent, then the hiring person is more likely a customer and not an employer. The question of economic dependence is complicated and requires fact-specific analysis.

Question 90—**Temporary Workers:** This FAQ addresses the issues of FFRCA leave when a temporary placement agency with over 500 employees places an employee at a second business with fewer than 500 employees. Because the temporary agency has over 500 employees, it will not be required to provide paid sick leave or expanded family and medical leave to employees. Whether or not the second business, which is subject to FFCRA, will be required to provide paid sick leave or expanded family and medical leave to the temporary employee will depend on a joint employer analysis. If the second business directly or indirectly exercises significant control over the terms and conditions of the temporary worker's work, then it is likely a joint employer and must provide the paid sick leave and expanded family medical leave. When determining the joint employer status, the DOL will consider factors such as whether the second business has the power to hire, fire, supervise, control the schedule or other conditions of employment, and whether it maintains employment records. Importantly, even though the temporary agency in this instance does not have to provide paid leave or extended family medical leave, it is still prohibited from discharging, disciplining, or discriminating against an employee for taking paid leave with the second business. Likewise, the temporary agency may not interfere with an employee's right to take leave, nor may it retaliate against such employee.

Question 91—**Teleworking**: This FAQ addresses the issue of when teleworking employees suddenly have childcare issues and are requesting paid sick leave and expanded family medical leave to care for their children. The DOL makes clear that an employer may require an employee to provide the qualifying reason for the leave, submit an oral or written statement that the employee is unable to work because of the reason, and provide other required documentation as outlined in section 826.100 of the DOL's rules applying the FFCRA. The DOL cautioned employers to be careful when asking these questions, "lest it increase the likelihood that any decision denying leave based on that information is a prohibited act." The DOL pointed out there may be numerous legitimate reasons why an employee who was able to telework now needs to take leave to care for children. The DOL also pointed out that employers are not prohibited from disciplining employees who unlawfully take paid sick leave or expanded family medical leave based on misrepresentations.

Question 92—**Leave for Symptoms:** This FAQ addresses what documentation an employer can require from an employee with symptoms of COVID-19 who takes time off to obtain a diagnosis. An employer may require the employee to identify his or her symptoms and a date for a test or doctor's appointment. However, an employer cannot require the employee to provide further documentation or certification that the employee actually sought a diagnosis or treatment from a healthcare provider in order for the employee to use paid sick leave for COVID-19 related symptoms. This minimal documentation requirement is intentional – employees with symptoms may take the leave in order to slow the spread of COVID-19. If the employee is taking unpaid FMLA leave or another type of paid leave, any documentation requirements related to those leaves still apply.

Question 93—**Schools Closed for Summer:** This addresses once school closes for summer vacation, employees may still take paid sick leave or expanded family and medical leave to care for children. Paid sick leave and emergency family and medical leave are not available as a result of school being closed for the summer, or any other reason not related to COVID-19. However, if the child's care provider during the summer is closed or unavailable due to COVID-19, then the employee may be eligible for the leave.

The Equal Employment Opportunity Commission (EEOC) recently posted additional, updated guidance for employers regarding what they should do when an employee has a known medical condition, that the CDC identifies as placing the individual at higher risk for severe illness, comes back to work and does not request any accommodations. In Q&A G.4

and G.5, the EEOC makes clear that the ADA does not mandate the employer take action if the employee does not request a reasonable accommodation. Even if an employer is concerned about the employee's health being jeopardized upon returning to the workplace, the ADA does not allow the employer to exclude or take adverse action against an employee solely because the employee has a disability that might put him or her at a greater risk. However, if the employee's disability poses a "direct threat" to his or her health that cannot be eliminated or reduced by a reasonable accommodation, then an employer may exclude the employee from returning to the workplace. The direct threat standard is high and the assessment must be individualized. Further, employers must engage in the interactive process to determine if there is a reasonable accommodation that would allow the employee to return to the workplace, and if not, then employers must consider other accommodations such as telework, leave or reassignment.

North Carolina Employers should also be aware that the NCDHHS published resources for Phase I of Gov. Cooper's reopening plan.

**Checklist for Business Owners**: This includes descriptions of required signage, cleaning and disinfecting, and recommendations of steps to take when employees return.

**Signage for Businesses**: NCDHHS provides models to meet required posting requirements, including the "Know Your Ws" poster and an "Emergency Maximum Occupancy" posting.

**Symptom Screening Checklist**: This easy-to-use checklist covers daily screening to determine if employees should come to work and screening to determine when employees may return to work after an illness.

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Brooks Pierce is dedicated to keeping our clients fully informed during the COVID-19 crisis. For more information, please visit our COVID-19 Response Resources page.