

COVID-19 Webinar “Q&A” For Employers

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The following is a synopsis of questions received in advance of, during live Q&A, and following multiple webinar presentations by Carlos Zumpano and Kellee Cueto on the Families First Coronavirus Response Act, which was signed into law on March 18, 2020. The webinars took place both before and after the House bill was signed into law and since presented, additional guidance has begun to come out from the agencies that govern different aspects of the law. To the extent we are able, we have updated the answers based on the new guidance. Please note that the questions may be slightly altered from their original submission, combined with other, similar questions, and/or addressed out of order from the live portion of the webinar for clarity and organizational purposes. This document is meant to provide guidance to employers, but is not and should not be considered legal advice and does not create an attorney client relationship between you and Zumpano Castro, LLC. Because additional guidance is continuously being released, you should use this Q & A as a reference guide only, and you should consult with your designated Regis HR representative for the most up to date information and seek legal advice as appropriate. Finally, the responses provided are based on Federal and Florida law, so it is important for businesses operating outside of Florida to ensure compliance with respective state laws. Continue to monitor the following for new guidance: <https://www.dol.gov/coronavirus>

Workplace Health & Safety

Q. What do we do if an employee comes to work with COVID-19 symptoms?

A. You are permitted to require employees to leave the workplace and ask them to seek medical attention, including getting tested for COVID-19. (Note: Individuals may need to meet certain criteria to be eligible for testing. It is the medical personnel and/or the federal and state health agencies that are making this determination, not necessarily an employer.) Train managers not to overreact and maintain a sense of calm. If an employee has the virus, there are additional steps the employer will need to take to notify others who may potentially have been exposed. If it is possible/practical, obtain a list of all other employees, clients, visitors, etc. that the ill employee has been in contact with during the previous 14 days (the incubation period for the illness).

Q. Can I check the temperature of each employee daily as they come into and leave work?

A. The CDC has determined that COVID-19 has become widespread enough within the community such that it has become a “direct threat” to the health and safety of the individual or others. As such, the EEOC has given the green light now permitting employers to take employee temperatures without running afoul of the ADA. The EEOC has also stated that the individual taking the temperatures needs to be trained to do so and the reading itself should be kept confidential. The consensus is that the infrared temperature scanners are a less invasive “medical examination” than the oral thermometer and therefore preferable. If employees need to wait in any lines to have their temperature taken, there should be at least six feet distance between employees and the time spent in line is likely compensable time for the employee. It is also recommended that employers have a plan in place before implementing temperature taking such that there is consistency across all possible contingencies - do employees with a fever get sent home with pay? Can they continue to work remotely? What about employees who cannot work remotely? What does the employer want to do if the employee refuses to have his/her temperature taken? These should all be fleshed out before starting to take employee temperatures. With all of the forgoing employment guidance, we be remiss not to point out that the medical guidance from the CDC still states that carriers of the virus may not have a fever and having a fever does not mean the individual has the virus. Therefore, temperature testing is (still) not the best way to prevent spread of the virus - staying home (where possible), social distancing (when staying home is not possible), washing of hands, disinfecting of surfaces and not touching one’s face are all considered to be better at stopping the spread.

Q. What do we do if an employee tests positive for COVID-19?

A. All employees who worked closely with that employee for the previous 14 days (the incubation period) must be sent home to prevent further spread of the infection. The employee who tested positive should provide a list of all individuals who may be impacted. Be mindful of privacy laws and do NOT disclose the employee who tested positive when notifying other employees. You will also want to deep clean and disinfect (or outsource the deep cleaning and disinfecting of) affected workspaces.

Q. How do we NOT disclose an employee’s name if s/he has tested positive for COVID-19 and we need to notify other employees?

A. Employee privacy protections remain in place. Employers cannot disclose an employee’s name while providing notice to other employees, customers, guests, etc. of potential exposure to COVID-19. Talking points can include, “We have reason to believe that you have been in close

contact with an individual who is now experiencing symptoms of... has tested positive for... has been exposed to another individual with... COVID-19.”

Q. What do we do if an employee wants to return to work after having COVID-19 symptoms?

A. You are permitted to request a physician note advising that the employee is healthy and able to return to work.

Q. What precautions should we take for employees who need to take public transportation?

A. There should be no difference in the treatment of employees who take public transportation and those who use personal vehicles (or bicycles or walk) to get to work. Remind employees of basic hygiene protocols. Be sure to have handwashing and/or hand sanitizer (with minimum 60% alcohol) available for employees upon arrival to the office. Evaluate remote work or other opportunities to limit interactions between employees in the workplace (videoconferencing vs. conference rooms, etc.).

Q. What do we do if an employee is afraid to come into work for fear of contracting COVID-19?

A. Employees are only entitled to refuse to work if they believe they are in imminent danger. Section 13(a) of the Occupational Safety and Health Act (OSH Act) defines “imminent danger” to include “conditions or practices in any place of employment which are such that a danger exists which can reasonably be expected to cause death or serious physical harm immediately or before the imminence of such danger can be eliminated through the enforcement procedures otherwise provided by this Act.” OSHA discusses imminent danger as where there is “threat of death or serious physical harm,” or “a reasonable expectation that toxic substances or other health hazards are present, and exposure to them will shorten life or cause substantial reduction in physical or mental efficiency.” Requiring employees to work with patients in a medical setting without personal protective equipment at this time may rise to this threshold. However, most workplaces will not meet the elements required to permit an employee to legally refuse to work, but this would need to be determined on a case-by-case basis.

Q. If there is an employee who does not feel safe coming into the office because they have an elderly parent at home, what do we have to pay them by law as of today?

A. If the employee is unable to do any work (i.e. cannot work from home, telecommute, etc.) then you will only need to pay the employee insofar as you would be required to pay pursuant to the FLSA (Fair Labor Standards Act). Absent an employment agreement or contract to the contrary, if the employee is an hourly, non-exempt employee, you would only need to pay for hours worked (and thus not need to pay the employee if s/he chooses to stay home and perform

no work under these circumstances. If the employee is a salaried, exempt employee, you will likely be required to pay the employee for the full pay period if s/he performed any work during the pay period unless other exceptions apply. You should also be mindful of existing company policies for PTO and sick leave. This is a fact specific inquiry, so please reach out to your Regis HR representative.

Q. Can I prevent employees from going into the workplace following their return from domestic or overseas travel?

A. Yes. Take a look at your current policies. If they do not address travel, your policies can be modified to require a period of self-quarantine following return from certain travel.

Q. Can I restrict employees from traveling on their personal time?

A. No, you cannot restrict employees from traveling on their personal time, but you can restrict whether they can return to the office based on to where they have traveled and your company policies regarding return to work and self-quarantine.

Q. Can we set up a daycare or kid friendly area in our office for our staff that does not have alternative childcare due to COVID-19 related shutdowns?

A. No. Daycares need to be licensed and while this is well-intentioned, one purpose of closing schools is to encourage social distancing to help prevent the spread of the virus. There may also be insurance issues to take into account. Alternatives to working in the office should be explored, and additional options related to leave are addressed by the Families First Coronavirus Response Act.

Q. If an employee's family member is getting tested and you request that the employee stay home and self-quarantine for 14 days, can the employee still work remotely?

A. Yes. Remote work is preferable to help prevent the spread of COVID-19. If the employee is able to work remotely, they should. Policies should be reviewed and adapted to address remote work set-up and requirements.

Q. We are an office of 18 people. If one person is confirmed to have coronavirus, everyone will have come "into close contact". Do we send everyone home? We will have to close the office.

A. Yes, you will need to send home everyone who is has been in close contact and advise employees to seek medical guidance if they develop symptoms. During this self-quarantine, to the extent remote work can be done, you should do so. Follow CDC guidelines, and have a cleaning service disinfect the office. If this scenario occurs April 1 or later, additional requirements pursuant to the Families First Coronavirus Response Act may apply.

Q. I have a call center. I cannot accommodate employees to be 6 feet apart and they cannot work from home. How do I respond to their concerns about the virus transmission?

A. If telecommuting is absolutely not an option, then it is imperative that additional efforts are made to clean and disinfect the office pursuant to CDC guidelines. Additionally, if the recommended distance of 6 feet cannot be achieved, it may make sense to look into alternating schedules (half the employees work for two weeks while half are off/on PTO/on leave/furloughed – based on your policies, operational needs, etc. – and the other half works the following two weeks). It is unknown how long social distancing may be in effect, so we recommend looking into technology that would permit call center employees the ability to work remotely as an operational consideration.

Families First Coronavirus Response Act – April 1, 2020 through December 31, 2020

Q. How does Expanded FMLA work?

A. Expanded FMLA applies to public and private sector employers with less than 500 employees. Employees who have been on the payroll for 30 calendar days are eligible for a 12 week, job protected leave where the employee is unable to work or telework due to a need to care for a minor child if the child's school or childcare provider has been closed or is unavailable due to a public health emergency. The first ten days of the leave are unpaid – but the employee can take accrued PTO or sick leave, though the employer cannot require the employee to use accrued paid leave. The remaining ten weeks are paid at 2/3 of the employee's regular rate of pay for the number of hours the employee would otherwise be scheduled to work, capped at \$200 per day and \$10,000 for the entire leave. Employees must be restored to their prior position or its equivalent at the conclusion of the leave. There is an exception to job restoration for employees with fewer than 25 employees if the position no longer exists due to operational changes caused by the public health emergency. Employers can exclude health care providers and emergency responders from eligibility for Expanded FMLA. Small businesses (of fewer than 50 employees)

may be exempt from certain provisions if providing the employees with the required leave would jeopardize the viability of the business.

Q. How does Emergency Paid Sick Leave work?

A. Emergency Paid Sick Leave applies to public and private sector employers with fewer than 500 employees. There is immediate eligibility for employees to take Emergency Paid Sick Leave for one of the following 6 reasons: 1.) the employee is subject to a federal, state, or local quarantine or isolation order related to COVID-19; 2.) the employee has been advised by a health care provider to self-quarantine because of COVID-19; 3.) the employee is experiencing symptoms of COVID-19 and is seeking a medical diagnosis; 4.) the employee is care for an individual subject or advised to quarantine or self-isolate; 5.) the employee is caring for a son or daughter whose school or place of care is closed, or child care provider is unavailable, due to COVID-19 precautions; or, 6.) the employee is experiencing substantially similar conditions as specified by the Secretary of Health and Human Services, in consultation with the Secretary of Labor or Treasury. Emergency Paid Sick Leave provides for 80 hours of paid sick time for full time employees and the typical number of hours an employee is scheduled to work over a two week period for employees who work less than full time. Emergency Paid Sick Leave must be paid at the employee's regular rate of pay for leave related to the employee's OWN illness (reasons 1-3). This amount is capped at \$511 per day or \$5110 for the 80 hours. Where the leave is related to the care of OTHERS (reasons 4-6), the Leave must be paid at 2/3 the employee's regular rate of pay, and capped at \$200 per day or \$2000 for the 80 hours.

Q. I have less than 50 employees. Do Expanded FMLA and Emergency Paid Sick Leave still apply to me?

A. Guidance has started to come out on the "Under 50" which states that the exemption is for the child care aspect ONLY and does not exempt employers from Emergency Paid Sick Leave related to an employee's own illness. Please note that the "regular" FMLA may still apply (though unpaid) depending on the severity of the COVID-19 infection. These inquiries are fact specific and should be addressed with your Regis HR representative.

Q. Does the employer take the employee's word for not being able to work from home due to child care or is there specific proof they need to provide?

A. We anticipate additional guidance will be coming out on required documentation, but at this time, we see no legal prohibitions against having an employee sign a form acknowledgment that s/he meets the criteria for the Expanded FMLA along with an agreement to pay back any benefits received if the employee was not entitled to receive them. Keep in mind that the employee's pay

is limited and capped under Expanded FMLA, so if the employee is otherwise able to work from home, that may be the employee's preference. Employers may wish to review their work from home policies to ensure they are adequately addressing the needs of the business while balancing the needs of the workforce, particularly with respect to flexibility, during this crisis.

Q. How can we validate an employee's claim of caring for a family member affected by the virus?

A. We anticipate additional guidance will be coming out on required documentation, and recognize that the Emergency Paid Sick Leave is not tied to the Family Medical Leave Act, but at this time, we see no legal prohibitions against following your standard FMLA forms practices where an employee is seeking (regular) FMLA leave or Emergency Paid Sick Leave to care for a family member affected by COVID-19.

Q. I already had an employee come to work showing symptoms of a cold. I have since sent the employee home and will assume he is infected. What are my immediate options in terms of compensation?

A. If the employee is able to work remotely, you will continue to pay the employee while he works remotely. If the employee is unable to work remotely, follow your standard practices and policies regarding PTO and/or sick leave. For employees who become ill and have a qualified reason April 1 through December 31, 2020, Emergency Paid Sick Leave will likely apply.

Q. Is there an age limit defined in caring for children when it comes to Expanded FMLA?

A. The law refers to "minor" children, who are otherwise defined as under age 18.

Q. What portion of paid sick leave will be reimbursed to the business? How quickly?

A. The government has advised there will be a tax credit equal to 100% of the amount paid by the employer (up to the per employee caps). This tax credit will be for the employer portion of the Social Security tax, which we anticipate would be provided on a quarterly basis. Additional guidance should be coming out soon.

Q. What do we do if school is closed but workplace is open?

A. This is currently impacting many people and is an area where it makes sense for employers to be flexible while also making sure they are treating employees consistently and not opening themselves up to discrimination claims. Remote/telework, alternating schedules, and other alternatives should be explored. Where employees are able to work from home, you should permit them to do so. Where employees are unable to work or work from home due to a school

closure or loss of child care related to the health crisis, the employee may be entitled to Emergency Paid Sick Leave and Expanded FMLA (above).

Q. What do we do if an employee requests leave to care for a family member diagnosed with COVID-19?

A. You should consult with your Regis HR representative and/or legal counsel to walk you through whether Emergency Paid Sick Leave and/or “regular” FMLA applies. This is a fact specific inquiry.

Q. Do I need to continue paying employees who are not working?

A. Assuming the employees are not eligible for Expanded FMLA or Emergency Paid Sick Leave (explained above), the FLSA has not changed, so for the most part, the answer is no. BUT – there are circumstances in which you are required to be paying. Examples would include salaried, exempt employees who have worked a partial week (where other exceptions do not apply), contractual obligations pursuant to an employment agreement, or a collective bargaining agreement. Also, be mindful of existing company policies and respective state laws. Before making a decision to NOT PAY, consult with your Regis HR representative to determine whether additional legal support is necessary.

Q. We have 4 restaurants with their own payroll and EIN. Each has about 15 employees. They all have the same parent company and operate under same brand. Do the exceptions for Expanded FMLA apply to each restaurant or are we considered an employer with 60 employees for the purposes of these exceptions?

A. Without additional guidance, it is understandable that some will assume that the definition of “employer” from the original FMLA applies, which would use the “integrated employer test” to determine employer coverage and employee eligibility. The entire relationship is reviewed in its totality with no single factor being determinative. The factors are: 1.) common management; 2.) interrelation between operations; 3.) centralized control of labor relations; and, 4.) degree of common ownership/financial control. Unless we get guidance to the contrary, we believe it is likely that the exceptions for “under 50” will not apply if the “integrated employer test” puts your total employee number over 50.

Q. Can we layoff our employees now in order to avoid having to provide Expanded FMLA or Emergency Paid Sick Leave on or after April 1?

A. We are unaware of any current restrictions on laying off employees however, employers should be mindful that plaintiff's attorneys may look to these situations as actionable FMLA retaliation. Employers should also keep in mind that pending Federal Stimulus legislation (not yet law) is believed to have loan provisions for businesses with eligibility requirements that include maintaining a certain percentage of employees on the payroll.

Q. Are the expanded FMLA benefits applicable only to COVID-19 situations and not to individuals currently under FMLA for other reasons?

A. Expanded FMLA is applicable ONLY for employees who are unable to work or telework due to a need to care for a minor child if the child's school or childcare provider has been closed or is unavailable due to a public health emergency. It is not available for any other reason.

Q. How does the pay rate get calculated for tipped (Hourly) employees under the Expanded FMLA and Emergency Paid Sick Leave Act?

A. The DOL has not provided direct guidance for tipped employees yet, but it is not unreasonable to use a six-month look back period (same as the DOL guidance on determining the regular rate) to determine what that hourly amount would be for the employee.

Q. There is a couple working for the same organization and they have a son. Both request Expanded FMLA for "care of a child." Legally speaking, can I deny the request to one of them?

A. The "regular" FMLA contains a "marriage penalty" that provides "(s)pouses who are eligible for FMLA leave and are employed by the same covered employer may be limited to a combined total of 12 weeks of leave during any 12-month period if the leave is taken to care for the employee's parent with a serious health condition, for the birth of the employee's son or daughter or to care for the child after the birth, or for placement of a son or daughter with the employee for adoption or foster care or to care for the child after placement. This limitation on the total weeks of leave applies to leave taken for the reasons specified as long as the spouses are employed by the same employer. It would apply, for example, even though the spouses are employed at two different worksites of an employer located more than 75 miles from each other, or by two different operating divisions of the same company." While there is no specific guidance on this issue yet for the Expanded FMLA, because the "marriage penalty" only applies in limited circumstances, it may be that it is unlikely to apply here – meaning that we believe it is unlikely you will be able to deny the leave to one of the spouses. Given the uncertainty of the duration of

the school closures/unavailability of child care, from a practical perspective, the married couple may not even wish to take the leave at the same time, which would lessen the burden (of having them both out at the same time) on the workplace.

Operational Questions

Q. What do we do if there is a shelter in place order or my place of business is otherwise required to shut down due to a municipal or geographical quarantine?

A. If employees are unable to come into the place of business or the place of business is required to be closed, a determination needs to be made whether the business can support remote work and/or remote operations. Company policies should be reviewed to address remote work and/or whether employees may use PTO under these circumstances. If you want to avoid having employees use PTO under these circumstances, your policies should be reviewed and/or updated immediately. Any policy updates should be done for legitimate business purposes and in a way that there is no discriminatory impact on any protected class of employees. You should also anticipate that any policy changes may have the potential for employees to become disgruntled.

Q. What options do I have for pay cuts, temporary closures, furloughs, and layoffs?

A. If business operations must cease temporarily or if adjustments need to be made to headcount to support operational and financial need, there are several options including pay cuts (still need to pay minimum wage as required by FLSA), temporary closures, furloughs, and layoffs. Additionally, the pending Federal Stimulus legislation (not yet signed into law) is believed to require certain businesses maintain a certain percentage of their existing employees in order to be eligible to apply for Stimulus loan money. Notice requirements of WARN and state specific mini-WARN laws may also apply, so we recommend consulting with legal counsel when discussing these options.

Q. When should employees start applying for unemployment?

A. Each state administers their own Unemployment Compensation Insurance Program. We are suggesting that employers provide employees with information on how to apply for unemployment benefits at the time of any pay cut, furlough, layoff or termination and that the employee submit his/her application as soon as possible.

Q. Has there been any guidance on payroll tax? Can we stop paying?

A. No. No payroll tax holidays have been issued at this time. You should continue paying all applicable employment taxes.

Q. Would it be better for our employees if we terminate them (vs. reducing pay) so they are eligible for unemployment?

A. Reducing pay, furloughs, etc. are all business decisions. Employers should be mindful that unemployment eligibility criteria are changing in order to meet increased need and the requirements of newly released federal funds. With respect to reducing pay, employers are permitted to reduce wages, but must ensure compliance with existing laws, including minimum wage/FLSA as applicable, and that any reduction is administered in way that does not violate anti-discrimination laws. Layoffs and facility closures may be subject to WARN or state mini-WARN laws. It is best to consult with your Regis HR representative and/or legal counsel to understand the ramifications of each option.

Q. I own a restaurant. Can I repurpose my servers to perform deliveries?

A. Yes. Repurposing employees is encouraged – and not only in the restaurant industry. With respect to delivery drivers, make sure that insurance policies provide appropriate coverage. Employers can get creative with jobs that can be performed by existing employees. Examples for restaurants include work on updating menus, social media marketing, other administrative tasks, etc. As with all repurposing, be sure to comply with existing laws and review and amend employment agreements as appropriate.

Q. Should we furlough our salaried employees since we cannot temporarily adjust their salaries?

A. You can adjust salaries, but be sure that you are doing so in a non-discriminatory manner and that the employee(s) is not falling below the minimum salary requirements for salaried exempt employees under the FLSA. Furloughs are also an option. The decision-making will rely on fact-specific inquiry, so you should be discuss the various options with your Regis HR representative and legal counsel as appropriate.

Q. If our business is still open but we have employees who are attempting to take advantage of the crisis situation and not show up for work, how should we handle it?

A. You can still follow your disciplinary policies with respect to attendance and call-out procedures. It is important to apply your policies in a non-discriminatory manner.