

# The Winter COVID-19 Surge Important Update and Action Items for Employers

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DAVID BARRON, ARIELLE EISENBERG, MICHELE BALLARD MILLER,  
AND MICHAEL SCHMIDT



# Presenters on Today's Webinar

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**San Francisco**  
**Michele Ballard Miller**



**New York**  
**Mike Schmidt**

**Houston**  
**David Barron**



**Miami**  
**Arielle Eisenberg**



# Overview of Webinar Topics

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- The latest guidance and definitions from the CDC
- Employee holiday travel and restrictions
- Considering the appropriate vaccine policy
- Addressing an employee positive COVID-19 test – updates on testing, contact tracing, and quarantining
- Continued role of the FFCRA and other leave/compensation obligations



# CDC GUIDELINES AND HOLIDAY TRAVEL

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# CDC Recommends . . .again

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The CDC has consistently advised against traveling during the holidays. But, if your employees insist on traveling, provide them with the below CDC advice:

- Before traveling
  - Assess for COVID-19 symptoms
  - Quarantine for 14 days from last possible exposure from COVID-19
  - Assess travel risk: car trips → train or bus trips → indirect flights
  - Assess lodging risk: house with people from your household → hotels → communal spaces
- Consider community and destination
  - Number of COVID-19 cases at destination
  - Check the CDC data tracker
  - State and local websites for up to date information

# Staying Safe During Holiday Travel

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- Wear a mask
- Social distance
- Wash your hands
- Avoid touching eyes, nose, and mouth
- Use disinfection wipes on high-touch surfaces
- Use hand sanitizer
- Stay home as much as possible upon return
- Get tested upon return

# Controlling Employee Travel

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It is not recommended to try to control employee travel.

- Employees may not be truthful
- Risk of infection goes up without transparency
- May negatively effect employee morale
- State and local laws



# Controlling Employee Travel

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- Check state and local laws where you have employees for laws and regulations regarding vacation time requirements
- Consider rejecting requests for vacation time to travel to hot spots
- Require employees to disclose travel plans
- Educate employees about the risks of traveling
- Educate employees about safety precautions while traveling
- Review state orders regarding quarantine before and after traveling



# Returning From Holiday Travel

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Most employers will not be able to control employee travel plans. But you can be prepared with policies and plans in place for employees returning from holiday travel.

- Consider temporary re-assignments upon an employee's return from travel
- Change schedules to increase social distancing
- Prepare a clear and well-defined travel policy
- Consider quarantine policies for employees returning from travel
  - Paying employees for quarantine time will increase the likelihood they will truthfully disclose their travel plans

# Updates on Testing and Quarantining

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# COVID-19 Tests

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- If an employee is showing symptoms of COVID-19, consider requiring the employee get a COVID-19 test

There are two kinds of COVID-19 Tests:

- **Molecular Tests (aka PCR tests)**
  - Most accurate test for detecting COVID-19
  - Requires a nasal swab or saliva test
  - Can be used whether or not employee is showing symptoms
  - Positive PCR result is a confirmed COVID-19 case

# COVID-19 Tests

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- **Antigen Tests** (aka Rapid Tests)
  - Looks for specific proteins on the surface of the virus
  - May not be as accurate, especially for people who do not have symptoms
  - A positive antigen test is considered a probable case of COVID-19
  - High rate of false results (both positive and negative)
  
- So, which test should you require for your employees?

# Confirmed COVID-19 Test

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If an employee is confirmed to have COVID-19, inform any other employee who may have come in close contact with the infected employee. **The infected employee's identification should remain confidential.**

- Close off any areas used for prolonged periods of time by the infected employee
- CDC recommends waiting 24 hours before cleaning and disinfecting to minimize potential for other employees being exposed
- Follow CDC disinfecting guidelines
- Employees who test positive for COVID-19 should isolate

# Updated CDC Isolation Guidelines

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- A test is no longer recommended by the CDC to end isolation. The CDC now recommends a symptom based strategy
- Employees can discontinue isolation under the following conditions:
  - At least 10 days have passed since symptom onset; **and**
  - At least 24 hours have passed since resolution of fever without the use of fever-reducing medications; **and**
  - Other symptoms have improved
- The CDC also stated that persons with severe illness may have symptoms that come back beyond 10 days which may warrant extending duration of isolation for up to 20 days after symptom onset

# State Quarantine Rules

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Many states have implemented their own rules regarding quarantine. Be sure to check each state in which you have employees to comply with that state's laws and regulations. Here are some examples:

**California**: self-quarantine for 14 days after travel

**Massachusetts**: requires completion of a travel form when arriving in the state and quarantine for 14 days or produce a negative COVID-19 test

**New Jersey**: 14 day quarantine required if coming from any state beyond the immediate region (New York, Connecticut, Pennsylvania, Delaware)

**Illinois**: Chicago visitors coming from any red state must quarantine for 14 days

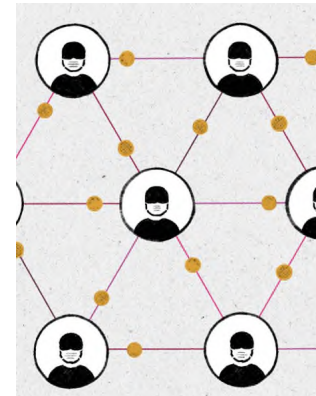
**New York**: Travelers must either a negative COVID-19 test within 3 days of departure from home state, quarantine for 3 days upon arrival and produce a second negative test on the 4<sup>th</sup> day

**Pennsylvania**: 14-day quarantine or provide negative COVID-19 test

# Contact Tracing

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- **Identify contacts:** Interview the likely infected employee to understand who their co-workers are and with whom he or she has been in close contact with in the workplace.
- **Locate and notify contacts:** Inform all potentially contacted employees of their potential exposure. If the employee has been in close contact with the probable positive employee, he or she should be asked to isolate or self-quarantine for CDC recommended period.
- **Monitor contacts:** Periodically check in with individuals in self-quarantine to determine if he or she has developed symptoms.
- **Protect privacy:** Ensure that any investigation and contract tracing methods are done so in a way that protects the privacy of individuals and that information about an employee's medical condition is shared only on a need to know basis.





# Is COVID an OSHA Recordable Workplace Injury?

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- May 19, 2020 OSHA Memorandum on COVID Workplace Illnesses
- COVID-19 is a recordable illness, and employers are responsible for recording cases of COVID-19 on their OSHA 300 log, if all the following are met:
  - Is confirmed as a COVID-19 illness;
  - Is work-related as defined by 29 CFR 1904.5; and
  - Involves one or more of the general recording criteria in 29 CFR 1904.7, such as medical treatment beyond first aid or days away from work.

# How do I “investigate” where COVID was contracted?

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- *According to OSHA, in most circumstances, a reasonable investigation into work-relatedness includes:*
  - Asking the employee how he believes he contracted the COVID-19 illness;
  - Discussing any work and out-of-work activities that may have led to the COVID-19 illness; and
  - Reviewing the employee's work environment for potential COVID exposure, including any other instances of workers in that environment contracting COVID-19 illness.
- The employer should determine whether it is more likely than not that exposure in the workplace played a causal role in contracting COVID-19 based on the information reasonably available to the employer at the time it made its work-relatedness determination. If the employer later learns more information related to an employee's COVID-19 illness, then that information should be taken into account as well.

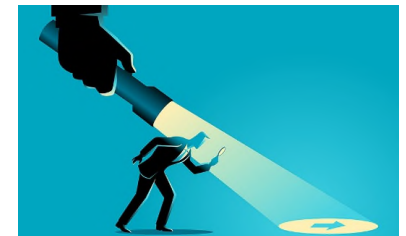


# How do I “investigate” where COVID was contracted?

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**Examples** of types of evidence weighing in favor of or against work-relatedness:

- If several cases develop among workers who work closely together and there is no alternative explanation.
- If contracted shortly after lengthy, close exposure to a particular patient or coworker who has a confirmed case of COVID-19 and there is no alternative explanation.
- If any employee’s job duties include having frequent, close exposure to the general public in a locality with ongoing community transmission and there is no alternative explanation.
- An employee's COVID-19 illness is likely not work-related if s/he is the only worker to contract COVID-19 in the vicinity and her job duties do not include having frequent contact with the general public.
- An employee's COVID-19 illness is likely not work-related if s/he, outside the workplace, closely and frequently associates with someone (e.g., a family member, significant other, or close friend) who (1) has COVID-19; (2) is not a coworker, and (3) exposes the employee during the period in which the individual is likely infectious.



# VACCINE POLICIES

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# The COVID-19 Vaccine

## *What we know*

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- Five vaccines are in Phase 3 clinical trials
- All but one of these vaccines will require two shots to be effective
- No vaccine has yet been authorized or approved by the federal government - **any initial approval will be an “Emergency Use Authorization” and not full FDA approval**
- Plan to roll out the first vaccine doses before the end of 2020, starting with healthcare workers and nursing home residents.
- Plan to have vaccine widely available in 2021 and everyone vaccinated before the end of 2021
- Vaccine will start in a limited supply so not everyone will be able to get vaccinated right away

# VACCINE POLICIES

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- Given that COVID-19 is a novel virus, it is unclear what laws and regulations may be put into place regarding the COVID-19 vaccine.
- Employers should look to the EEOC's guidance on the flu vaccine to determine how to structure policies regarding the COVID-19 vaccine until specific laws, regulations, or guidance is published regarding COVID-19 vaccinations
- The EEOC has indicated in the past that it will allow employers to required vaccinations if the requirement is job-related, the policies adequately inform employees of the requirement, and employees can seek an exception (i.e., an accommodation)
- In September 2020, EEOC advised employers to encourage, but not require, employees to get a flu vaccine
- The CDC provides a list of State Healthcare Worker and Patient Vaccination Laws

# Current EEOC Statement

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**13. May an employer covered by the ADA and Title VII of the Civil Rights Act of 1964 compel all of its employees to take the influenza vaccine regardless of their medical conditions or their religious beliefs during a pandemic?**

No. An employee may be entitled to an exemption from a mandatory vaccination requirement based on an ADA disability that prevents him from taking the influenza vaccine. This would be a reasonable accommodation barring undue hardship (significant difficulty or expense). Similarly, under Title VII of the Civil Rights Act of 1964, once an employer receives notice that an employee's sincerely held religious belief, practice, or observance prevents him from taking the influenza vaccine, the employer must provide a reasonable accommodation unless it would pose an undue hardship as defined by Title VII ("more than de minimis cost" to the operation of the employer's business, which is a lower standard than under the ADA).<sup>(36)</sup>

Generally, ADA-covered employers should consider simply encouraging employees to get the influenza vaccine rather than requiring them to take it. **\*As of the date this document is being issued, there is no vaccine available for COVID-19.**

# Vaccine Considerations

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- What are your current written policies regarding other vaccinations, like flu shots?
- What is the industry standard for your business regarding vaccinations?
- Do your employees come into contact with high-risk individuals through their job duties?
- Will you allow employees who refuse to be vaccinated to continue to work from home as an accommodation?
- Are there incentives you can offer under wellness plans, etc. to encourage vaccinations?
- Can you require employees who refuse to get vaccinated to continue to wear facemasks?
  - Right now the CDC is saying that we should continue to wear facemasks even with a vaccine
- Who will pay for the vaccine?
  - The FLSA requires that employers reimburse employees for expenses incurred on behalf of the employer
  - Is the vaccine a business necessity?



# Healthy Workplace Strategies

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- Anticipate a range of employee objections
  - Health/disability concerns
  - Religious objections
  - “Anti-Vaxxers”
  - Concerns about possible safety issues/rushed development
- Engage union(s) early to seek buy-in
- Education campaigns
  - Vaccine is not a magic wand
- Paid time off to get vaccinated?
- Strategize regarding record-keeping plan
- Reminders for follow-up shots?
- Consider potential carrots and sticks

# The Continued Role of the FFCRA and Paid Leave

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# Families First Coronavirus Response Act Remember Me?



The Families First Coronavirus Response Act (FFCRA or Act) requires certain employers to provide their employees with paid sick leave and expanded family and medical leave for specified reasons related to COVID-19. 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 the higher of 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 10 weeks more of paid sick leave and expanded family and medical leave paid at ⅓ for qualifying reason #5 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 scheduled to work over that period.

#### ELIGIBLE EMPLOYEES

In general, employees of private sector employers with fewer than 500 employees, and certain public sector employees, are eligible for up to two weeks of fully or partially paid sick leave for COVID-19 related reasons (see below). Employees who have been employed for at least 30 days prior to their leave request may be eligible for up to an 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, including unable to telework, because the employee:

- |   |   |
|---|---|
| 1. is subject to a Federal, State, or local quarantine or isolation order related to COVID-19;              | 5. is caring for his or her child whose school or place of care is closed (or child care provider is unavailable) due to COVID-19 related reasons; or |
| 2. has been advised by a health care provider to self-quarantine related to COVID-19;                       | 6. is experiencing any other substantially-similar condition specified by the U.S. Department of Health and Human Services.                           |
| 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); |   |

#### ENFORCEMENT

The U.S. Department of Labor's Wage and Hour Division (WHD) has the authority to investigate and enforce compliance with the FFCRA. Employers may not discharge, discipline, or otherwise discriminate against any employee who lawfully takes paid sick leave or expanded family and medical leave under the FFCRA, files a complaint, or institutes a proceeding under or related to this Act. Employers in violation of the provisions of the FFCRA will be subject to penalties and enforcement by WHD.



WAGE AND HOUR DIVISION  
UNITED STATES DEPARTMENT OF LABOR

For additional information  
or to file a complaint:  
**1-866-487-9243**  
TTY: 1-877-889-5627  
[dol.gov/agencies/whd](https://dol.gov/agencies/whd)



WH1422 REV 03/20

- *Still* effective upon return-to-work (April 1, 2020-December 31, 2020)
- *Still* need to consider requests and maintain records
- *Still* need to account for the lingering pandemic psychology
- *Still* (likely) need to post FFCRA notice in physical workspace upon return-to-work



# Families First Coronavirus Response Act Remember Me?

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## ► **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, including unable to **telework**, because the employee:

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| <ol style="list-style-type: none"><li><b>1.</b> is subject to a Federal, State, or local quarantine or isolation order related to COVID-19;</li><li><b>2.</b> has been advised by a health care provider to self-quarantine related to COVID-19;</li><li><b>3.</b> is experiencing COVID-19 symptoms and is seeking a medical diagnosis;</li><li><b>4.</b> is caring for an individual subject to an order described in (1) or self-quarantine as described in (2);</li></ol> | <ol style="list-style-type: none"><li><b>5.</b> is caring for his or her child whose school or place of care is closed (or child care provider is unavailable) due to COVID-19 related reasons; or</li><li><b>6.</b> is experiencing any other substantially-similar condition specified by the U.S. Department of Health and Human Services.</li></ol> |
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# What About Travel?

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- There is a debate as to whether the FFCRA will apply after an employee has returned from travel. The following considerations should be taken into account:
- Was the travel for business or personal reasons?
- Is there a state mandate in place regarding quarantine upon return from travel?
- Can the employee work from home?
- Is the employee experiencing COVID-19 symptoms?
- Is the employee awaiting COVID-19 test results post-travel?
- Additional considerations?

# Your FAQs . . .

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- Son/Daughter and School?
  - “School” → Elementary school or secondary school
  - “Son or Daughter” → Biological, adopted, foster child, stepchild, legal ward, child of person standing in *loco parentis*, who is under 18 years of age (or 18 or older if incapable of self-care)
- Others available at home?
  - No, only if no other suitable person is available to care for son/daughter during leave period
- School is closed due to COVID-19?
  - Yes, if school closure is due to COVID-19 reasons
- It worked before, but now not so much?
  - Be careful, but may be able to ask about changed circumstances

# . . . Your FAQs

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- Intermittent leave?
  - PSL (#5) and FMLA → Yes, if *both* employer *and* employee agree on intermittent leave (in writing or clear mutual understanding)
  - PSL (#5) and FMLA → If employee is reporting to workplace or teleworking, employee can take leave intermittently in any increment of time agreed upon by both parties.
- Documentation?
  - Employee name
  - Date(s) for which leave is requested
  - Qualifying reason for the leave
  - Oral or written statement that the employee is unable to work because of the qualified reason for leave
  - Name of the son/daughter being cared for
  - Name of the school, place of care, or child care provider that has closed or become unavailable
  - Representation that no other suitable person will be caring for the son/daughter during the period for which the employee takes PSL or FMLA
- Interplay Between PSL (#5) and FMLA?
  - Benefits run concurrently
  - 1<sup>st</sup> two weeks of leave paid under PSL / 2<sup>nd</sup> ten weeks paid under FMLA

# Concurrent PTO and Paid Sick Leave

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- Paid sick leave is in addition to any form of paid or unpaid leave provided by law, policy or collective bargaining agreement.
- An employer may not require that the two weeks of paid sick leave run concurrently with any other leave.

BUT ...

- The employer can “top off” the paid sick leave maximum of \$511 per day by paying out PTO. If so, the employer would only be eligible for a tax credit of \$511 per day.



# Concurrent PTO and Paid Family Leave

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- Unlike paid sick leave, the company may require an employee to use accrued PTO time concurrently with emergency paid family leave to care for a child because their school or place of care is closed. (DOL FAQ#86).
- If the company requires concurrent use of PTO and paid FFCRA leave, the employee should be paid their full pay, but the tax credit will be limited to 2/3 pay up to \$200 per day.
- If the employee agrees, the Company may also use the “top off” method to concurrently apply 1/3 PTO to supplement the 2/3 FFCRA emergency paid family leave. Again, the employee will receive full pay, but the tax credit will be limited to 2/3 pay up to \$200 per day.

# Biden Administration on Paid Leave

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- Biden supports the Family and Medical Insurance Leave Act – proposed legislation that would provide workers with 12 weeks of paid time off to care for a newborn/adopted child, take care of themselves or family members with a health condition, or care for military veteran. Essential the FMLA with pay.
- As of now the FFCRA has a sunset date of December 31, 2020. Congress has released a bipartisan stimulus proposal worth \$908 billion. Trump has indicated he would sign such a bill if it were to pass both houses of congress.
- What if an employee needs leave under the FFCRA with less than 2 weeks left in the year?

**David Barron**

dbarron@cozen.com

(713) 750-3132

Blog: HR Headaches

<https://www.hr-headaches.com/>

**Arielle Eisenberg**

aeisenberg@cozen.com

(786) 871-3953

**Michael Schmidt**

mschmidt@cozen.com

(212) 453-3937

Podcast: Employment Law Now

[iTunes](#)

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[www.employmentlawnow.com](http://www.employmentlawnow.com)

**Michele Miller**

[mbmiller@cozen.com](mailto:mbmiller@cozen.com)

(415) 262-8301

