

JacksonLewis

Going Viral: Key COVID-19 Legal Updates for Employers

April 1, 2020

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Matthew F. Nieman is a Principal in the Washington, D.C. Region office of Jackson Lewis P.C. He also serves as the Litigation Manager for the office.

Mr. Nieman represents employers in a broad spectrum of labor and employment law matters, including discrimination, wage and hour, questions related to the Uniformed Services Employment and Re-employment Rights Act of 1994 (“USERRA”), and workplace drug-testing issues. He is actively involved in all phases of the litigation process on the full range of employment discrimination and employment-related tort and contract claims, including the representation of employers in actions before the Department of Labor, the Equal Employment Opportunity Commission, the National Labor Relations Board, the Occupational Safety and Health Administration, the Mine Safety and Health Administration, and various state and local agencies.

As part of his litigation practice, he has concluded many employment-related adversarial proceedings, including solo trials and multiple jury trial defense-verdicts. He has additionally drafted numerous successful dispositive and summary judgment motions in state and federal courts throughout the Mid-Atlantic region.

Mr. Nieman is a frequent writer and speaker and provides training to employer groups on various workplace-related topics, including sexual harassment, discrimination, substance-abuse prevention, and litigation avoidance.

Prior to entering private practice, Mr. Nieman was in public service as an active-duty U.S. Army Judge Advocate (“JAG”) at Fort Benning, Georgia and at Camp Liberty, Baghdad, Iraq. During his service as an Army JAG, Mr. Nieman enjoyed unique opportunities to interact with state and local governments in both the criminal and civil arenas as well as to develop trial experience.

Mr. Nieman earned his B.S. in Industrial & Labor Relations from Cornell University and his J.D. from the College of William & Mary Marshall-Wythe School of Law.

About Jackson Lewis P.C.

As legal professionals **focused on the workplace**, we have a unique vantage point into the human condition.

It is our **privilege** to do work that affects real people.

It is our **calling** to craft policies that achieve the delicate balance between supporting diverse workers and the **businesses that employ them**.

Firm overview

- We represent management exclusively in every aspect of employment, benefits, labor, and immigration law and related litigation.
- As leaders in educating employers about the laws of equal opportunity, Jackson Lewis understands the importance of having a workforce that reflects the various communities it serves.
- With 61 locations and more than 950 attorneys, we offer local knowledge backed by the support of a national firm.
- We are founding members of L&E Global, a global alliance of premier employer's counsel firms.

National recognition



Recognized for excellence and ranked as a Tier 1 National “Best Law Firm” by *U.S. News — Best Lawyers*® for:

- Employment Law – Management;
- Labor Law – Management; and
- Litigation – Labor & Employment.

More than 70% of Jackson Lewis’ firm locations also received a Tier 1 Metropolitan designation in various labor and employment categories.



Recommended in *The Legal 500 United States 2019* for:

- Employee Benefits, Executive Compensation and Retirement Plans: Design;
- Immigration; Labor and Employment Disputes (including collective actions): Defense;
- Labor-Management Relations; and
- Workplace and Employment Counseling.



72 attorneys have been recognized in the 2019 edition of *Chambers USA: America’s Leading Lawyers for Business*. More than **200 attorneys** were selected for inclusion in the 2019 edition of *The Best Lawyers in America*®.



Designated as a “**Powerhouse**” in Everyday Employment Litigation in Complex Employment Litigation in *BTI Litigation Outlook 2019: Changes, Trends and Opportunities for Law Firms*.



Practices

- Class Actions and Complex Litigation
- Collegiate and Professional Sports
- Corporate Diversity Counseling
- Corporate Governance and Internal Investigations
- Disability, Leave and Health Management
- Employee Benefits
- General Employment Litigation
- Health Law and Transactions
- Immigration
- International Employment Issues
- Labor and Preventive Practices
- Non-Competes and Protection Against Unfair Competition
- Privacy, Data and Cybersecurity
- Wage and Hour
- White Collar and Government Enforcement
- Workplace Safety and Health
- Workplace Training



Industries

- Automotive
- Chemicals
- Construction
- Energy and Utilities
- Financial Services
- Government Contractors
- Healthcare
- Higher Education
- Hospitality
- Insurance
- Life Sciences
- Manufacturing
- Media
- Professional Services
- Real Estate
- Retail and Consumer Goods
- Staffing and Independent Workforce
- Technology
- Transportation

FAQ 1

What should I be communicating to my employees now?

- We are actively evaluating all business-related risks.
- We are unaware of any company personnel being infected with COVID-19.virus.
- We will continue to monitor employee travel to affected areas.
- When necessary, we will make sure that individuals who have been potentially exposed remain away from the workplace for at least 14 days.
- Explanation of how COVID-19 spreads.
- CDC recommendation for steps to minimize risk of spread.
- Stay home when you are sick.
- Explanation of symptoms.
- Who to call if you or family member develops symptoms of COVID-19.

FAQ 2

Are there steps US employers should be taking now to reduce the spread of COVID-19 at work?

Consider CDC recommendations:

- Sick employees should stay home/separate sick employees.
- Communicate to your employees that you want them to stay home when sick (following call-off procedures), use respiratory etiquette, wash hands.
- Perform routine environmental cleaning.
- Employees who are in close contact with someone with COVID-19 should notify their supervisor and refer to the CDC risk assessment.

FAQ 3

What should employers do to prepare to continue to operate in the event of a community outbreak?

- Identify objectives such as: (a) reducing transmission among staff, (b) protect people at higher risk, (c) maintain business operations, (d) minimize adverse impact on supply chain.
- Identify possible work-related exposures i.e. business and personal travel by employees and how you will handle.
- Prepare for increased absences.
- Consider available staffing options including remote work, staggered shifts, etc.
- Plan to minimize exposure between employees and the public.
- Plan employee communications.
- Plan for supply chain disruption if various areas experience widespread COVID-19 spread.
- Check your force majeure clauses if you have ongoing contractual commitments.

FAQ 4

What if an employee has a family member at home with confirmed COVID-19?

- Consult CDC's Risk Assessment. Employee may fall under either Medium Risk or High Risk depending on circumstances
- CDC recommends High and Medium Risk avoid congregate settings for 14 days
- Situations where risk level is uncertain are challenging but in that case consult the CDC risk levels, the type of workplace, and the job being performed by the employee

FAQ 5

What if an employee or customer/client is confirmed to have COVID-19 after being in our workplace?

Consider:

- Communicate with state/local health department ASAP.
- Follow directions regarding disinfection.
- Work with CDC and state/local health department to identify potential contacts.
- Perform risk assessment on employees who had contact with the individual. The CDC's Risk Assessment focus is on "close contacts" i.e. within 6 feet for prolonged period of time or direct contact with body secretions.
- Those with close contacts need to remain away from the workplace for 14 days and monitor themselves for symptoms.
- Focus on communication with employees keeping in mind confidentiality obligations under ADA and FMLA for employees.
- Manage PR issues.
- Be prepared to cover for absent employees.

FAQ 6

Do employers have to pay employees who are away from work due to concerns of exposure?

Consider:

- Will the employee be performing any work?
- Is the employee exempt and likely to do some work no matter what during the week?
- Is the employee ill?
- Your policies, past practices and any CBA.
- Any applicable federal, state, or local paid leave law.
- Did the potential exposure occur in connection with work or in connection with personal travel?

FMLA Enhancements for COVID-19

Covered Employers FMLA Enhancements:

- Only to private employers with ***fewer than 500 employees*** and certain public employers.
- Allows an employer of an employee who is a healthcare provider or an emergency responder to elect to exclude the employee from the application of these two provisions.
- Allows ***subsequent*** U.S. Department of Labor regulations to exempt small businesses with fewer than 50 employees when the provision would jeopardize the viability of the business as a going concern.

Potential Exemption (per DOL Q&A) :

A small business employer (fewer than 50 employees) is exempt from providing

(a) paid sick leave due to school or place of care closures or child care provider unavailability for COVID-19 related reasons and

(b) expanded family and medical leave due to school or place of care closures or child care provider unavailability for COVID-19 related reasons

when doing so would jeopardize the viability of the small business as a going concern.

Potential Exemption (per DOL Q&A) :

May claim exemption if an authorized officer of the business determines that:

1. The provision of paid sick leave or expanded family and medical leave would result in the small business's expenses and financial obligations exceeding available business revenues and cause the small business to cease operating at a minimal capacity;
2. The absence of the employee or employees requesting paid sick leave or expanded family and medical leave would entail a substantial risk to the financial health or operational capabilities of the small business because of their specialized skills, knowledge of the business, or responsibilities; or
3. There are not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services provided by the employee or employees requesting paid sick leave or expanded family and medical leave, and these labor or services are needed for the small business to operate at a minimal capacity.

FMLA Employee Eligibility:

- Employees who have been employed for at least 30 calendar days.
- The usual FMLA requirements that the employee has been employed for a year, worked for at least 1,250 hours, and works in a location where there are 50 employees within a 75-mile radius do not apply.

Reasons for Leave under FMLA Expansion:

- An employee who is unable to work (or telework) to take leave due to a need to care for the employee's son or daughter (under 18 years of age) if the child's elementary or secondary school or place of care has been closed, or the childcare provider is unavailable, due to a "public health emergency."
- A public health emergency defined as an emergency with respect to COVID-19 declared by a federal, state, or local authority.

FMLA Employee Entitlements:

- For a school or day care closure:
 - 10 days of leave unpaid
 - Subsequent absences for this reason must be paid at **2/3** the employee's regular rate of pay.
 - A cap of \$200 a day and \$10,000 in aggregate per employee.
 - If the first 10 days are unpaid, an employee may elect to substitute any accrued vacation leave, personal leave, or medical/sick leave for the unpaid leave. Cannot force to use accrued paid leave.
- The law does not provide a new 12 week entitlement period, it simply adds another reason for leave and specifies payment.

Use of FMLA Time:

- It is unclear from the law whether new FMLA can be used in less than full day increments. The Act implies employees can use this FMLA in the same increments the employer allows for other leaves.
- Note that FMLA normally can be used in your smallest timekeeping increment. This is also a possibility.
- DOL Q&A says can be used intermittently with employer agreement. Strong arguments that regular FMLA rules (e.g., intermittent use) will apply even without agreement
- Regulations are expected.

Notice Requirements

- For the paid FMLA provisions:
 - Employees must provide the employer with “notice of leave as is practicable.”
 - A mandatory poster issued by USDOL:
https://www.dol.gov/sites/dolgov/files/WHD/posters/FFCRA_Poster_WH1422_Non-Federal.pdf

Job Protection Rules

- **Normal FMLA Leave's Job Protection Rules Apply in Most Cases**
- **Exception to job protection rule:** For employers with fewer than 25 employees if the employee's position no longer exists due to economic conditions or other changes in the employer's operations that affect employment and are caused by the public health crisis during the period of leave
 - The employer must make reasonable efforts to restore the employee to the same or an equivalent position
 - If the reasonable efforts fail, the employer must make efforts to contact the employee and reinstate the employee if an equivalent position becomes available within a one-year period from:
 - The date on which the qualifying need related to a public health emergency concludes, or
 - The date that is 12 weeks after the date the employee's leave started.

Emergency Paid Sick Leave Act

Covered Employers for PSL:

Employer Coverage for PSL:

- Employers with fewer than 500 employees.

Eligible Employees for PSL:

- The paid sick leave requirements would apply to all employees under a covered employer.

Employee Entitlement For PSL:

- **80 hours** of paid sick leave for full-time employees.
- The equivalent of the average number of hours over two weeks for part time employees.
- **In addition to any paid sick leave already provided.**

Reasons of Paid Sick Leave:

- (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 healthcare provider to self-quarantine due to concerns related to COVID-19.
- (3) The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis.
- (4) The employee is caring for an individual who is needs to quarantine, isolate, or self-quarantine under government order or health care advisor advice.
- (5) The employee is caring for their son or daughter if the school or place of care of the son or daughter has been closed, or the childcare provider of the son or daughter is unavailable, due to COVID-19 precautions.
- (6) The employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services, in consultation with the Secretary of the Treasury and the Secretary of Labor.

PSL Benefit Amount:

- Paid sick leave is paid at the employee's regular rate but:
 - Capped: \$511 per day and \$5,110 in the aggregate when used by employee for their own condition
 - Capped \$200 per day and \$2,000 in the aggregate when used for family reasons and when employee experiences a “the substantially similar condition”
 - Paid at **2/3** the employee's regular rate when used to care for another individual or due to school/day care closure.

Use of PSL Time:

- It is unclear whether PSL can be used in less than full day increments. The Act implies employees cannot use in less than full day increments.
- Some confusion from potential overlay with COVID-19 FMLA
- Regulations are expected.

Notice Requirements:

- For the Paid Sick Leave provisions:
 - After the first sick day, Employer may require an employee to follow reasonable notice procedures in order to continue receiving the paid sick leave.
 - Same Poster as for Emergency FMLA

Effective Date:

- Both the paid FMLA and the Paid Sick Leave provisions take effect today, April 1, 2020
- Remain in place until the end of 2020.

Tax Relief for Employers

- Businesses and tax-exempt organizations with fewer than 500 employees are eligible.
- Employers are not subject to the employer portion of Social Security withholding taxes.
- An employer to use the withheld taxes to help fund the employer's payment of the paid leave. That is, the employer does NOT have to forward the withheld taxes to the IRS.
- If there are not sufficient payroll taxes to cover the cost of qualified sick and child care leave paid, employers will be able file a request for an accelerated payment from the IRS.

CORONAVIRUS AID, RELIEF AND ECONOMIC SECURITY ACT (CARES ACT)

CARES Act

- Enacted last Friday, allocates \$350 billion to help small businesses keep workers employed amid the pandemic and economic downturn
 - Rushed (and it shows), some errors and lots of confusion
- Waiting for regulations to come out which should be within 30 days of enactment, and guidance from the SBA. Law includes:
- Paycheck Protection Program
 - Loans can be up to 2.5x the borrower's average monthly payroll costs, not to exceed \$10 million.
 - A borrower is eligible for loan forgiveness equal to the amount the borrower spends on: Payroll costs, Interest on the mortgage obligation incurred in the ordinary course of business, Rent on a leasing agreement, and Payments on utilities during the 8-week period beginning on the date of the origination of the loan.

CARES Act

- Emergency Economic Injury Grant
 - \$10,000 emergency grants who have applied for a SBA economic injury disaster loan. The grant must be used for allowable purposes
- Unemployment Compensation
 - Federal Pandemic Unemployment Compensation - \$600 Additional Weekly Benefit on top of the regular amount of compensation available under State law
 - Extends unemployment insurance by 13 weeks and provides a four-month enhancement of benefits
 - Makes unemployment compensation available for those not traditionally eligible for regular unemployment benefits, including those with limited work history or those who have exhausted their state unemployment compensation benefits
 - Temporary Full Federal Funding of the First Week
 - Check applicable State and local actions

Other Issues

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- Worker's Compensation
- ADA Issues
 - Accommodations, perceived as infected, direct threat analysis
- OSHA
 - General duty, PPE, is a COVID-19 illness recordable?
- Privacy Issues
 - Unlikely to be HIPAA, But Still Have Privacy and Confidentiality Obligations
 - Employees exposed to a co-worker with confirmed COVID-19 should refer to CDC guidance for how to conduct a risk assessment of their potential exposure.
- Wage and Hour Issues
 - Exempt employee issues, non-exempt employee recording of hours.

Other Issues

- WARN/Mini-WARN Issues
- Health Insurance and COBRA
- Immigration/E-Verify
- Employer Policies
 - PTO and Paid Sick Leave, Leaves of Absence, Layoffs and Furloughs, Severance pay

Practical Problems

- Employees who test positive
 - *Should not be allowed to work until medical clearance. Need to notify employees who may have been exposed without identifying the employee.*
- Employees who believe they have been exposed
 - *Employees exposed to a co-worker (or other individual) with confirmed COVID-19 should refer to CDC guidance for how to conduct a risk assessment of their potential exposure.*
 - *They should not be required to work but you do not have to pay them unless they qualify for new paid sick leave benefits.*
- Dealing with Customers who may be positive
- Universal precautions, working remotely and social distancing
- Dealing with fear – Communication is the key

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Thank **you.**



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