

# COVID-19-Related Legal Questions Keep Coming

By Jathan Janove, J.D.

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**Q**uestions about COVID-19 in the workplace keep rolling in. Prominent labor and employment attorneys from around the country answer them below.

**Question:** Can we require employees to use their vacation or sick leave before they take emergency paid sick leave (EPSL)?

**Answer:** No. According to Diane Waters, an attorney with Lewis Brisbois in Dallas, paid sick leave under the Emergency Paid Sick Leave Act (EPSLA) is in addition to any form of paid leave that may be available to an employee. Employers may not require employees to use vacation, personal, medical or sick leave available under a company policy, state or local law or applicable collective bargaining agreement before taking leave under EPSLA.

Waters notes that because EPSL is specific to leave necessitated by COVID-19 and is only available through Dec. 31, 2020, employers may not require employees to exhaust more broadly applicable leave before taking EPSL. Additionally, as EPSL is a separate "bucket" of paid leave, employers also may not require paid vacation, personal, medical or sick leave to run concurrently with or cover the same hours as EPSLA.

For more information, see these FAQs on the Department of Labor's website:

- <https://www.dol.gov/agencies/whd/pandemic/ffcra-questions#32> (<https://www.dol.gov/agencies/whd/pandemic/ffcra-questions#32>)
- <https://www.dol.gov/agencies/whd/pandemic/ffcra-questions#86> (<https://www.dol.gov/agencies/whd/pandemic/ffcra-questions#86>)

**Question:** Can we require an employee to use paid leave while he or she takes expanded family and medical leave (EFMLA)?

**Answer:** According to Waters, it depends. During the unpaid portion of EFMLA (i.e., the first two weeks), an employee can, but may not be required to, use EPSL or any other employer-provided paid leave. Once the paid portion of EFMLA applies, however, an employer can require company-provided paid leave (e.g., vacation or other paid time off but typically not sick or medical leave) to run concurrently with EFMLA while an employee must care for his or her child whose school or place of care has closed or become unavailable due to a COVID-19-related reason.

EFMLA is paid at two-thirds of the employee's regular rate of pay, up to the daily and aggregate limits (\$200 per day or \$10,000 in total). Waters notes that if an employer requires an employee to use any company-provided paid leave concurrently with EFMLA, the employer must provide the employee with full pay until the employee has exhausted available paid leave under the employer's plan.

While EFMLA and employer-provided paid leave run concurrently, the employer may only obtain EFMLA tax credits for wages paid at two-thirds of the employee's regular rate of pay. If an employee exhausts company-provided paid leave but has more EFMLA available, the employee will receive any remaining EFMLA in the amounts specified in the EFMLA, subject to the daily and aggregate limits. Additionally, provided both an employer and employee agree, and subject to federal or state law, paid leave provided by an employer may supplement the two-thirds pay under the EFMLA so that the employee may receive the full amount of the employee's normal compensation.

"As more states and local jurisdictions enact or expand upon various forms of paid leave, it will be critical for employers to understand the interplay between federal, state and local leave laws," Waters said.

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**Question:** If we have employees who are refusing to return to work because they have a fear of contracting COVID-19, what can we do?

**Response:** According to Mark Tolman, an attorney with Jones Waldo in Salt Lake City, "It depends on why your employees are afraid to return to work." If an employee fears contracting COVID-19 because of some underlying disability or serious health condition, the employee may be eligible for leave under the Family and Medical Leave Act (FMLA) or for an accommodation (e.g., remote work) under the Americans with Disabilities Act (ADA).

For example, an employee may have an anxiety disorder that is triggered by being out in public because of the pandemic. Another employee might have a chronic health condition (e.g., asthma or diabetes) that places him or her at high risk for COVID-19 infection. Under either scenario, Tolman said, "If the employer is covered by the FMLA and the employee is eligible for FMLA leave, the employer should start the FMLA process for an employee with an underlying health condition by providing the FMLA's Notice of Eligibility and Rights and Responsibilities forms. The employer also should initiate the ADA's interactive process to determine if the employee's condition qualifies as a disability under the ADA and if the employer can provide an accommodation without undue hardship."

According to the Equal Employment Opportunity Commission's (EEOC's) COVID-19 guidance:

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

Tolman said an employee may also be fearful of returning to work because a family member has a serious health condition that places him or her at high risk for a COVID-19 infection. In these situations, he recommends following your FMLA process to determine if the employee needs leave to care for the family member. However, Tolman added, "ADA accommodations will not be required in this situation." According to the EEOC, "The ADA does not require that an employer accommodate an employee without a disability based on the disability-related needs of a family member or other person with whom she is associated."

Finally, Tolman states that you may have "an employee who does not have a mental or physical impairment underlying their fear of returning to work—the employee is just generally afraid of COVID, like so many of us." In these situations, he advises, the employee will have no federal protection and an employer can compel a return to work, upon threat of discipline. Still, Tolman recommended "an empathetic approach that alleviates fear, such as by educating your employees about the safety standards the company has adopted or providing flexible working arrangements, such as telework, whenever possible."

#### **Previous columns:**

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3 More COVID-19 Legal Questions You Should Answer ([www.shrm.org/ResourcesAndTools/hr-topics/employee-relations/humanity-into-hr/pages/3-more-covid-19-legal-questions-you-should-answer.aspx](http://www.shrm.org/ResourcesAndTools/hr-topics/employee-relations/humanity-into-hr/pages/3-more-covid-19-legal-questions-you-should-answer.aspx)), *SHRM Online*, September 2020

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