

Ask the Attorney: Coronavirus relief package and travel expectations

Can we make our employees travel during this pandemic?

Q: “We have employees who are refusing to go to work due to the coronavirus (some of these jobs involve travel). If we are following all protocols recommended by the CDC and we are not sending them to a country like China with a high level of danger, are we within our rights to ask them to continue to work?” - Karen, Florida

A: Whether you can insist upon your employees reporting to work now, during the coronavirus pandemic, depends both upon the type of work you are engaged in and the state in which the individual works. In some states, like California workers in “essential” businesses are permitted and encouraged to come to work, but the vast majority are directed to stay home to shelter in place under the [Governor Newsome’s Executive Order](#). In addition, several jurisdictions with paid “sick or safe leave” laws allow workers to stay home for preventive purposes, which may include time spent self-quarantining if the worker has been advised by a physician to do that. (Some of these laws have been very recently revised or re-interpreted to permit workers to take time off for preventive care.) Interfering with someone’s right to take paid sick leave by requiring them to work is typically prohibited under these laws.

As for travel, the State Department has issued a “Level 4” travel warning, telling travelers not to go overseas unless they are able to stay there indefinitely. Within the United States, non-essential travel is increasingly being curtailed, so to the extent your workers might be asked to travel to another jurisdiction, it is important to understand whatever local requirements may be in place, and whether your travel needs are likely to be upheld as essential if a jurisdiction that has no restrictions decides to implement those in the near term.

The state and local orders limiting work and travel for public safety are changing rapidly, and it is critical that employers, even those who operate business deemed “essential,” be aware of the limits on their ability to require workers to come to work. Review relevant orders closely.

How will the coronavirus relief package affect employee leave?

Q: “Could you please expand on the coronavirus relief package specifically on the issue of sick days and paid family leave?” - Cecilia, California

A: On March 18, 2020, the U.S. Senate approved House-passed legislation responding to the COVID-19 pandemic, and President Trump signed the “Families First Coronavirus Response Act.” Although the new law includes a range of provisions, including free coronavirus testing, of direct interest to the business community, this new law includes requirements for specified employers to provide emergency paid sick leave, as well as emergency paid leave under the Family and Medical Leave Act (FMLA), commencing after the new law’s effective date of April 2, 2020. The bill includes refundable tax credits for employers that are required to offer emergency FMLA or paid sick leave, including self-employed individuals. These credits are only available to those employers that are required to offer these benefits under the bill.

The final bill provides that private-sector employers with fewer than 500 employees, and covered public-sector employers, must provide up to 12 weeks of job-protected FMLA leave for “a qualifying need related to a public health emergency” to employees who have been on the payroll for 30 calendar days. This “qualifying need” is limited to circumstances where an employee is unable to work (or telework) due to a need to care for a minor child if the child’s school or place of child care has been closed or is unavailable due to a public health emergency.

The first segment of emergency FMLA leave (10 days) can be unpaid. An employee can opt to substitute accrued vacation, personal, or sick leave during this time, but an employer may not require an employee to do so. The remaining 10 weeks of FMLA leave is required to be paid, generally at two-thirds of the employee’s regular rate, for the number of hours the employee would otherwise be scheduled to work. The bill limits the amount of required pay for leave to no more than \$200 per day and \$10,000 in the aggregate.

Emergency FMLA leave taken is generally job-protected, meaning the employer must restore employees to their prior positions (or an equivalent) upon the expiration of their need for leave. The bill includes an exception to this requirement for employers with fewer than 25 employees, if the employee’s position no longer exists following leave due to operational changes occasioned by a public health emergency (e.g., a dramatic downturn in business caused by the COVID-19 pandemic), subject to certain conditions.

The new law allows the Secretary of Labor to exclude health care providers and emergency responders from the definition of employees who are allowed to take such leave, and to exempt small businesses (defined as those with fewer than 50 employees) if the required leave would jeopardize the viability of their business.

The final bill provides that private-sector employers with fewer than 500 employees, and covered public-sector employers, must provide up to 12 weeks of job-protected FMLA leave for “a qualifying need related to a public health emergency” to employees who have been on the payroll for 30 calendar days. This “qualifying need” is limited to circumstances where an employee is unable to work (or telework) due to a need to care for a minor child if the child’s school or place of child care has been closed or is unavailable due to a public health emergency.

The first segment of emergency FMLA leave (10 days) can be unpaid. An employee can opt to substitute accrued vacation, personal, or sick leave during this time, but an employer may not require an employee to do so.

The remaining 10 weeks of FMLA leave is required to be paid, generally at two-thirds of the employee’s regular rate, for the number of hours the employee would otherwise be scheduled to work. The bill limits the amount of required pay for leave to no more than \$200 per day and \$10,000 in the aggregate.

Emergency FMLA leave taken is generally job-protected, meaning the employer must restore employees to their prior positions (or an equivalent) upon the expiration of their need for leave. The bill includes an exception to this requirement for employers with fewer than 25 employees, if the employee’s position no longer exists following leave due to operational changes occasioned by a public health emergency (e.g., a dramatic downturn in business caused by the COVID-19 pandemic), subject to certain conditions.

The final bill retains language allowing the Secretary of Labor to exclude health care providers and emergency responders from the definition of employees who are allowed to take such leave, and to exempt small businesses (defined as those with fewer than 50 employees) if the required leave would jeopardize the viability of their business.

Many questions remain about how the new law will be implemented, including how notice and certification requirements will apply. On Friday March 20, the Department of Labor held an on-line listening session in which employers posed questions, but did not provide guidance. The Agency has promised to release regulations in

April. Additional legislation is moving through the Congress, and further changes to the law may be made.