

**JacksonLewis**

# **Legal Landmines: Nonprofits Navigating Return to Work During the COVID-19 Pandemic**

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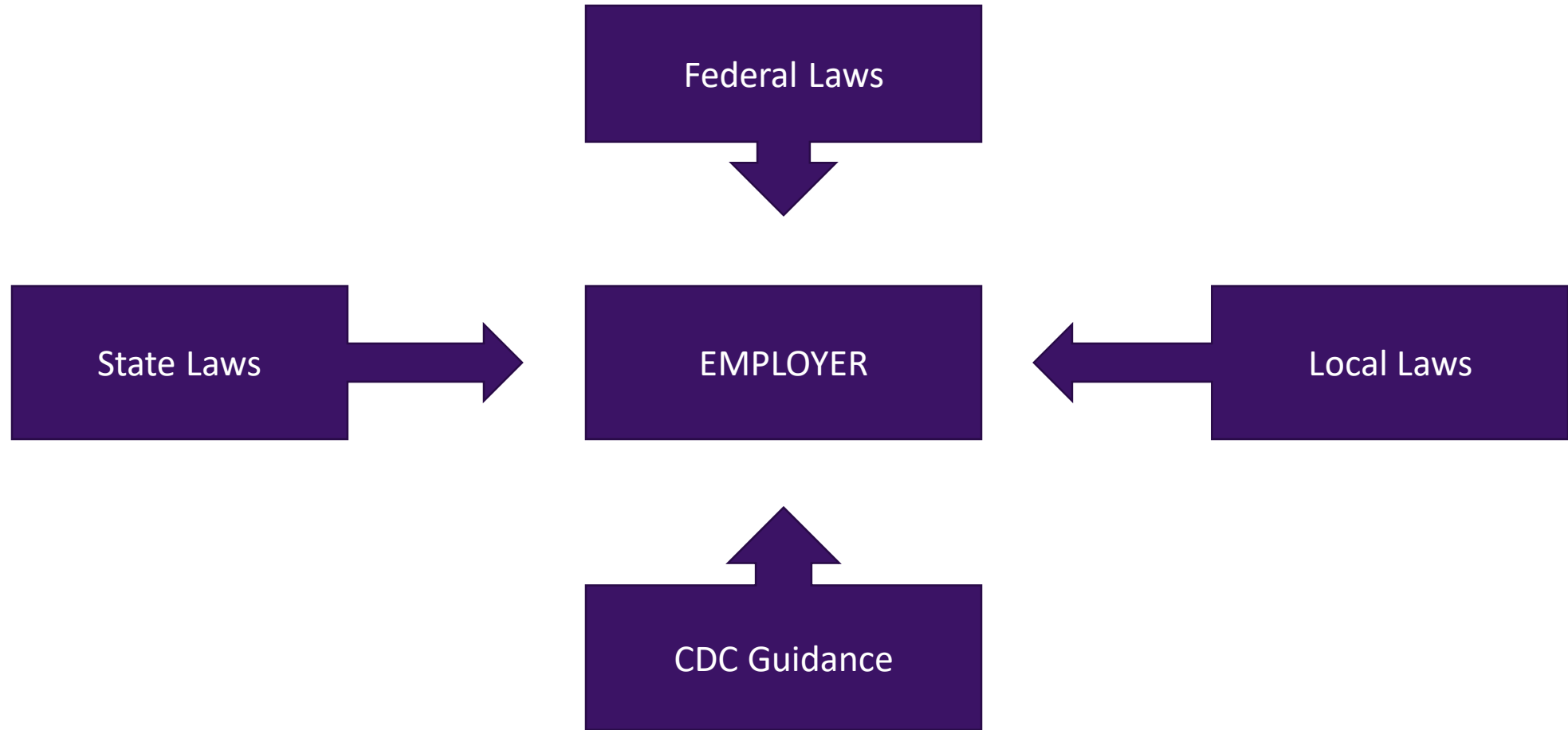


For legal guidance in any specific circumstance, please consult with an attorney.



- Applicable Laws and Guidance
- Operationalizing Legal Obligations and Recommendations
- Obligations Under the FMLA and ADA
- Responses to Common COVID-19 Scenarios

# Leave Laws and Guidance



# Federal and State Laws To Consider

## Federal Laws

Occupational Safety and Health Act (OSHA)

Americans with Disabilities Act (ADA)

Title VII and other laws against national origin, age and other discrimination

Fair Labor Standards Act (FLSA) and state and local wage and hour laws

Section 7 of the National Labor Relations Act (NLRA)

Genetic Information Nondiscrimination Act (GINA)

Family and Medical Leave Act

Families First Coronavirus Response Act (FFCRA)

## State Laws

Expansions Of FFCRA for All Employers

Paid Family Leave and Mini FMLA Laws

Paid Sick Leave Laws

Predictive Scheduling Laws

# State And Local Laws and Recommendations To Consider

- Business Opening Orders
- Mass Gathering Restrictions
- Social Distancing/Sanitation Protocols
- Mask Requirements
- Vulnerable Population Obligations
- Health Screening And Temperature Check Requirements
- Travel Orders And Recommendations
- Protocols When Employees Are Exposed To COVID-19, Have COVID-19 Related Symptoms Or Test Positive
- Obligation To Notify Local Health Department, Participate In Contact Tracing
- Posting Requirements



# Primary Sources of Federal Agency Guidance

## EEOC, CDC and DOL

**U.S. Equal Employment Opportunity Commission**

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### Coronavirus and COVID-19

We have established this page to consolidate relevant coronavirus and COVID-19 information and to answer questions from the public about the EEO laws and COVID-19.

- The EEOC's Office of Federal Operations (OFO) [issued instructions](#) on April 6, 2020, regarding the processing of federal sector EEO complaints covered by 29 CFR Part 1614. Those [instructions were revised on July 27, 2020](#), to allow the issuance of agency final actions. We do not intend this guidance to require any task that would increase risks to the health or safety of federal employees.
- EEOC Chair Janet Dhillon issued a [statement](#) about unlawful national origin and race discrimination against Asian Americans and people of Asian descent in the workplace during the pandemic.
- The EEOC posted information to inform the public [we are continuing to enforce the nation's employment non-discrimination laws](#) while ensuring that all of our activities are consistent with public health guidelines.
- The EEOC posted a question and answer document, [What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws](#), last updated on June 17, 2020.
- The EEOC has provided guidance entitled [Pandemic Preparedness in the Workplace and the Americans With Disabilities Act \(PDF version\)](#) that can help employers implement strategies to navigate the impact of COVID-19 in the workplace. This pandemic publication, written during the prior H1N1 outbreak, is still relevant today and identifies established ADA and Rehabilitation Act principles to answer questions frequently asked about the workplace during a pandemic. It was updated on March 19, 2020 to address examples and information regarding COVID-19; **the new information appears in bold**.
- To supplement these documents, the EEOC posted a pre-recorded webinar addressing questions arising under any of the Federal Equal Employment Opportunity Laws and the COVID-19 pandemic. The video can be [seen on YouTube](#) or in the video player below. A [transcript of the webinar](#) is also available.

**CDC** Centers for Disease Control and Prevention  
CDC 24/7: Saving Lives. Protecting People™

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### Coronavirus Disease 2019

CDC is responding to the novel coronavirus outbreak.

[Learn More About COVID-19](#)

- Cloth Face Coverings**  
Wear a face covering to help protect others in case you're infected but don't have symptoms.
- Social Distancing**  
Limiting face-to-face contact with others is the best way to reduce the spread of COVID-19.
- When to Wear Gloves**  
Use gloves when cleaning and disinfecting or providing care to someone who is sick.

**UNITED STATES DEPARTMENT OF LABOR**

Occupational Safety and Health Administration

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OSHA ▾ STANDARDS ▾ TOPICS ▾ HELP AND RESOURCES ▾

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Safety and Health Topics / COVID-19

### COVID-19

#### COVID-19 Frequently Asked Questions

This page includes frequently asked questions (FAQs) and answers related to the coronavirus disease 2019 (COVID-19) pandemic. Questions are grouped by topic, and cover:

- General Information
- Cleaning and Disinfection
- Cloth Face Coverings
- Construction
- Employer Requirements
- Healthcare
- Personal Protective Equipment
- Reporting
- Restrooms and Handwashing Facilities
- Retaliation
- Return to Work
- Testing for COVID-19
- Training
- Worker Protection Concerns

**General Information**

Where can workers find general information about protecting themselves at work during the COVID-19 pandemic?

Where can employers find general information about, and requirements for, protecting workers during the COVID-19 pandemic?

What precautions should employers in non-healthcare workplaces take to protect workers from COVID-19?

**Cleaning and Disinfection**

How should I clean and disinfect my workplace?

Is OSHA providing any guidance for companies performing remediation and clean-up efforts in high-risk situations, such as **flexworksites**, or **flexwork** or **business** facilities?

# How Do You Comply With All Those Recommendations And Requirements?

- Determine what is legally required and most appropriate to protect your employees and customers
  - CDC Guidance, EEOC and DOL Guidance (Primary but not exclusive agencies)
  - State and local executive orders in the states and cities where you have employees
  - The specific risks and realities of your workplace
- Create a written plan to comply with any applicable state re-opening orders
  - Safety and hygiene
  - Screening and testing
  - Social distancing
  - Responses to cases/symptoms/exposure
  - Cleaning and disinfecting
  - Employee communications, acknowledgments
  - Addressing concerns and requests
- Train your employees

# Temperature, Symptom and Exposure Screening

- Self-assessment or employer-assessment?
- At home or at work?
- Compensable or not compensable?
- CDC currently uses 100.4F or greater, but some states and local orders use a threshold of 99.5°F -100.4°F
- CDC current symptoms of COVID-19: chills or fever, cough, shortness of breath or difficulty breathing, fatigue, muscle or body aches, headache, new loss of taste or smell, sore throat, congestion or runny nose, nausea or vomiting, diarrhea. Check to make sure your state or local ordinance does not identify other symptoms.
- The screen should inquire about exposures based on close contacts and travel

# Should You Require COVID-19 Testing?

- EEOC permits molecular COVID-19 testing before employees enter a facility, EEOC
  - Requires that the tests be accurate and reliable
  - Suggests employers consider guidance from the FDA, CDC, and other public health authorities
- EEOC does not permit serological aka antibody testing
- A COVID-19 test is like a snapshot in time—just because an individual is negative today, they could be positive tomorrow
- Requiring COVID-19 testing may not be practical due to a shortage of available testing and due to the lag between the time tests are conducted and results are received
- According to CDC, it may be necessary to confirm a rapid antigen test result with a RT-PCR test, especially if the result of the antigen test is inconsistent with the circumstances.
- If you are going to incorporate testing, make sure to check state laws and state and local COVID-19 orders regarding what is minimally required or prohibited in each jurisdiction

# Protocol For How Long An Employee Should Remain Out Of The Workplace

## Employee is symptomatic, but no known exposure

State and local rules vary regarding response to employee who indicates they have symptoms during a daily health screening.

If consistent with state and local rules, consider allowing employees to return to work upon receipt of a negative COVID-19 test result and/or a doctor's note indicating the employee does not have COVID-19.

If an employee does not take a COVID-19 test and/or receive a doctor's note indicating the employee does not have COVID-19, best practice to keep employee out of work until they satisfy the return to work protocols for someone who has tested positive for COVID-19.

Some states/local DOH have return to work requirements for symptoms that do not allow a doctor's note and/or a negative test. BE SURE TO CHECK STATE AND LOCAL RULES

## Employee is symptomatic following known exposure

Employees who develop COVID-19 symptoms following known exposure to a person with COVID-19, must remain out of work until they satisfy the return to work protocols for someone who has tested positive for COVID-19, even if they receive a negative COVID-19 test result.

## Employee is Presumed Positive\* Or Is Diagnosed With COVID-19

CDC Guidance for Discontinuance of Home Isolation

- 10 days since onset of symptoms (20 days for severe symptoms or immune compromised individuals)
- 24 hours fever free without meds
- Other symptoms improving

Asymptomatic Individuals

- 10 days since COVID-19 test

Test based strategy for symptomatic individuals no longer recommended except for immunocompromised or to discontinue isolation earlier

# Protocol For How Long An Employee Should Remain Out Of The Workplace

## Employee (No Symptoms) Has Close Contact With Someone Diagnosed With COVID-19

14 days from last exposure during contagious period

Does not matter whether employee tests negative

CDC's Critical Infrastructure Worker Guidance provides employer with option to allow exposed, but asymptomatic to continue to work if certain procedures are followed

People who have tested positive for COVID-19 do not need to quarantine (or get tested again) for up to 3 months as long as they do not develop symptoms again.

## Employee Has Exposure Due To International Travel Or In Violation of State Travel Restriction

14 days from return from travel

Some states have exceptions to 14 day quarantine rule

## CDC Definition of Close Contact

Being within 6 feet of someone who has COVID-19 for a total of 15 minutes or more

Providing care at home to someone who is sick with COVID-19

Having direct physical contact with a person who is sick with COVID-19 (hugged or kissed them)

Sharing eating or drinking utensils with a person who is sick with COVID-19

A person who is sick with COVID-19 sneezed, coughed, or somehow got respiratory droplets on you

# Response Plan For COVID-19 Infections in the Workplace

- Consider Creating an Incident Report Form
- Contact tracing and direct notification of employees who may have come in close contact
  - Identify relevant time period
    - 48 hours before symptom onset or date of positive specimen draw if asymptomatic
  - Maintain confidentiality of COVID-19 positive individual
  - Require employees to remain out of work for 14 days following exposure
    - Different rules for essential/critical infrastructure employees
- Consider whether to Issue general workplace notification
- Cleaning in accordance with CDC or State/Local guidance
  - Different cleaning guidance if it has been 7 days or more since COVID-19 positive individual was in the workplace
- Notification of state and/or local health department
  - Best practice
  - Some state and local orders require notification
- Notification of Customers/Visitors
- OSHA Recording Requirements

# CDC Guidance — People at Increased Risk of Severe Illness from COVID-19

## Conditions shown in studies with most consistent evidence of risk:

- Serious heart conditions
- Cancer
- Chronic kidney disease
- COPD
- Obesity
- Sickle cell disease
- Organ transplant
- Type 2 diabetes

## Conditions that seem to have mixed evidence of risk in various studies:

- Asthma
- Cerebrovascular disease
- Hypertension
- Pregnancy
- Smoking
- Use of corticosteroids or other immunosuppressive medications



# CDC Guidance — Vulnerable Populations

## Strategies for high risk individuals include:

- Implementing telework and other social distancing practices
- Actively encouraging employees to stay home when sick
- Providing sick leave
- Promoting handwashing
- Providing supplies and appropriate personal protective equipment (PPE) for cleaning and disinfecting workspaces
- Requiring all employees to wear cloth face coverings
- In workplaces where it is not possible to eliminate face-to-face contact, consider assigning employees who are at higher risk of severe illness work tasks that allow them to maintain a 6-foot distance from others, if feasible.

# Federal Leave Entitlements

# FFCRA – Emergency Paid Sick Leave

## Reasons for leave:

- A Federal, state, or local quarantine or isolation order related to COVID-19;
- Has been advised by a health care provider to self-quarantine related to COVID-19;
- Is experiencing COVID-19 symptoms and is seeking a medical diagnosis;
- Is caring for an individual subject to an order described in (1) or self-quarantine as described in (2);
- Is caring for a child whose school or place of care is closed (or child care provider is unavailable) for reasons related to COVID-19; or
- Is experiencing any other substantially-similar condition specified by the Secretary of Health and Human Services, in consultation with the Secretaries of Labor and Treasury.

## Up to 80 hours Paid sick Leave

### Paid sick leave is paid at the employee's regular rate but:

- Capped: \$511 per day and \$5,110 in the aggregate when used for first 3 reasons
- Capped \$200 per day and \$2,000 in the aggregate when used for last 3 reasons.

# FFCRA – Expanded FMLA Employee Entitlements

- **Reason for leave:**

An employee is unable to work (or telework) due to a need to care for the employee's son or daughter whose school or place of care has been closed, or whose childcare provider is unavailable, due reasons related to COVID-19

- **Up to 12 weeks of leave**

- The law does not provide a new 12 week entitlement period, it simply adds another reason for leave and specifies payment.

- **Amount of Paid Leave**

- First 10 days of leave unpaid
- Remaining 10 weeks paid at 2/3 the employee's regular rate of pay.
- A cap of \$200 a day and \$10,000 in aggregate per employee.
- During first 10 days, an employee may elect to substitute any accrued vacation leave, personal leave for the unpaid leave or substitute their EPSL

# Federal Leave Entitlements — FMLA

- Qualify for FMLA Leave:
  - Employee with COVID-19 or symptoms?
  - Caring for a family member with COVID-19 or symptoms?
- Treatment by a health care provider?
- Incapacitated?
- Must qualify as “serious health condition”

# Americans with Disabilities Act

# Don't Forget About the ADA...

- COVID-19 Classified as International Pandemic
- Impacts how the ADA applies to workplace issues
  - Direct threat standard / Job related and consistent with a business necessity
- A reasonable accommodation may be necessary for an employee who is unable or afraid to return to work due to a disability
- Reasonable accommodation may include but is not limited to:
  - Making existing facilities used by employees readily accessible or safe; job restructuring; part-time or modified work schedules; providing PPE; reassignment to a vacant position; acquisition or modifications of equipment or devices; appropriate adjustment or modifications of examinations, training materials, or policies; and other similar accommodations for individuals with disabilities.
  - May also include an unpaid leave of absence.

# COVID-19 Absence Management: 3 Questions To Help Determine If You Are Legally Required To Provide Time Off Work

Is the employee “**entitled**” to be absent with job protection?

- FFCRA, FMLA, State Paid Sick Leave, State PFML, State COVID-specific and Other State Entitlements for paid and unpaid time

Has Company “**committed**” to providing additional job-protected leave?

- Collective Bargaining Agreement, if any
- Your policies and past practices

Is additional leave required as a **reasonable accommodation** for employees with disabilities or pregnancy related medical conditions?

- ADAAA or similar state statutes
- PDA or similar state statutes



# Common COVID Scenarios

- “I tested positive for COVID-19.”
- “I have been exposed to COVID-19.”
- “My spouse has been exposed to COVID-19.”
- “My spouse has COVID-19.”
- “The government has advised that I stay home because I fall in a vulnerable population category.”
- “I’m caring for a parent who is old and could get sick” or “I live with someone who falls in a vulnerable population category.”
- “I have a medical condition and need to work from home as an accommodation.”
- “My child’s day care (or school) is closed (or on a Hybrid schedule) and I need to take care of the child or help with schoolwork.”
- “I’m afraid and I think you are opening too soon.”
- “I’ve been doing job remote for the last 6 months why do I have to be on site now?”

# Resources – Links to Federal Agency Guidance

- CDC: <https://www.cdc.gov/coronavirus/2019-nCoV/index.html>
- EEOC: <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>
- DOL:
  - <https://www.dol.gov/agencies/whd/pandemic>
  - <https://www.dol.gov/agencies/whd/pandemic/ffcra-employer-paid-leave>
- Remember to consult state and local requirements

# Jackson Lewis Resources

- [Visit our Resource Center](#)
- [Access our COVID-19 Products](#)
- [Sign up for COVID-19 Updates](#)

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Thank **you.**