

2nd Quarter Compliance Webinar: Back To The Office?

**And More... How COVID-19 Is
Affecting Absence Management**

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Our Speakers



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Legal Disclaimer

Not Legal Advice

This presentation is designed to provide accurate information in regard to the subject matter covered. It is provided with the understanding that ReedGroup is not engaged in rendering legal or other professional services. If legal advice or other expert assistance is required, the services of a competent attorney or other professional person should be sought. Due to the numerous factual issues which arise in any human resource, leave of absence, or employment question, each specific matter should be discussed with your attorney.

AGENDA

Back to the Office? And more...

Return to Office Issues

COVID-19 Developments

Non-COVID-19 Legislative Updates

FFCRA Lawsuits

Return to the Office

Maintaining a Safe Work Environment

1

Employers may take employees' body temperatures or require employees to take their own temperatures.

2

Employers can make disability related inquiries and conduct medical examinations that are job related and consistent with business necessity.

3

Employers can require the use of safety equipment and mandate social distancing in the workplace.

4

Employers may delay the start date of an applicant who has been diagnosed with COVID-19 or has COVID-19 symptoms.

5

Employers may require a note from a health care provider certifying that an employee who had COVID-19 or symptoms can return.

6

Employers may adapt or shorten the ADA interactive process to grant a disabled employee's requested accommodation on a long-term or trial basis.

EEOC guidance for high risk employees

- Safety measures are top priority for employers
- Additional guidelines on return to work for at risk employees



Reasonable accommodations

- High-risk employees may qualify for accommodations
 - People 65 years and older
 - People with underlying conditions, including:
 - chronic lung disease or moderate to severe asthma
 - serious heart conditions
 - immunocompromised
 - severe obesity (body mass index [BMI] of 40 or higher)
 - diabetes
 - chronic kidney disease undergoing dialysis
 - liver disease
 - Pregnant women may also be more susceptible



Undue hardship under the ADA

- An employer may deny a reasonable accommodation, even to a high-risk employee, if it imposes an undue hardship to the organization.
- Employers and employees should work together to find a less burdensome alternative.
- “Direct threat” defense – if the employee risks health to themselves or others.



Monitor Information



- CDC, WHO, state/local health authorities.
- Employers can follow the guidelines and suggestions made by public health organizations without violating the federal employment laws.
- Check your state and local executive orders and guidance on accommodations.
- Consult your legal counsel.

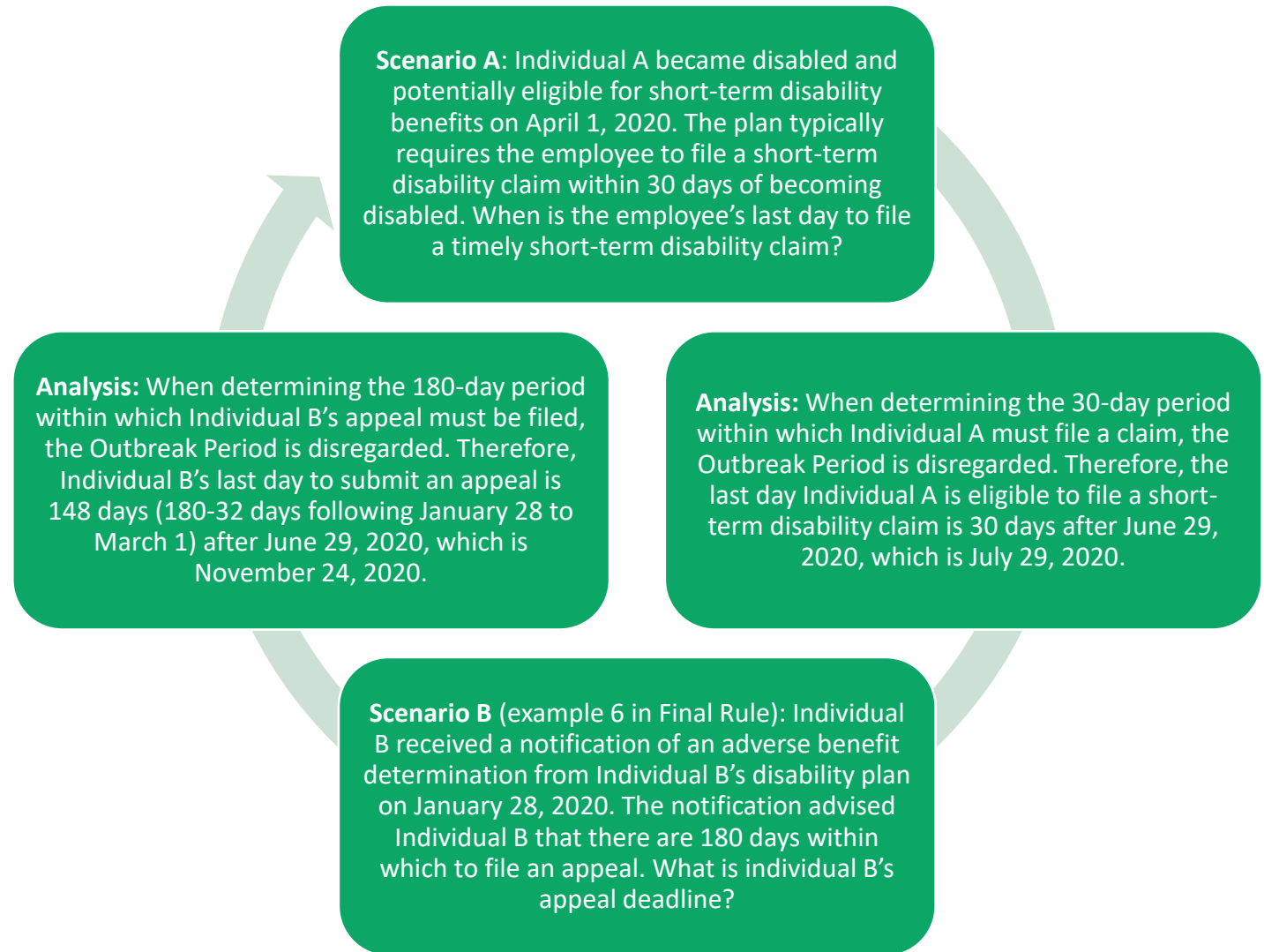
COVID-19 Developments

FFCRA – Benefit Overview

	FFCRA (EPSLA) SICK LEAVE	FFCRA (EPFMLEA) EXPANDED PAID FAMILY LEAVE
Eligible employees	FT & PT employees, no minimum hours	FT & PT employees, 30 calendar days
Total leave available	<ul style="list-style-type: none"> Full Time: 80 hours Part Time: # of hours employee works avg over 2-week period 	<ul style="list-style-type: none"> First two weeks: unpaid Weeks 3-12: paid
Benefit amount	<ul style="list-style-type: none"> \$511 cap per day/\$5,110 aggregate \$200 per day/\$2,000 aggregate depending on leave reason 	2/3 of employee's regular rate of pay capped at \$200 per day and \$10,000 in aggregate
Benefit payor	Employer	Employer
Tax credits	Yes	Yes
Job protected	Yes	Yes

ERISA Claims

The new rule suspends certain claim procedure time frames to “disregard” the COVID-19 “Outbreak Period,” which it defines as the period from March 1, 2020 until sixty days after the announced end of the National Emergency (subject to a potential end date change by the federal agencies in a future notice). The rule specifically impacts the following disability benefits timelines: 1. Date for an individual to file a benefit claim under the plan (29 CFR § 2560.503-1) and 2. Date for an individual to file an appeal of an adverse benefit determination (29 CFR § 2560.503-1(h)).



Employer Tip: Check your ERISA claims administration to ensure alignment with the new rule and update employee notifications where appropriate.

Furloughed Employees

Leave of Absence and Return-to-Work



WHAT IF AN EMPLOYEE IS ON LEAVE,
SUCH AS FMLA, AND BECOMES
FURLOUGHED?



WHAT IF A FURLOUGHED EMPLOYEE
NEEDS A NEW FMLA CLAIM? FFCRA?



WHAT IF AN EMPLOYEE HAS RETURNED
FROM FURLOUGH AND NEEDS FMLA
BUT NOW NO LONGER QUALIFIES?

DOL Q&A Summary

Highlights



FFCRA Documentation

- Employee name
- Dates for requested leave
- COVID-19 reason for leave
- Statement that employee is unable to work or telework because of COVID-19
- If requesting leave for childcare purpose, also need:
 - Employee must provide name of child
 - Name of school or childcare provider
 - Statement that no suitable person is available to provide care

Reinstatement rights

- General rule: employees on FFCRA leave must be returned to same or equivalent position, but not protected from actions that would have affected the employee if hadn't taken leave (e.g., layoff)
- May deny job restoration to key employees, if necessary, to prevent substantial and grievous economic injury to the operations
- Return from Expanded FMLA not required by employers with fewer than 25 employees under certain conditions

Intermittent use upon return

- May use FFCRA leave intermittently only if the employer and employee agree, and only for leave to care for child whose school or place of care is closed due to COVID-19
- Paid sick leave must be taken consecutively until the employee no longer has a qualifying reason

State COVID-19 Updates

Statutory Updates

State	Changes Overview	Effective Date
California	<ul style="list-style-type: none"> Added Leave Reason to SDI – Employees who are unable to work due to contracting or exposure to COVID-19, with proper medical certification Change to SDI Wait Period – One-week waiting period waived Added Leave Reason to PFL – Employees who are unable to work due to caring for a quarantined family member with COVID-19, with proper documentation 	At or before 3/12/20
New York	<ul style="list-style-type: none"> New Mandated Paid Sick LeaveAdded Leave Reason – Employee who is unable to work and is subject to an individualized mandatory or precautionary quarantine or isolation order due to COVID19 Amount of paid sick leave depends on employer size and whether a public or private entity Unpaid sick leave must be provided until the termination of any mandatory or precautionary quarantine or isolation order due to COVID-19 Job Protection – Employees must be restored to pre-leave position with same pay, other terms & conditions 	3/18/20
New York	<ul style="list-style-type: none"> Added Definition of Disability – inability to perform regular duties due to mandatory or precautionary quarantine or isolation order due to COVID-19 and when employee has exhausted all COVID-19 paid sick leave Change to Wait Period – Removed for DBL claims for employee subject to qualifying quarantine or isolation order Change in Benefit Amount / Maximum – difference between the max weekly family leave benefit & employee's average weekly wage from 'each covered employer' up to max benefit of \$2,043.92/week and combined total with PFL of \$2,884.62 Updated Form – to encompass COVID-19 quarantine or isolation order 	3/18/20; DBL changes impact employers with 99 or less employee
New York	<ul style="list-style-type: none"> Added Leave Reason – COVID19 related leave taken when employee is unable to work and is subject to mandatory or precautionary quarantine or isolation order (employers with 99 or less employees) or to provide care for a minor dependent child of the employee who is subject to mandatory or precautionary quarantine or isolation order (all private employers) Maximum Weekly Benefit - \$840.70 for PFL only – combined weekly with DBL for employee's own quarantine or isolation order \$2,884.62 Updated Form – to encompass COVID-19 quarantine or isolation order Effective 3/27/20, expansion of the definition of "serious health condition" to include a COVID19 diagnosis, regardless of whether the family member has undergone inpatient care or is subject to continuing treatment 	3/18/20; PFL to care for a quarantined minor dependent child applicable to all private employers

Non-COVID-19 Legislative Updates

New Mexico And Virginia Pregnancy Accommodation laws

Effective May 20, 2020 (NM) and July 1, 2020 (VA)

- Requires reasonable accommodations related to an employee's pregnancy, childbirth, or related conditions
- Must engage in good faith interactive process
- No “forced” leave
- Prohibits discrimination and retaliation
- Undue hardship analysis may apply
- NM law amends the New Mexico Human Rights Act
 - Applies to employers with 4 or more employees
- VA law amends the Virginia Human Rights Act
 - Applies to employers with 5 or more employees
 - Notice requirements
 - Significant penalties for noncompliance





New Jersey Temporary Disability Benefits – Organ and Bone Marrow Donors

Effective May 20, 2020

- Provides job protection for organ and bone marrow donors for the period of disability due to donation
- Eliminates the 7-day waiting period for donors

New Jersey Disability and Paid Family Leave Increases

Effective July 1, 2020

- Both NJ TDB and PFL increase weekly benefit rate up to 85% of employee's average weekly wage (capped at 70% of statewide average weekly wage)
- PFL (also referred to as Family Leave Insurance (FLI))
 - Increases benefit entitlement from 6 to 12 weeks
 - Intermittent benefits increase from 42 to 56 days
 - Employees permitted to take leave from one employer while continuing to work for another



California Paid Family Leave (PFL)

Effective July 1, 2020

- Increases benefit from 6 to 8 weeks
- **Note:** San Francisco Paid Parental Leave also increases from 6 to 8 weeks



Massachusetts PFML Proposed Regulations

Massachusetts PFML Proposed Regulations

458 CMR 2.00 updated on 5/14/2020

- 5/14/2020: Department of Family and Medical Leave (DFML) issued amendments to the Department's regulations at 458 CMR 2.00.
- 6/11/2020: DFML will hold a public hearing on the proposed amendments. Oral presentations are allowed. Written statements may also be submitted any time online prior to June 12, 2020 at 5:00 pm.
- Final version released: TBD

Definitions

Section 2.02

- **Completed Application** - an application for benefits that contains all of the required information from the covered individual pursuant to 458 CMR 2.08(2) and all of the information required from the employer pursuant to 458 CMR 2.08(6). The application for benefits shall be deemed complete when the Department receives the information required under 458 CMR 2.08(6) or 10 business days after the Department requests the information required under 458 CMR 2.08(6) from the employer, whichever is sooner.
- **Good Cause** - A demonstration by a party that a failure to comply with a requirement of M.G.L. c. 175M and 458 CMR 2.00 was due to circumstances beyond the party's control.
- **Intermittent Leave** – Intermittent leave shall be taken in increments of 15-minute intervals.
- **Job Protected Leave** - the period of time described in 458 CMR 2.16(1), immediately following the first date on which an employee commences the taking of any type of leave that is associated with a qualifying reason regardless of whether an application for benefits has been submitted to the Department in connection therewith or whether that leave is paid or unpaid. Employees who do not file an application for benefits with the Department but use any other type of leave paid or unpaid and associated with a qualifying reason, will have their leave run concurrently with the leave period provided in M.G.L. c. 175M

Employer Specific Changes

- Opting-In – Section 2.06
 - Application Process
 - Effective Dates
- Notification of Leave to Employer – Section 2.08
- Employer Reimbursements – Section 2.12



Private Plan Requirements

Section 2.07

- **Partial Exemption**
- **Contribution/Filing Requirements**
- **Effective Dates**
- **Appeals Process at the Private Plan Level**
- **Insurance Form Approval**
- **Private Plan Termination**
- **Intersect with State Plan**

Benefit Administration

(also applies to private plan administration)

- Application for Benefits: Section 2.08/Section 2.10
 - Timing/Notice Requirement
 - Consent Requirement
 - Certification/Attestation Contents
 - Employer/Designee Applications
 - Intermittent Leave Reporting/Extensions
 - Multiple Births in Benefit Year
- Notifications: Section 2.09
 - Approval of benefits
 - Denial of benefits
- Benefit Calculations: Section 2.12
 - Rate Changes
 - Offsets (including employer provided leave)
 - Waiting Period



Retaliation: Section 2.16

- Employee Fraud and Retaliation
- Employee Job Protection Presumed
- Prior Existing Employment Rules/Policies

DC Paid Family Leave Act

Benefits begin July 1, 2020



8 WEEKS

parental leave to bond
with a new child, including
adopted and foster children



6 WEEKS

family leave to care for a
sick family member



2 WEEKS

personal medical leave

Illinois School Activities Leave

Effective August 1, 2020



ADDS BEHAVIORAL AND ACADEMIC
MEETINGS AS REASONS FOR LEAVE



PROHIBITS TERMINATION OF AN
EMPLOYEE FOR USE OF THIS LEAVE

FFCRA Litigation

FMLA Retaliation

John Doe v. Dee Packaging Solutions, Inc

Eastern District of Pennsylvania



Employee with pre-existing medical condition alleges retaliation under the FMLA.

Jackson v. Midnight Express Power Boats, Inc.

Southern District of Florida



Ennin v. EFC Trade, Inc.

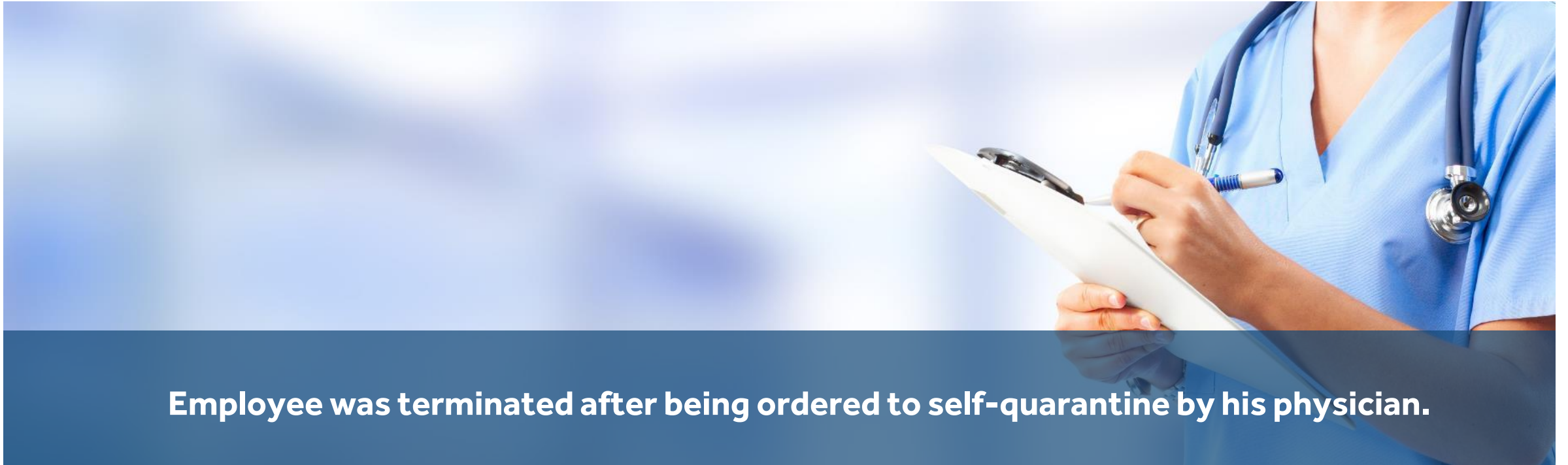
Case no. 2:20-cv-01817 (Southern District of Ohio)



Employee alleges she was furloughed in retaliation for taking FMLA.

Spells v. Physician and Tactical Healthcare Services LLC

District of New Jersey



Employee was terminated after being ordered to self-quarantine by his physician.

Angela M. Connor v. Professional Medical Billing, Inc.

Northern District of Indiana



FFCRA Litigation

ADA

Kristy v. Costco Wholesale Corporation

Santa Clara County, CA



Employee alleges he was constructively discharged after falsely being accused of having COVID-19

Benavides v. Board of Regents of the University of Michigan

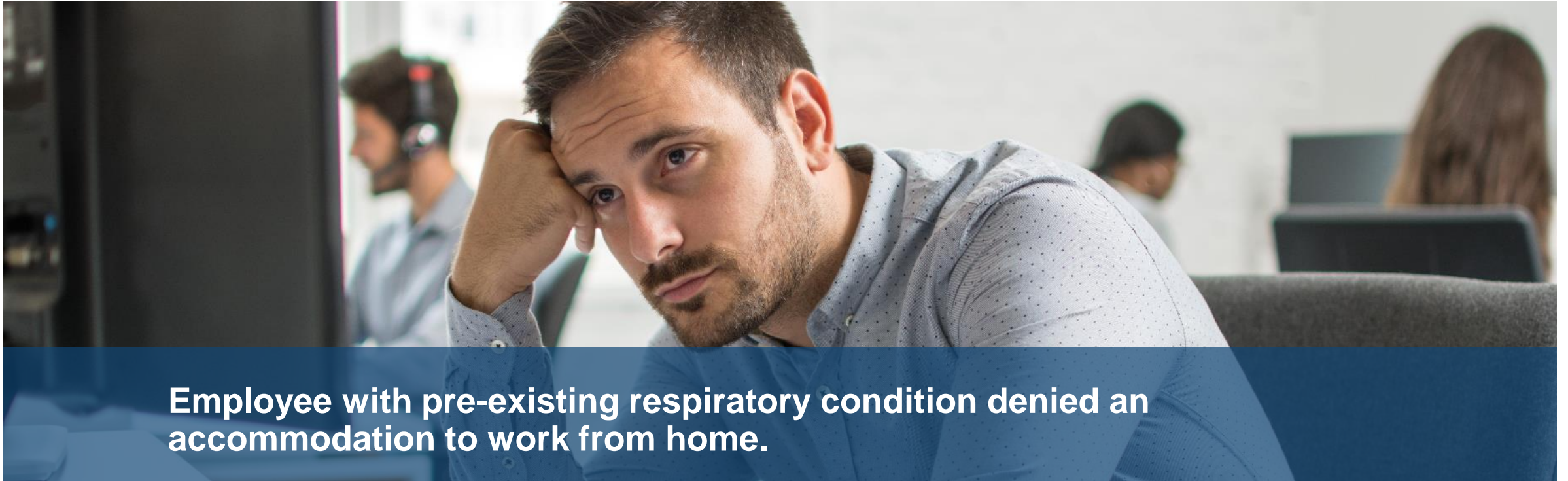
Case No. 20-000392-CD Cir. CT Washtenaw Cty, Mich.



Employee alleges she was separated because she was perceived to have COVID-19.

Frunzi v. Mei Group

Tarrant County, Texas



Employee with pre-existing respiratory condition denied an accommodation to work from home.

FFCRA Litigation

Agency Action

DOL/OHSA–COVID-19 Enforcement

- COVID-19 complaints are being filed with administrative agencies like the DOL and OSHA.
- The claims consist of retaliation allegations, non-payment of wages, and workplace safety violations.



Despite the COVID-19 outbreak these agencies are staffed and still processing complaints, so employers need to be prepared.

DOL v. RMS Electrical Services

Employee Awarded Reinstatement and Back Pay



- **Employee terminated from work after being denied leave.**

DOL v. Custom Machine and Fabrication Inc.


Employee Awarded \$1,060




- Employee denied paid sick leave under the Emergency Paid Sick Leave Act

Additional Resources

Coronavirus Resource Center

 Solutions ▾ Resources ▾ Who We Are Careers Contact Blog

Search 

Managing Employees' Leave of Absence During the Coronavirus Pandemic

The Coronavirus pandemic has created new, urgent challenges for employers. Below, we've documented some of the current leave of absence practices that our clients are using to help manage during this pandemic, as well as an FAQ based on our work with our clients.

NEW: ACOEM® COVID-19 Guidance for Employers and Businesses

Quarantined or Virus Exposed Employee FAQs

Commonly Asked Questions by Employees

Policy & Regulation Impacts

Latest Statutory Guideline Changes

Miscellaneous Leave of Absence Questions

NEW: ACOEM® COVID-19 Guidance for Employers and Businesses

+ Guidance for Employers & Businesses

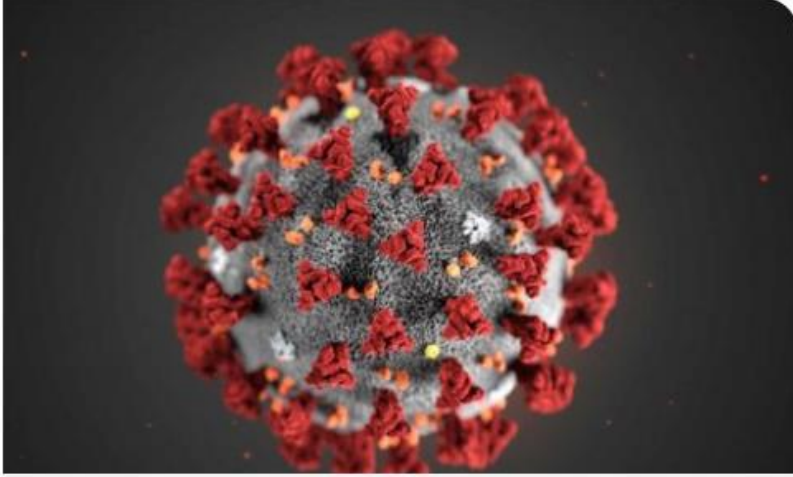
Additional Coronavirus Leave of Absence Resources

[Compliance Webinars & Podcasts](#)

[ReedGroup Blog](#)

<https://www.reedgroup.com/managing-employees-during-the-coronavirus-pandemic/>

Blog



The House Moves to Provide Paid Leave to Employees Impacted by COVID-19

On Friday evening, the House passed the Families First Coronavirus Response Act, H.R. 6201, which expands protections under the FMLA and expands paid leave time to employees impacted by the coronavirus crisis. Though the bill still has to make it through the Senate, some of the key components are expected to remain the same. The ... [Continued](#)

Our Bios



James Venable, VP of Employment Law

James Venable provides expertise in the areas of absence management compliance and employee relations counseling. Mr. Venable has more than 20 years of experience across senior roles in Legal, Human Resources, and Compliance from several Fortune 500 companies. Mr. Venable joined ReedGroup in April 2018 after serving as Vice President of Human Resources, Employee Relations, Labor Relations, Compliance and Environmental Health and Safety for Comcast, where he was responsible for engagement and labor relations activities for the company's West Division Business Unit.



Sue Woods, Senior Compliance Counsel

Sue Woods, JD, is Senior Compliance Counsel at ReedGroup where she focuses on product and operational compliance in leave and absence management solutions. Sue brings years of experience practicing labor and employment law, including advising employers on the intricacies of the Family and Medical Leave Act (FMLA), the Americans with Disabilities Act (ADA), Title VII, and state and local leave laws. By writing timely articles and speaking at seminars and events, Sue strives to break down tricky leave compliance issues into actionable, practical employment solutions.



Ashlee Brennan, Senior Compliance Counsel

Ashlee Brennan, JD, Senior Compliance Counsel has a strong background in leave of absence management compliance, conflict resolution, and cross-departmental problem solving. She has worked for several non-profit organizations assisting individuals with disabilities in a variety of roles prior to joining ReedGroup. Her work in the industry has specialized in statutory disability and paid family leave compliance while also providing solutions for FMLA, ADA, and ERISA concerns. Ms. Brennan graduated from Michigan State University College of Law in 2015, and is admitted to the Colorado Bar.

Thank you.