




COVID-19

UPDATE:
April 24, 2020

**Coronavirus / COVID-19
Response Team**


MILLER 
JOHNSON
Attorneys

1

MILLER 
JOHNSON
Attorneys

**Updated Employment
Guidance: FFCRA, EEOC
and OSHA**

» Sandy Andre
Cathy Tracey

MILLER 
JOHNSON
Attorneys

2

The materials and information have been prepared for informational purposes only. This is not legal advice, nor intended to create or constitute a lawyer–client relationship. Before acting on the basis of any information or material, readers who have specific questions or problems should consult their lawyer.

3

Today's Topics

1. Updated FFCRA Q&As
2. Updated EEOC Guidance
3. Updated OSHA Guidance Documents

4

1. Updated FFCRA Q&As

FFCRA: What's New

- Timeline:
 - Passed Into Law: 3/19/20
 - Q & A Guidance: 3/26/20
 - Final Temporary Rule: 4/1/20
- Q&A Guidance: Check early, check often
 - <https://www.dol.gov/agencies/whd/pandemic/ffcra-questions>
 - Organized by topic in addition to Q&A by number
 - As of this week: 88 Q&As

Q&As: # 80 - 85

- Compute number of hours EPSLA for employees with irregular schedules/hours
- Compute number of hours of Expanded FMLA for employees with irregular schedules/hours
- Compute my employee's "regular rate" for FFCRA purposes
- Compute regular rate for employee's who are paid a fixed salary
- Rounding
- What six-month period do I use to calculate the regular rate when my employee has used FFCRA paid leave during that time?

Q&As: # 86 - 88

- When can employer require an employee to use his/her existing leave policy and when does the choice belong to employee?
- When do "shelter in place" orders qualify as reason #1 under EPSLA?
- What am I (employee) entitled to recover if my employer refuses to provide me EPSLA/Expanded FMLA (as applicable) and the Department brings an enforcement action?

2. Updated EEOC Guidance

EEOC: What's New

- Framework: 2009 Pandemic Guidance
 - https://www.eeoc.gov/facts/pandemic_flu.html
 - New 2020 information appears in bold
- April 2017: Updated COVID-19 Technical Assistance Publication
 - https://www.eeoc.gov/eeoc/newsroom/wysk/wysk_ada_rehabilitaion_act_coronavirus.cfm?utm_content=&utm_medium=email&utm_name=&utm_source=govdelivery&utm_term=
 - Really good news: Date Stamp of last update

Disability-Related Inquires / Medical Exams

Q: May an employer administer a COVID-19 test before permitting employees to enter the workplace?

A: Must be job related and consistent with business necessity. Applying this standard to the current circumstances of the COVID-19 pandemic, employers may take steps to determine if employees entering the workplace have COVID-19 because an individual with the virus will pose a direct threat to the health of others.

Confidential Medical Information

■ Hiring and Onboarding

Q: May an employer postpone the start date or withdraw a job offer because the individual is 65 years old or pregnant, both of which place them in a higher risk from COVID-19?

A: No . . . However, an employer may choose to allow telework or to discuss with these individuals if they would like to postpone the start date.

Reasonable Accommodation

Q: In a workplace where all employees are required to telework during this time, should an employer postpone discussing a request from an employee with a disability for an accommodation that will not be needed until he returns to the workplace when mandatory telework ends?

A: Not necessarily; an employer may give higher priority to discussing requests for reasonable accommodation that are needed while teleworking.

Reasonable Accommodation

Q: Are the circumstances of the pandemic relevant to whether a requested accommodation can be denied because it poses an **undue hardship**?

A: Yes. . . In some instances, an accommodation that would not have posed an undue hardship prior to the pandemic may pose one now.

Reasonable Accommodation

Q: What types of **undue hardship** considerations may be relevant to determine if a requested accommodation poses “significant expense” during the COVID-19 pandemic?

A: The sudden loss of some or all of an employer’s income stream because of this pandemic is a relevant consideration.

- **But:** Even under current circumstances, there may be many no-cost or very low-cost accommodations.

Return to Work

Q: How will employers know what steps they can take consistent with the ADA to screen employees for COVID-19 when entering the workplace?

A: “Direct threat” is determined based on the best available objective medical evidence. Guidance from the CDC or other public health authorities is such evidence.

- CDC: Interim Guide for Critical Infrastructure Workers
 - <https://www.cdc.gov/coronavirus/2019-ncov/community/critical-workers/implementing-safety-practices.html>

3. Updated OSHA Guidance Documents

Michigan EO 2020-42: Stay at Home Order

- Requires businesses, operations, and government agencies that continue in-person work to develop a COVID-19 preparedness and response plan, consistent with recommendations in OSHA's *Guidance on Preparing Workplaces for COVID-19*
- <https://www.osha.gov/Publications/OSHA3990.pdf>

OSHA: What's New

- https://www.osha.gov/SLTC/covid-19/news_updates.html
- Alerts: COVID-19 Guidance for
 - Construction Workforce
 - Manufacturing Industry Workforce
 - Package Delivery Workforce
 - Retail Workers

Enforcement Memoranda

- Recording cases of COVID-19
- Required annual fit-testing in healthcare and all other industries
- Supply shortages of disposal N95 filtering facepiece respirators
- Use of respiratory protection equipment certified under standards of other countries
- Considering employer's good faith efforts to comply with OSHA-mandated training, audits, assessments, inspections, and testing

OSHA: What Could Be New?

- HR 6559: COVID-19 Every Worker Protection Act of 2020
 - Would require Secretary of Labor to issue an Emergency Temporary Standard within 7 days of enactment
 - Would require Secretary of Labor to promulgate a final standard within 24 months of enactment
 - Requiring businesses to take various actions designed to protect workers



Sandy Andre

616.831.1731

andres@millerjohnson.com



Cathy Tracey

616.831.1792

traceyc@millerjohnson.com

millerjohnson.com

45 Ottawa Ave SW
Suite 1100
Grand Rapids, MI 49503

100 W Michigan Ave
Suite 200
Kalamazoo, MI 49007