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Return to Work Analysis for Vulnerable Employees During COVID-19

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May 14, 2020

As phased reopening of the economy occurs during COVID-19, some employees may be fearful to return to work. While fear alone is not a sufficient legal basis to remain at home, a medically vulnerable employee or an employee caring for a medically vulnerable individual may be entitled to benefits under the Families First Coronavirus Response Act¹ or an accommodation under the Americans with Disabilities Act. The Family Medical Leave Act should be considered as well.

COVID-19 has brought unprecedented changes to the workplace and employers are grappling with how to make the return to work safer for employees. We addressed the OSHA guidelines in previous alerts [here](#) and [here](#). What is an employer's response when a returning employee is not medically vulnerable, but cares for an elderly parent who is medically vulnerable? What is an employer's response when the returning employee is medically vulnerable due to a diagnosis of cancer? Does that analysis change if the returning employee has asthma? There is no one-size-fits-all approach and employers must evaluate each employee's situation on a case-by-case basis.

Vulnerability Analysis Under the Families First Coronavirus Response Act (FFCRA)

The FFCRA sets out specific protections for both vulnerable employees and those caring for vulnerable individuals during COVID-19. Under the FFCRA, an employer with fewer than 500 employees must determine if a vulnerable employee or one caring for a vulnerable individual is eligible for paid sick leave under the Emergency Paid Sick Leave Act portion of the FFCRA. The FFCRA is effective for leave taken between April 1, 2020 to December 31, 2020 and an employee is eligible for paid sick leave regardless of the length of employment. Employers who provide paid sick leave under the FFCRA are [eligible](#) for reimbursement of those costs through refundable tax credits. Small businesses with less than 50 employees may be exempt from providing paid sick leave if doing so would jeopardize the viability of the [business](#).

To be entitled to paid sick leave under the FFCRA, the employee's need to stay at home must:

1. be due to the employee's particular vulnerability to COVID-19, or the particular vulnerability to COVID-19 of an individual for which the employee is a caregiver;
2. prevent the employee from working or teleworking; and
3. be upon the advice of a health care provider.

For example, an employee could be entitled to paid sick leave under the FFCRA if a health care provider advises the employee to stay home because the employee's lung cancer renders the employee particularly vulnerable to COVID-19. Or, the employee could be entitled to paid sick leave under the FFCRA if the employee is the caregiver for an 85-year-old who has COPD and has been deemed by a health care provider to be particularly vulnerable to COVID-19. However, the FFCRA does require the vulnerable individual for whom the employee is providing care to be an immediate family member or a person who resides in the employee's home for the employee to be entitled to paid sick leave. Under both scenarios, an employer should ask the employee for appropriate documentation from a health care provider regarding the need to remain home, but should not insist that the vulnerable employee or vulnerable individual physically visit a health care provider.

If an employee is eligible for benefits under the FFCRA due to the employee's vulnerable condition, the employer must provide up to two weeks of paid sick leave. For full-time employees, this would be up to 80 hours of paid sick leave, and for part-time employees this would be equivalent to the average number of hours worked by that employee for a two-week period. The employee must receive their regular rate of pay or the applicable state or federal minimum wage, whichever is higher, for a maximum of \$511 per day and \$5,110 in total over the entire paid sick leave period.

If an employee is eligible for benefits under the FFCRA due to caring for a vulnerable individual, the employee is entitled to two-thirds of the employee's regular rate of pay or the applicable state or federal minimum wage, whichever is higher. The employee is entitled to a maximum of \$200 per day and \$2,000 in total over the entire paid sick leave period.

Under the FFCRA, a full-time employee's paid sick leave is capped at 80 hours and a part-time employee's sick leave is capped at the two-week equivalent, regardless of the qualifying reasons for leave. For example, an employee who is advised by a health care provider to remain at home for their own health, and later may also need to remain at home as the caregiver for a vulnerable individual, is entitled to a maximum of 80 hours or the part-time equivalent in total for both qualifying scenarios. However, an employee who does not exhaust the maximum amount of leave can take any remaining leave if the employee again qualifies under the FFCRA. An employer and employee can also agree to allow an employee to supplement the paid sick leave to which the employee is entitled under the FFCRA by using any accrued vacation time or other employer leave benefits. If an employee is teleworking, an employer can agree to allow an employee to take paid sick leave under the FFCRA intermittently if, for example, the employee cannot work the employee's normal hours while teleworking. However, an employee who is not teleworking must take leave in full-day increments.

Vulnerable Employee Analysis under the FMLA

The FFCRA does not apply to employers with 500 or more employees. However, the Family Medical Leave Act (FMLA) (or similar state or local leave law) still applies to those employers. Employees are eligible to take FMLA leave if they:

- have worked for their employer for at least 12 months;
- have at least 1,250 hours of service over the previous 12 months; and
- work at a location where at least 50 employees are employed by the employer within 75 miles.

For eligible employees, the FMLA provides employees with up to twelve weeks of unpaid, job-protected leave when the employee has a serious health condition or the employee provides care to a spouse, child or parent with a serious health condition. A "serious health condition" is an illness, injury, impairment, or physical or mental condition that involves inpatient care or continuing treatment by a health care provider.

The CDC has determined people with underlying conditions are at greater risk for severe illness if infected with COVID-19. According to the CDC, those underlying conditions are individuals with chronic lung disease or moderate to severe asthma, those who have serious heart conditions, those who are immunocompromised, those with severe obesity (body mass index [BMI] of 40 or higher), those with diabetes, those with chronic kidney disease undergoing dialysis, and those with liver disease. Those underlying conditions are likely "serious health conditions" under the FMLA. Thus, if someone has one of those underlying conditions, the employee may request FMLA. Likewise, the FMLA allows an employee to take leave to care for someone with a serious health condition. Accordingly, if an employee is caring for someone with one of those underlying conditions, the employee may be eligible for FMLA. If an employee makes such an FMLA request, it should be accompanied by documentation. An employer should recognize that the employee's medical documentation to support the request may be delayed during the pandemic. Please note that even though the CDC has stated

that those who are over the age of 65 are at greater risk of severe illness, age alone does not trigger protection under the FMLA. Instead, it is the underlying serious health condition.

If an employee contracts COVID-19, it may be a serious health condition but the DOL has not stated that contraction of COVID-19 alone is a disability or a serious health condition. Those determinations must be made on a case-by-case basis.

Analysis Under the Americans with Disabilities Act (ADA) and Reasonable Accommodations

The ADA has not been amended due to COVID-19. The pandemic will, however, present novel issues under the ADA, including the need for employers to provide reasonable accommodations to vulnerable employees. The Equal Employment Opportunity Commission (EEOC) has not been clear in its guidance on this topic, and employers must act with care.

Employer Disability-Related Inquiry Under the ADA During COVID-19

The [EEOC guidance](#) issued on May 5, 2020 addressing the ADA and COVID-19 applies to employees who are particularly susceptible if exposed to the coronavirus or particularly vulnerable to worse medical outcomes if they contract COVID-19. Per the EEOC, an employer can make disability-related inquiries and conduct a medical examination of a vulnerable employee related to COVID-19 so long as the examination is job-related and consistent with business necessity. The results of these inquiries are to be analyzed in conjunction with the local COVID-19 threat level to evaluate the overall risk to the vulnerable employee, and each assessment must be conducted on an individual basis.

An employer cannot bar an employee from entering the workplace just because the employer is aware that the employee has a medical condition that places the employee in a high-risk category for COVID-19. If, however, the employer conducts an inquiry of the employee's specific medical conditions, the COVID-19 infection rates in the area, and other employee and/or case-specific factors, the employer may determine the employee is a "direct threat to self." The initial EEOC guidance released on May 5, 2020 allowed an employer to ask employees who were deemed a "direct threat to self" to remain at home. The EEOC quickly clarified that position, however, and noted on May 7, 2020 that the "direct threat" standard is high and that to meet this standard the employer must show a "significant risk of substantial harm" to the employee related to COVID-19. To meet this burden, the employer must analyze the safety measures already in place, such as PPE and social distancing, as well as the duration of the risk, the nature and severity of the potential harm, and the chance of harm based on the vulnerable employee's particular case and medical status.

If the employer's assessment reveals that the employee is a "direct threat to self," the employer must attempt to find a reasonable accommodation to reduce or eliminate the direct threat by engaging in the interactive process with the employee. Possible accommodations may include providing additional PPE such as masks, gloves, and gowns to the employee (even when not provided to other employees), the elimination of marginal job functions, moving the employee's work station, the temporary adjustment of work schedules, or the option to telework. If, however, these reasonable accommodations would result in undue hardship to the employer and the employee is a "direct threat to self," the employer can ask the employee to remain at home.

Vulnerable Employee Request for Accommodation During COVID-19

Employees who are medically vulnerable due to COVID-19 may also request an accommodation on their own by alerting the employer of their need for accommodation due to COVID-19. The employer and employee must engage in the interactive process and the analysis of an employee's request for a reasonable accommodation must be made on an individual basis, analyzing the factors listed above to determine whether accommodations

such as additional PPE, adjusted work schedules or location, or some other change could protect the employee without being an undue hardship to the employer.

There is no duty under the ADA for an employer to provide an accommodation to an employee based on any caregiving relationship the employee might have with someone with a disability. Therefore, an employee without a disability cannot request leave, or a modified work accommodation to allow them to care for an individual with a disability, including any disability due to COVID-19.

If you have any questions, please contact one of the authors or any member of Baker Donelson's [Labor & Employment Team](#). Also, visit the [Coronavirus \(COVID-19\): What You Need to Know information page](#) on our website.

¹ The FFCRA allows employers to exclude certain health care providers from paid sick or other leave benefits. For more information, please see our previous [alert](#).