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Employment Law Update

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Kevin P. Doyle

100 West 5th Street, Suite 900
Tulsa, Oklahoma 74103-4292
Phone: (918) 231-8284

kdoyle@praywalker.com

Work Tourism

Work tourism. The issue for employers:

State income tax withholding is necessary for the state an employee provides services and not the state where the employee resides.

Exception: a reciprocal agreement between an employee's home state and work state. This agreement allows residents in neighboring states to not have to file and pay income taxes on wages earned in the working state. Determine if a state has suspended or modified its rules.

<https://www.wipfli.com/-/media/wipfli/downloadable-files/tax-salt-coronavirus-tracker-other.pdf>



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Work Tourism

Work Tourism (continued)

- **Workers' compensation insurance.** States require that the employer register for and obtain workers' compensation insurance in the state where the employee is performing the services.
- **Unemployment insurance.** For remote workers employed by an out-of-state business, a state where the employee is working requires that the employer register for and pay the unemployment insurance premiums for the employee through the state unemployment insurance program where the employee is performing the services.



Telework

Teleworking out of pandemic necessity—and eliminating some essential job duties—

Precedent? Providing telework does not prevent employers from LATER asserting that onsite work is essential or that telework imposes a hardship. Support this position:

- Telework in response to COVID-19: Be clear--telework is provided only in response to the pandemic and is temporary---some essential functions will be temporarily suspended.
- Upon return to onsite work: Resumption of all essential job functions is expected.
- Job descriptions: Recite that onsite work is essential to a particular job--explain why.



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Mandatory Vaccines

EEOC Position:

- COVID-19. No current guidance.
- Flu. Vaccinations may be mandated for all employees (but often are not).

Exceptions: disability or religious accommodation requests. Employers should provide adequate notice.

2020-21 Flu Shot: Important to relieve expected burden on health care providers.



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Mandatory Vaccines

What are we watching for?

- Vaccine side effects will drive ADA accommodation discussions.
- State laws and anti-vaccination influences.
- Politics.
- A Gallup poll--if the FDA approved a free COVID-19 vaccine today, 35 percent of respondents would not receive the vaccine.

Recommendation: Employer organize and pay for vaccines but wait to commit based upon \$\$.



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New and Related Issues....

The Fair Labor Standards Act (FLSA):

- Telework-tracking work hours.
- Salary Basis.
- Fluctuating Workweek.

WARN Act: Is COVID a natural disaster, an exception to the notice requirements?

FMLA: New forms.

USDOL: Joint Employer Doctrine and FLSA

Business entities and individuals are liable for paying minimum wage and overtime premiums if they meet the definition of "employer"

FLSA defines employer as "any person acting directly or indirectly in the interest of an employer in relation to an employee."

Under the FLSA, employees may have one or more joint employers, in addition to their direct employer, that is jointly and severally liable with the primary employer to pay wages.

USDOL: Joint Employer Doctrine and FLSA

January 2020 Rule: In deciding whether a business or individual is an employer USDOL will consider whether a business:

- Hires and fires employees.
- Supervises and controls employees' work schedules or conditions of employment to a substantial degree.
- Determines employees' rate and method of payment.
- Maintains employment records.

USDOL: Joint Employer Doctrine and FLSA

Key feature of January 2020 Rule:

Reserving the right to control the employee's working conditions would not be enough to hold that a business is a “joint employer”.

Actually control would be needed. Staying out of the day-to-day employment decisions of their contractors and franchisees supports the position that the business is NOT a joint employer.

Prior Rule (Obama Administration): “economic reality” test.

September 2020: Federal judge strikes down USDOL January 2020 Joint Employer Rule. Now what?



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USDOL: Employee vs Contractor

Proposed Rule September 2020:

Proposed economic reality test, the DOL would consider whether a worker is in business for himself or herself and thus is an independent contractor, or is economically dependent on an entity for work and is an employee.

In making this determination, the DOL would identify two core factors:

- The nature and degree of the worker's control over the work.
- The worker's opportunity for profit or loss based on initiative or investment.



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USDOL: Employee vs Contractor

USDOL would also identify three additional factors that may serve as additional **guides** in the analysis:

- The amount of skill required for the work.
- The degree of permanence of the working relationship between the worker and the potential employer.
- Whether the work is part of an integrated unit of production.

USDOL: Employee vs Contractor

USDOL Core Factors

1. Nature and degree of the individual's control over the work. An individual is an independent contractor to the extent he or she exercises substantial control over key aspects of the performance of the work.

Examples:

- Setting his or her own work schedule.
- Choosing assignments.
- Working with little or no supervision.
- Being able to work for others, including a potential employer's competitors.



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USDOL: Employee vs Contractor

However, the individual is likely to be classified as an employee to the extent that a potential employer, as opposed to the individual, exercises substantial control over key aspects of the work, including through requirements that the individual work exclusively for it during the working relationship.

Businesses will not jeopardize the contractor relationship by requiring compliance with specific legal obligations, health and safety standards, insurance, contractually agreed-upon deadlines or quality control standards



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USDOL: Employee vs Contractor

2. The worker's opportunity for profit or loss based on initiative or investment—an individual is an independent contractor if he or she has an opportunity for profit or loss on either:

- The exercise of personal initiative, including managerial skill or business acumen.
- The management of investments in, or capital expenditure on, for example, helpers, equipment or materials.

Centers for Disease Control and Prevention (CDC)

Critical Infrastructure: Critical infrastructure workers who have been potentially exposed may continue to work if they are asymptomatic and the additional precautions are implemented.

Requiring Employees to notify their employer if they have been exposed, have symptoms, and/or have tested positive for the COVID-19 coronavirus.

- Employers may require any employee who becomes ill at work with COVID-19 coronavirus symptoms to notify their supervisor or other management.
- Employees with symptoms may be directed to remain at home until they are symptom-free for at least 24 hours.

Centers for Disease Control and Prevention (CDC)

Returning to Work:

Per CDC research:

- people with mild to moderate COVID-19 remain infectious no longer than 10 days after their symptoms began.
- People with more severe illness or those who are severely immunocompromised remain infectious no longer than 20 days after their symptoms began.



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Centers for Disease Control and Prevention (CDC)

Positive test results but no symptoms:

Persons with a positive test who never develop symptoms - isolation and other precautions can be discontinued 10 days after the date of their first positive RT-PCR test for SARS-CoV-2 RNA.

Equal Employment Opportunity Commission (EEOC)

A. Hiring

- Employers may screen applicants for symptoms of the COVID-19 after a conditional job offer, as long as all entering employees in that job category are also tested.
- Employers may take an applicant's temperature as part of a post-offer, pre-employment medical exam after you have made a conditional offer of employment.

Equal Employment Opportunity Commission (EEOC)

B. Delayed Start Date. Employers may delay the start date of an applicant who has COVID-19 or symptoms.

C. Withdraw Job Offer. Employers may withdraw a job offer when the employer needed the applicant to start immediately but the applicant has COVID-19 or symptoms.

D. Stay Home/Leave Work. Employers may ask an employee to stay home or leave work (seek medical attention and get tested) if the employee exhibits symptoms of COVID-19.

E. Temperature and Questions. Employers may take an employee's temperature at work to determine whether the employee might be infected. Employers may ask questions concerning symptoms and interactions with others with symptoms or a positive test.



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Occupation Safety & Health Administration (OSHA)

If a COVID-19 illness is determined to be work-related it should be recorded on OSHA Form 300.

Employers must conduct a reasonable and good faith investigation to determine if the COVID-19 illness is a recordable illness.

Record keeping and reporting requirements do not apply to employers with fewer than 10 employees at all times during the previous calendar year and employers in certain non-hazardous industries.

OSHA

The illness is recordable if:

1. The case of COVID-19 is confirmed - at least one respiratory specimen that tested positive for SARS-CoV-2, the virus that causes COVID-19.
2. The case is work-related - an event or exposure in the work environment either caused or contributed to the resulting condition or significantly aggravated a pre-existing injury or illness.
3. The case involves one or more of the general recording criteria:
 - a. death,
 - b. days away from work,
 - c. restricted work or transfer to another job,
 - d. medical treatment beyond first aid, or
 - e. loss of consciousness.



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OSHA

Considerations for determining whether the illness is work-related and thus reportable:

1. The reasonableness of the employer's investigation into work-relatedness. Employers, especially small employers, are not expected to undertake extensive medical inquiries. Upon learning of an employee's COVID-19 illness the employer should:
 - a. ask the employee how the employee believes he or she contracted the COVID-19 illness;
 - b. while respecting employee privacy, discuss with the employee his or her work and out-of-work activities that may have led to the COVID-19 illness; and
 - c. review the employee's work environment for potential SARS-CoV-2 exposure.

OSHA

Considerations for determining whether the illness is work-related and thus reportable (Continued)

2. The evidence available to the employer.
3. The evidence that a COVID-19 illness was contracted at work. OSHA lists the following guidance in determining whether the employee COVID-19 illness is work-related:
 - a. likely work-related when several cases develop among workers who work closely together and there is no alternative explanation.
 - b. likely work-related if it is contracted shortly after lengthy, close exposure to a particular customer or coworker who has a confirmed case of and there is no alternative explanation.

OSHA

Considerations for determining whether the illness is work-related and thus reportable (Continued)

3. The evidence that a COVID-19 illness was contracted at work. OSHA lists the following guidance in determining whether the employee COVID-19 illness is work-related:

c. likely work-related if the employee's job duties include having frequent, close exposure to the general public in a locality with ongoing community transmission and there is no alternative explanation.

d. likely not work-related if the employee is the only worker to contract COVID-19 in the employee's vicinity and the employee's job duties do not include having frequent contact with the general public, regardless of the rate of community spread.

OSHA

Considerations for determining whether the illness is work-related and thus reportable (Continued)

3. The evidence that a COVID-19 illness was contracted at work. OSHA lists the following guidance in determining whether the employee COVID-19 illness is work-related:

- e. An employee's COVID-19 illness is likely not work-related if the employee, outside the workplace, closely and frequently associates with someone (e.g., a family member, significant other, or close friend) who (1) has COVID-19; (2) is not a coworker, and (3) exposes the employee during the period in which the individual is likely infectious.
- f. Employers should give due weight to any evidence of causation, pertaining to the employee's illness, provided by medical providers, public health authorities, or the employee.



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OSHA

Employee fear: Employees are entitled to refuse to work if they believe they are in imminent danger.

Imminent Danger: “any conditions or practices in any place of employment which are such that a danger exists which can reasonably be expected to cause death or serious physical harm immediately or before the imminence of such danger can be eliminated through the enforcement procedures otherwise provided by this Act.”

- threat of death or serious physical harm
- a reasonable expectation that toxic substances or other health hazards are present, and exposure to them will shorten life or cause substantial reduction in physical or mental efficiency.

National Labor Relations Board (NLRB)

The NLRB is the federal agency responsible for administration and enforcement of the National Labor Relations Act (NLRA).

NLRA provides protection to employees in union and non-union settings. Employees are permitted to engage in concerted activity for mutual aid or protection.

NLRB examples of employee protected activity (protected from discipline or termination for engaging in such activity):

- talking with one or more employees about working conditions
- participating in a “concerted refusal to work” in unsafe conditions
- joining with co-workers to talk to the media about problems in your workplace



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Families First Coronavirus Relief Act (FFCRA)

Emergency Family and Medical Leave Expansion Act (EFMLEA)

EFMLEA expands the Family and Medical Leave Act (FMLA), allowing leave for eligible employees who can't work (or telework) because their minor child's school or childcare service is closed due to a COVID-19 emergency declared by a federal, state or local authority.

Note: Nothing in this legislation limits an employers ability to make decisions concerning staffing levels, including lay-offs, furloughs, reduction in hours, or reduction in pay levels (subject to FLSA requirements for related to minimum wage, overtime and exemptions). Employers should consider all federal stimulus loan criteria as a part of any staffing decisions.



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FFCRA - *Emergency Family and Medical Leave Expansion Act (EFMLEA)*

Effective date.

The expanded FMLA provisions take effect April 1, 2020 and expire on December 31, 2020.

Eligible Employees.

Eligible employees include employees who work for an employer with fewer than 500 employees and who have been on the payroll for at least 30 calendar days.



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FFCRA - Emergency Family and Medical Leave Expansion Act (EFMLEA)

Paid and Unpaid Leave.

- a. The first 10 days of this leave may be unpaid; however, employees may elect (shall not be required by the employer) to substitute available paid time off, such as vacation, personal or sick leave, during this leave.
- b. After the initial 10 days, employers must pay eligible employees at least two-thirds of the employees' regular rate of pay (as defined under the Fair Labor Standards Act) based on the number of hours the employees would otherwise have been scheduled to work. These paid-family-leave benefits are capped at \$200 a day (or \$10,000 total).



FFCRA - *Emergency Family and Medical Leave Expansion Act (EFMLEA)*

Exceptions –excluded employees.

Employers with fewer than 25 employees are not obligated to reinstate employees at the end of the leave if the employee's position has been eliminated due to economic conditions or other changes in operating conditions of the employer caused by COVID-19, and the employer is unable to reinstate the employee to an equivalent position.

Poster.

https://www.dol.gov/sites/dolgov/files/WHD/posters/FFCRA_Poster_WH1422_Non-Federal.pdf



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FFCRA - Paid Sick Leave

Emergency Paid Sick Leave Act

The Emergency Paid Sick Leave Act provides that, if employed by covered employers, employees:

- Receive up to 80 hours of paid sick leave at 100% of their pay if unable to work because the employee is quarantined, and/or experiencing COVID-19 symptoms, and seeking a medical diagnosis.
- Receive up to 80 hours of paid sick leave at 2/3 the employee's regular rate of pay if unable to work because of a need to care for a quarantined individual, to care for a child whose school is closed or child care provider is unavailable for reasons related to COVID-19, and/or the employee is experiencing substantially similar conditions as specified by the U.S. Department of HHS.
- May receive up to an additional ten weeks of ***EFMLEA*** leave at 2/3 the employee's regular rate of pay if the employee is unable to work due to a need to care for a child whose school is closed, or child care provider is unavailable for reasons related to COVID-19.

FFCRA - Paid Sick Leave

Covered Employers.

Employers with fewer than 500 employees and public agencies with at least one employee.

80 Hours of paid sick leave required.

Covered employers must provide full-time employees with up to 80 hours of paid sick leave if the employees are unable to work (or telework) due to COVID-19. Part-time employees are entitled to paid sick leave based on the number of hours the employees work, on average, over a two-week period.



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FFCRA - Paid Sick Leave

Qualifying reasons for paid sick leave.

1. The employee is subject to a federal, state, or local quarantine or isolation order related to COVID–19.
2. The employee has been advised by a health care provider to self-quarantine due to concerns related to COVID–19.
3. The employee is experiencing symptoms of COVID–19 and seeking a medical diagnosis.
4. The employee is caring for an individual who is subject to either number 1 or 2 above. (2/3 rate)

FFCRA - Paid Sick Leave

5. The employee is caring for his or her son or daughter if the school or place of care of the son or daughter has been closed, or the childcare provider of such son or daughter is unavailable, due to COVID–19 precautions. (2/3 rate)
6. The employee is experiencing any other substantially similar condition specified by the secretary of Health and Human Services in consultation with the Secretary of the Treasury and the Secretary of Labor. (2/3 rate)

FFCRA - Paid Sick Leave

Rate of pay applicable to each qualifying reason.

Paid sick leave must be paid at the employee's regular rate of pay, or minimum wage, whichever is greater, for leave taken for reasons 1-3 above.

An Employee taking leave for reasons 4-6 may be compensated at 2/3 of his or her regular rate of pay, or minimum wage, whichever is greater.

FFCRA - Paid Sick Leave

Use of available paid leave not required.

An employer may not require an employee to use other types of paid leave provided by the employer before the employee uses the paid sick time available under this law.

Effective date.

The-paid-sick leave provisions take effect April 1, 2020 and expires on December 31, 2020.

Poster.

https://www.dol.gov/sites/dolgov/files/WHD/posters/FFCRA_Poster_WH1422_Non-Federal.pdf



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FFCRA - Paid Sick Leave

September 2020, USDOL Clarification

- Reaffirm that employees may take FFCRA leave only when work is actually available to them.
- Reaffirm that employees must have their employer's approval to take intermittent FFCRA leave.
- Revise the definition of "health care provider" to include only employees who meet the definition of that term under the FMLA regulations or who are employed to provide diagnostic services, preventative services, treatment services or other services that are integrated with and necessary to the provision of patient care which, if not provided, would adversely impact patient care.



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FFCRA - Paid Sick Leave

September 2020, USDOL Clarification (continued)

- Clarify that employees must provide employers with documentation as soon as possible supporting their need for FFCRA leave.
- Employees are not eligible for FFCRA leave or unemployment benefits if they made the choice to keep their children home.

FFCRA - Tax Credits

Employers receive 100% reimbursement for paid leave pursuant to the Act.

- Health insurance costs are also included in the credit.
- Employers face no payroll tax liability.
- Self-employed individuals receive an equivalent credit.



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FFCRA - Tax Credits

Pursuant to the IRS:

Eligible employers who pay qualifying sick or child care leave will be able to retain an amount of the payroll taxes equal to the amount of qualifying sick and child care leave that they paid, rather than deposit the funds with the IRS.



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FFCRA – Small Business Exemption

Small businesses with fewer than 50 employees will be eligible for an exemption from the leave requirements relating to school closings or child care unavailability where the requirements would jeopardize the ability of the business to continue.

The exemption is intended to be available in circumstances threatening the viability of a business. Businesses seeking this exemption should immediately document why they believe they qualify for this exemption.



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Sources

- ***Centers for Disease Control and Prevention,***
<https://www.cdc.gov/coronavirus/2019-ncov/community/worker-safety-support/index.html>
- ***U.S. Dept. of Labor,*** March 24, 2020, “*Families First Coronavirus Response Act: Questions and Answers*”
- ***Internal Revenue Service, IR-2020-57,*** March 20, 2020, “*Treasury, IRS and Labor announce plan to implement Coronavirus-related paid leave for workers and tax credits for small and midsize businesses to swiftly recover the cost of providing Coronavirus-related Leave*”

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 - ☐ **Occupation Safety and Health Administration**
 - ☐ **National Labor Relations Board**



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Kevin P. Doyle
100 West 5th Street, Suite 900
Tulsa, Oklahoma 74103-4292
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