

When Your Essential Employees Are Afraid To Come To Work

By **Barbara Hoey and Nidhi Srivastava** (April 22, 2020, 4:56 PM EDT)

As the lockdowns, the stay-at-home orders and the seemingly endless stream of bad news about the COVID-19 pandemic now stretch into a second month, many essential businesses are finding themselves squeezed and faced with mounting staffing challenges.

On the one hand, they are acutely aware that they provide an essential service — whether it be in health care, banking or keeping your internet going. They must make sure that they have sufficient staff reporting to work so that they can provide this essential service effectively.

On the other hand, they are facing an increasingly nervous workforce. They are dealing with employees who are not sick or under a quarantine order, but are refusing to report to work, or are becoming creative about reasons why they need leave or should be allowed to work from home, even when other employees are not. Many want to stay home or out on leave until the pandemic is over, whenever that may be.

Here are some hypothetical examples of what essential businesses are facing:

- Fran, a healthy employee at a health care facility who is needed to handle patient admissions, says that she cannot report to work because she has a baby and does not want to be exposed to COVID-19 and possibly bring the virus home.
- Andy, an essential employee, refuses to report to work because he has asthma and he is concerned he may be at high risk of a severe infection if exposed to COVID-19. He demands to work from home, but his job requires him to handle documents that can only be accessed at work via the employer's computers.

These issues are complicated by the array of overlapping laws which entitle employees to leaves and accommodations, such as the Families First Coronavirus Response Act, or FFCRA, or other new state and local COVID-19-related leave laws; the Americans with Disabilities Act; and the Family and Medical Leave Act.



Barbara Hoey



Nidhi Srivastava

Employers do not want to prompt a lawsuit, and thus need to be cautious when navigating the various laws.

The examples given above prompt questions that do not lend themselves to easy answers. For example:

- As an essential business can you require, or should you mandate that healthy employees, such as Fran and Andy, report to work?
- What levels of accommodation are you required to provide? Does accommodating one person create an obligation to accommodate others with the same concerns?
- Can (or should) you terminate their employment if they refuse to report for work?
- Are you at risk of a potential claim in the future if you deny leave their leave requests?

Each situation must be addressed on a case-by-case basis. Employers need to ask pertinent questions in order to determine if a fearful employee has a valid basis for paid or unpaid leave, or some other accommodation.

Is Fran entitled to leave because of her fear of COVID-19?

As a general matter, fear of contracting or being exposed to COVID-19 is not a qualifying reason for leave under the FFCRA or other federal and state laws.

First, businesses that employ less than 500 employees should review the FFCRA. In the first example above, Fran does not fall into one of the six categories of FFCRA leave — i.e., she is not:

- Subject to a federal, state or local quarantine or isolation order related to COVID-19;
- Under advice from a health care provider to self-quarantine due to concerns related to COVID-19;
- Experiencing COVID-19 symptoms and seeking a medical diagnosis;
- Caring for an individual subject to a government order or medically advised self-quarantine as described above;
- Caring for a child whose school or place of care is closed (or child care provider is unavailable); or
- Experiencing any other substantially similar condition.[1]

Second, all employers should consider state and federal disability and leave laws, such as the ADA and the FMLA. Fran does not have a disability or a serious health condition, and her baby also does not have a disability. As such, she would not be entitled to leave or an accommodation under either law.

Third, employers should look at state and local laws. New York state and New York City laws, for example, define disability more broadly than under the ADA, but Fran still would likely not meet those definitions.

Therefore, Fran is required to perform her job, and may be told to report to work. If Fran refuses, she could be offered paid time off. After her PTO is exhausted, she can be required to report to work.

If an employee in this scenario exhausts PTO and still refuses to report to work, employers can consider discipline up to and including termination, for failing to perform job duties or violating attendance policies. This may be a difficult choice, but essential employees, such as Fran, cannot be excused from reporting to work out of fear.

What if Fran has a compromised infant or elderly parent at home?

Employers are also confronted with well employees who want to work from home, because of a family member who may be susceptible to COVID-19.

This is a difficult question, but legally, this person also does not have a basis to refuse to report to work. As an employer, you must review this checklist:

- Is the employee ill, or does the employee have a disability?
- If your business has less than 500 employees, does the employee fall within one of the six FFCRA leave categories?
- Does the employee qualify for leave under the FMLA, as he or she is not asking for time off to provide care for a family member who is ill?
- Does the employee have a family member with a disability, which is not clear with the well infant or well elderly person — and keeping in mind that the ADA does not require that an employer provide accommodations for a family member of an employee?[2]

In the end, the fact that Fran has a potentially compromised infant or elderly family member at home does not entitle her to leave, and she may be required to report to work.

What about Andy, the well employee with asthma or some other underlying health condition?

A well employee who claims he cannot work because of an underlying condition which puts him at higher risk if exposed to COVID-19 presents a challenging situation. On the one hand, the underlying condition alone does not prevent the employee from working, as one assumes that this person was working before COVID-19 erupted. On the other hand, the employee is concerned about being exposed to COVID-19 because of his or her health condition.

Does this employee qualify for leave under the FFCRA? Under this law, employees may request leave if they are unable to work because they have "been advised by a healthcare provider to self-quarantine due to concerns related to COVID-19." U.S. Department of Labor regulations advise that this means the health care provider has a belief that the employee has COVID-19, may have COVID-19 or is particularly vulnerable to COVID-19.[3]

What documentation should you require as the employer? The DOL regulations advise that the employee must first provide the dates for which leave is requested, a qualifying reason for leave, and a signed statement that he or she is unable to work due to the qualified reason.[4]

The written statement should be clear that the employee cannot work because of a health condition which makes that employee particularly susceptible to COVID-19. Broad statements that fail to demonstrate that the employee cannot physically report to work, or that fail to provide the name of the health care provider or the specific advice to self-quarantine will not suffice.

What if the employer is not subject to the FFCRA? For employers not subject to the FFCRA, they need to consider the ADA and review state and city laws. For example, in New York, the standard for a qualifying leave is stricter — employees must have a quarantine order from a local health authority in order to request New York paid sick leave.[5]

Los Angeles also enacted an employee-friendly supplemental paid sick leave law. The ordinance covers, among others, an employee who "takes time off work because the employee is at least 65 years old or has a health condition such as heart disease, asthma, lung disease, diabetes, kidney disease, or weakened immune system," and "an employee who takes time off due to a COVID-19 infection or because a public health official or health care provider requires or recommends the employee isolate or self-quarantine to prevent the spread of COVID-19." [6]

If Fran or Andy exhaust their leave, is a further accommodation required?

Employers will find themselves back in a dilemma if an essential employee exhausts emergency sick leave under federal, state or city law, and still refuses to return to work. At what point does employment termination become an option?

Here, employers need to be mindful that the U.S. Equal Employment Opportunity Commission requires employers to provide reasonable accommodations to an employee with a disability, to allow the employee to perform essential job functions, absent undue hardship.

A number of questions need to be answered:

- Does the employee have a disability under the law?
- Does the disability prevent the employee from performing his or her job duties?
- If the answer to either of the above questions is yes, can you accommodate the employee, and still allow the employee to perform those essential functions?

In earlier examples, the employees were both well and nervous, or had jobs which could not be done from home. In either case, an accommodation is not necessary under the law, or not possible. If an employee cannot do the job from home, the law does not require an employer to remove an essential function.[7]

What accommodations should an employer consider and offer? The EEOC recommends possible changes to the work environment, "such as designating one-way aisles (and) using plexiglass, tables or other barriers to ensure minimum distances between customers and coworkers." [8]

Employers may also consider staggering shifts and modifying the employee's schedule, or moving the employee to a different position temporarily. The employer can also provide face masks and gloves, if available, to limit exposure. While the DOL and EEOC encourage employers to be flexible, employees

must still be able to perform essential job functions and adhere to an employer's attendance policy.

Employers faced with employee requests for COVID-19 related leave must review each request on a case-by-case basis, considering all facts before making a decision to deny or grant leave, or making any other employment decision related to the employee.

In any case, as the employer you must document all of the accommodations offered to the employee, since if the employee refuses an accommodation, you can prove you have satisfied your legal obligations to the employee.

Conclusion

This pandemic presents new and unique challenges every day, as employers navigate new laws, new government orders, new Centers for Disease Control and Prevention guidance and increasingly nervous employees. COVID-19 also does not fit neatly into the framework of existing laws and regulations, such as the original FMLA and the ADA.

These issues will persist, as the summer may present a new wave of COVID-19 cases. Essential businesses find themselves between a rock and hard place — having to balance the need to protect employees from COVID-19, while also ensuring that the workforce is maintained in order to keep business afloat and serve customers or patients.

The best practice is to follow and stay up to date on the laws, be consistent, and document the basis of staffing decisions. This will allow essential businesses to continue providing essential services, mitigate risks and be fair to their essential employees.

Barbara Hoey is a partner and co-chair of the labor and employment practice group at Kelley Drye & Warren LLP.

Nidhi Srivastava is an associate at the firm.

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[1] H.R. 6201 § 5102(a).

[2] See EEOC Questions and Answers About the Association Provision of the Americans with Disabilities Act (2005), https://www.eeoc.gov/facts/association_ada.html.

[3] 29 C.F.R. § 826.20(a)(3)(i)(C).

[4] 29 C.F.R. § 826.100.

[5] See Obtaining an Order for Mandatory Or Precautionary Quarantine Under Governor Cuomo's New COVID-19 Paid Sick Leave Law (2020), <https://paidfamilyleave.ny.gov/system/files/documents/2020/03/obtaining-order-of-quarantine.pdf>.

[6] L.A.M.C., Article 5-27HH, Chap. XX, § 200.54.

[7] See EEOC The Americans With Disabilities Act: Applying Performance And Conduct Standards To Employees With Disabilities (2008), <https://www.eeoc.gov/facts/performance-conduct.html>.

[8] See EEOC What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws (2020), https://www.eeoc.gov/eeoc/newsroom/wysk/wysk_ada_rehabilitaion_act_coronavirus.cfm.