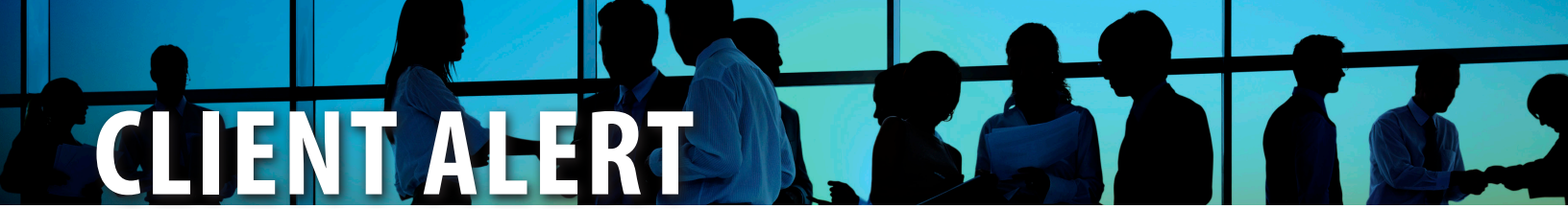

COVID-19 SURGE MEDICAL LEAVE REFRESHER FOR EMPLOYERS

by Chelsea L. Canaday

In 2020, as COVID-19 cases were mounting, many employers were tasked with following the brand-new Families First Coronavirus Response Act ("FFCRA"), which provided a framework and tax credits for paid leave, including paid sick leave, for certain reasons pertaining to COVID-19. In 2021, as COVID-19 cases declined, this paid leave became voluntary, and employers who elected to continue the paid leave programs also continued to receive tax credits. However, on September 30, 2021, these tax credits end, which may lead employers to scale back any paid sick leave policies that they continued under the FFCRA—and this is coming at a time when positive COVID-19 cases are on the rise again.

Given the end of the FFCRA tax credit and the recent covid surge, employers should take some time to brush up on their obligations to provide leave or sick, medical, and other family leave accommodations to employees.

Americans with Disabilities Act ("ADA")

Post-COVID conditions such as "long COVID" may rise to the level of a disability requiring accommodation. As stated by President Biden, "Many Americans who seemingly recovered from the virus still face lingering challenges like breathing problems, brain fog, chronic pain and fatigue . . . These conditions can sometimes . . . rise to the level of a disability." And the Office for Civil Rights of the Department of Health and Human Services and the Civil Rights Division of the Department of Justice recently released guidance explaining that the condition of "long COVID" can qualify as a disability under the ADA. Therefore, if there is an employee who states that they are having such symptoms, the employer should be sure to engage in the interactive process to determine on a case-by-case basis whether the employee has a disability, and whether the employer can provide them with a reasonable accommodation. This reasonable accommodation does not have to be leave from work or work from home—other options may be considered—and an employer does not have to provide an accommodation that creates an undue hardship.

In addition, many employers see an uptick in accommodation requests in general due to COVID-19, such as requests to work from home or to take leave. However, per the Equal Employment Opportunity Commission ("EEOC"), if an employer permitted employees to work from home or to take leave in 2020, that does not mean the employer is required to do so now. "[I]f there is a disability-related limitation, but the employer can effectively address the need with another form of reasonable accommodation at the workplace, then the employer can choose that alternative to telework. . . . The fact that an employer temporarily excused performance of one or more essential functions when it closed the workplace and enabled employees to telework to protect their safety from COVID-19, or otherwise chose to permit telework, does not mean that the employer permanently changed a job's essential functions, that telework is always a feasible accommodation, or that it does not pose an undue hardship." *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws.* Each analysis should be an individualized assessment with an interactive dialogue and medical documentation (in most instances). Unless the disability and/or the need for accommodation is obvious, the employee must provide documentation to establish that the employee has an ADA disability, and that the disability necessitates a reasonable accommodation. Circumstances may be different now than they were in 2020 or early 2021. For example, the employer may have called its staff back full time, and/or the employer may have set up increased safety measures for in-office work. Nevertheless, the fact that the employer did permit remote work, even if temporarily, should factor into future accommodation request considerations. For example, as noted by the EEOC, "the period of providing telework because of the COVID-19 pandemic could serve as a trial period that showed whether or not this employee with a disability could satisfactorily perform all essential functions while working remotely and the employer should consider any new requests in light of this information."

Finally, an employer is not required to grant employee requests for leave or another accommodation to avoid exposing a family member. The ADA does not require that an employer accommodate an employee without a disability based on the disability-related needs of a family member or other person with whom they are associated. Of course, an employer is free to provide such flexibilities if it chooses to do so.

Family and Medical Leave Act ("FMLA")

COVID-19, even if an asymptomatic case or one of short duration, is potentially a serious medical condition under the FMLA. Therefore, if an employee with COVID-19 does not have a disabling condition qualifying them for an accommodation under the ADA, they may still qualify for FMLA—or an employee with severe symptoms or "long COVID" may be covered under both the ADA and the FMLA. Businesses that are a covered employer under the FMLA should remember to provide the required notices to employees who cannot perform the essential functions of their position and are asking for time off on a continuous or intermittent basis. Again, this is the case if the employee tests positive, even if they are asymptomatic. The medical certification obtained from the employee will determine whether the leave is designated as FMLA leave.

Remember, the FMLA protects eligible employees who are incapacitated by a serious health condition, as may be the case with COVID-19 in some instances, or who are needed to care for covered family members who are incapacitated by a serious health condition. Leave taken by an employee solely to avoid exposure to COVID-19 is not protected under the FMLA.

Sick Leave

Federal law generally does not require employers to provide paid leave to employees who are absent from work because they are sick with COVID-19, have been exposed to someone with COVID-19, or are caring for someone with COVID-19. However, some federal contractors may be required to provide such leave to employees under certain circumstances, such as if the employee or a family member is sick with COVID-19 or seeking care related to COVID-19. In addition, certain state or local laws may also have different requirements, which employers must also consider when determining their obligation to provide paid sick leave.

With the end of FFCRA tax credits, employers that continued to voluntarily provide sick leave in 2021 should evaluate whether they can afford to continue to offer paid sick leave without the tax credit, or if this policy will end. Assuming the business will not continue to offer additional paid sick time for specific COVID-19 reasons (and if the business is not required to do so under state and local laws), the employer should review whether its traditional sick leave policies are non-punitive. Employers should also consistently enforce their sick leave policy when employees are sick or quarantined, consider unpaid time off, and consider all ADA and FMLA implications before terminating an employee for failing to attend work due to illness.

State and Local Requirements

Each jurisdiction may also have its own state and local leave laws and requirements. Employers should review those laws as well and ensure compliance.

Given the foregoing, employers have a maze to navigate when it comes to employee leave and accommodations pertaining to COVID-19. Should you have any questions on how to comply with the ADA or FMLA, or how to handle employee sick leave, Dickinson Wright's employment attorneys can assist.

ABOUT THE AUTHOR

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