

# Coronavirus (COVID-19) Update

## FNA Insurance Services, Inc. Workforce Absence Management

March 13, 2020

**The Coronavirus (COVID-19) is impacting businesses of all sizes, industries and locales. Our goal is to provide you information that is currently available regarding COVID-19's impact to leave of absence programs, but please be advised that this information is subject to change as the situation continues to evolve.**

This update memo covers the following:

- 1) Colorado Emergency Mandate for Paid Sick Leave
- 2) New Jersey Guidance on Employee Leave Benefits During COVID-19
- 3) Is Mandatory Temperature Testing Allowable?
- 4) "Pandemic pay" – Interim Solution?

### ***Colorado Emergency Mandate for Paid Sick Leave – Effective March 11, 2020***

The Colorado Department of Labor and Employment (CDLE) has immediately adopted a paid sick leave mandate, which impacts select industries, including:

- a. Leisure and hospitality
- b. Food services
- c. Child care
- d. Education, including transportation, food service, and related work with educational establishments
- e. Home health, if working with elderly, disabled ill, or otherwise high-risk individuals
- f. Nursing homes
- g. Community living facilities

Employers in these industries must provide up to four (4) days of paid sick leave for an employee with flu-like symptoms and who is being tested for COVID-19. The paid sick leave will end if the employee tests negative for COVID-19.

If the employer already provides at least four days of paid sick time, the employer is not required to provide more. However, of important note, if the employee exhausts paid sick time already provided by their employer, and then subsequently develops flu-like symptoms and is being

tested for COVID-19, then the employee is entitled to the four days of paid sick leave under this temporary mandate.

Furthermore, CDLE clarified that the four days of paid sick leave are not intended to be wage replacement if an employee tests positive for COVID-19 and subsequently requires quarantine and extended time away from work.

These four days of paid sick leave are to be paid at the employee's regular rate of pay. If the employee's rate of pay varies, employers must use the employee's average daily pay for the preceding month.

As of now, this paid sick leave mandate will remain in effect for 30 days. If the state of emergency continues, this mandate may be extended.

### *New Jersey Guidance on Employee Leave Benefits during COVID-19*

Before today, California and Washington were the only two states that had expanded statutory leave programs to account for COVID-19:

**California:** Approved expansion of State Disability Insurance (SDI) and Paid Family Leave (PFL) benefits for those quarantined due to or diagnosed with COVID-19.

**Washington:** Approved expansion of Paid Family Medical Leave (PFML) benefits for those diagnosed with COVID-19.

The New Jersey Department of Labor (DOL) has provided the following guidance and clarification:

- Employees symptomatic of COVID-19 or test positive of COVID-19 and are unable to work 1) may be entitled to use available sick leave under New Jersey Earned Sick Leave Law, 2) may be eligible for Temporary Disability Benefits (TDB), and 3) may be eligible for Workers' Compensation benefits.
- Employees may use available paid sick leave under New Jersey Earned Sick Leave Law if 1) they are told to self-quarantine due to COVID-19, 2) they are unable to work because of a workplace closure by order of a public official due to COVID-19, 3) they are unable to work due to the closure of a child's school by order of a public official due to COVID-19, or 4) they are caring for a relative who is symptomatic of or has been diagnosed with COVID-19.
- Employees may be eligible for Family Leave Insurance (FLI) if they are caring for a family member who is symptomatic of or has been diagnosed with COVID-19.

This marks the third state with statutory leave programs that have expanded the scope of benefits to account for COVID-19.

The New Jersey DOL has also expanded unemployment benefits in the following ways:

- Employees may be eligible for full or partial unemployment benefits if the employee's work hours are reduced by more than 20 percent a week due to COVID-19.
- Employees may be eligible for unemployment benefits if the employee is sent home from work because of the possibility that the employee was exposed to COVID-19. The DOL clarified that this would be considered a temporary layoff and employees seeking unemployment benefits would be relieved of the obligation to show they are actively seeking work.

### *Is Mandatory Temperature Testing Allowable?*

While employers may be compelled to force temperature testing of employees to assess potential COVID-19 exposure, employers are cautioned to think about ADA implications. The EEOC considers taking an employee's temperature as a "medical examination." The ADA prohibits employers from requiring medical examinations or making disability-related decisions unless:

- the employer can clearly demonstrate that the exam is "job related and consistent with business necessity" and/or
- there is objective, reasonable belief that the employee(s) pose(s) a "direct threat" to the health and safety of themselves or others that cannot be dealt with via any other reasonable accommodation.

To reiterate, the assessment of whether an employee poses a direct threat in the workplace must be based on objective, factual information, versus "subjective perceptions ... [or] irrational fears."

Although COVID-19 is now declared to be a pandemic, the rules above do not change unless:

- the employee's symptoms become more severe than seasonal flu or H1N1, or
- the pandemic becomes widespread in the community as assessed by state or local health officials or the CDC.

On March 11, 2020, the CDC suggested checking employees' temperatures daily in Seattle and Silicon Valley. However, to date, the Department of Labor (DOL) continues to refer to the EEOC's guidelines for disability-related inquiries and medical examinations as noted above.

### *"Pandemic Pay" – Interim Solution?*

The media is quickly picking up on what very large companies are doing to provide employees with pay if he/she is away from work in light of COVID-19. **It should be noted that this primarily impacts non-exempt hourly employees where telecommuting is not an option.** Please keep FLSA in mind and pay considerations for exempt employees.

To date, large companies appear to be doing the following (generalized observations):

1. Provide employees with two weeks of pay while not working to mirror the two weeks of quarantine/isolation.
2. Generally, qualifying reasons include:
  - a. Self-quarantine or medical quarantine
  - b. Care for a family member impacted by COVID-19
  - c. Closure of child's school or childcare facility
3. Paid time under this program is *separate* from any other paid time off (including paid sick leave) the employee may already have access to.
4. Policy clarifies that:
  - a. Paid time under this program is intended for a limited period of time and any changes to the program is at the discretion of organizational leadership.
  - b. At the conclusion of the program, any remaining unused paid time will become immediately unavailable (as the paid time was expressly for COVID-19-related purposes).
  - c. If the employee should leave the company at the conclusion of this program, any remaining unused paid time will not be paid out to the employee.
  - d. Time will be paid at the employee's normal rate of pay.

In working with our customers, not all companies are necessarily providing employees with *more* time; some are relying on the paid time off programs they already provide, and yet others are only providing paid time off to those who otherwise currently do not have access.

To operationalize this program, employers are configuring new time codes or pay codes into their HRIS/Payroll systems. In tandem, employers are establishing processes for how employees (or their managers) log in the time in HRIS/Payroll systems.

Since collecting documentation to substantiate the time away is challenging, some clients are considering attestation statements that employees must sign before being paid this "pandemic pay." Please also keep in mind that employers subject to local paid sick leave requirements may, in some circumstances, not be allowed to request documentation.

Employees who expect to be gone from work for more than three days should follow normal leave of absence procedures.

All of the above items should be taken into consideration should you contemplate pursuing a "pandemic pay" type of program.

**Summary of COVID-19 Impacts to Absence Management**

Topic	Status	Notes
FMLA	No change (yet)	<p>As of now, need to satisfy definition of “serious health condition” and all other FMLA provisions apply.</p> <p>House Bill submitted that would expand FMLA significantly in light of the current COVID-19 situation. Not yet passed.</p>
ADA	No change	<p>Need to satisfy definition of “disability”</p> <p>Limitations to medical examinations/inquiries</p>
Short Term Disability (group insurance)	No change	<p>Nearly all STD insurance carriers are remaining status quo in claims handling procedures; will review each claim submitted on a case-by-case basis.</p> <p>Need to satisfy definition of disability under the plan.</p>
Statutory Disability and Paid Family Medical Leave	Updated	<p>California – SDI and PFL expansion                      Washington – PFML expansion                      New Jersey – TDB and FLI expansion</p>
Paid Sick Leave (state or municipal required)	No change (yet)	<p>Generally entitles employees to use paid sick leave for own health condition, family health condition, as well as being away from work due to child’s school or childcare facility closure.</p> <p>Colorado – emergency sick leave mandate for select industries</p> <p>House Bill submitted to provide national paid sick leave. Not yet passed.</p>
Paid Time Off (employer programs)	Fluid	<p>Different employers are approaching this in different ways:  <i>(not an exhaustive list)</i></p> <ol style="list-style-type: none"> <li>1. Do not provide more paid time off; employees use paid time off they currently have access to</li> <li>2. Provide paid sick time to those who currently do not have access to paid sick time – may be in addition to other paid time off the employee currently has access to</li> <li>3. Provide “relief pay” or “pandemic pay” – largely akin to #2 above</li> </ol>