

Employment law questions about federal pandemic laws

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For the first time, federal law requires employers to pay employees' sick leave, quadruples unemployment compensation, lets independent contractors get unemployment compensation, requires some workers to continue to work during a pandemic or risk losing their jobs, and gives some law firms a free lunch worth thousands. All these things and more are in the new laws — the Families First Coronavirus Response Act and the Paycheck Protection Program — created in response to the COVID-19 pandemic.

This article focuses on frequently asked questions about these laws and their answers.

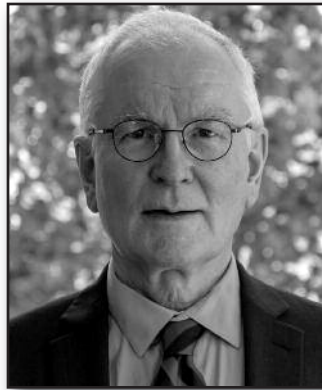
Can an employee who was fired for taking paid sick leave under FFRCA sue his or her employer?

Yes, although this takes some explaining.

FFRCRA requires employers to provide employees paid sick leave (Emergency Paid Sick Leave Act) and paid expanded family and medical leave (Emergency Family and Medical Leave Expansion Act or Family and Medical Leave Expansion Act [FMLA+]).¹ The laws apply to public and private employers with fewer than 500 employees.² Emergency responders and health-care providers are not eligible for either leave.³ Most federal employees are not eligible for FMLA+.

An employee is eligible for paid sick leave regardless of how long he has worked for his employer. To receive FMLA+, however, the employee must have worked at least 30 days. An employer with fewer than 50 employees can be exempted from paying sick leave or FMLA+.⁴

An employee is eligible for paid sick leave during her first two weeks of leave for the six reasons that follow. She is eligible for



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paid FMLA+ in weeks three through 12 only for reason 5.

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 medical diagnosis from a health-care provider;
4. The employee is caring for an individual who is subject to an order as described in this paragraph (a)(1)(i) or directed as described [in reason 1 or 2 above];
5. The employee is caring for his or her son or daughter whose school or place of care has been closed for a period of time, whether by order of a state or local official or authority or at the decision of the individual school or place of care, or the child-care provider of such son or daughter is unavailable, for reasons related to COVID-19; or
6. The employee has a substantially similar condition as specified by the secretary of Health and Human Services.⁵

Paid sick leave law is enforced in the same manner as FLSA, with attorney fees and liquidated (“double”) damages for willful violation.

EPSLA and FMLA+ were enacted on March 18 and became effective on April 2. The Department of Labor began enforcing them on April 16.

An employer is prohibited from firing, disciplining, or discriminating against any employee who took paid sick leave under EPSLA. The same applies to employer re-terminations against an employee who filed any complaint or instituted any proceeding against the employer regarding EPSLA's paid sick leave.⁶

Private causes of action for FMLA+ interference and retaliation are available against employers having more than 49 employees.⁷

Is COVID-19 disease a disability under the Americans with Disability Act?

The U.S. Equal Employment Opportunity Commission stated in March 2020 that it was unsure whether COVID-19 is a disability.⁸ To me, it appears that the disease meets the ADA definition at 42 USC § 12102 and 29 C.F.R. § 1630.1.

The infection affects a body system — the respiratory system. It substantially limits the major life activity of operating a major bodily function — the respiratory system. It could also be regarded as a disability because the impairment is not both minor and transient (less than six months).⁹

Can an employer fire an employee for having COVID-19 or because the employer thinks that the employee is infected with COVID-19?

No, presuming the employee was an “otherwise qualified employee under ADA and a physician expected the infected employee’s return to work within six months, that firing would violate ADA. ADA would, under those circumstances, require the employer to provide leave until the employee could return to work.¹⁰

If the employer thought an employee was infected with COVID-19 but the employee was not actually infected, there is no ADA violation if employee seeks an accommodation for the infection that is being regarded as a disability.

EEOC considers a person infected with COVID-19 to be a direct threat to himself and others at work.¹¹ As a result, an employer can require its employees to answer questions about COVID-19 exposure, and it can take its employees’ body temperature. An employer could legally fire an employee who refused to have his temperature taken

or answer questions about COVID-19 exposure. This presumes the employer subjected all employees to these tests and questions or that it limited testing to only certain employees based on criteria that used the best-available, objective, medical evidence.

Can an employee refuse to work because of unsafe working conditions involving COVID-19 that are likely to cause death?

Yes. OSHA requires an employer to “furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees.”¹² The employee could not sue her employer but could only file an Occupational Safety and Health Administration complaint for prosecution.

Seeking a remedy from the courts for an unsafe working environment has not succeeded. A Smithfield Foods, Inc. employee and the Rural Community Workers Alliance sued Smithfield Foods alleging that the defendant and its meatpacking plant in Milan, Missouri, failed to adequately protect workers from the virus that causes COVID-19. The judge ruled against the worker, finding that the plant was following the joint guidance issued in April 2020 by OSHA and the Centers for Disease Control and Prevention.¹³

The court declared that OSHA was in a better position than it to determine whether the plant was complying with the guidance.

Can I take leave from work because I care for a person who has preexisting conditions that puts him at higher risk if he contracted COVID-19?

Yes, under the paid sick leave law, an employee is entitled to up to two weeks’ leave to care for an individual who is subject to a quarantine order or an individual advised by a health-care provider to self quarantine related to COVID-19. [See reasons 2 and 4 in the previous list.]

This may require a doctor’s statement that the caregiver or the person with the preexisting conditions should be quarantined.

For leave beyond two weeks? The family-care provision of the regular FMLA allows

time off for an employee to care for an immediate family member with a serious health condition. A serious health condition is “an illness, injury, impairment or physical or mental condition that involves inpatient care (defined as an overnight stay in a hospital, hospice or residential medical care facility; any overnight admission to such facilities is an automatic trigger for FMLA eligibility) or continuing treatment by a health-care provider.”¹⁴

FMLA could only be helpful, therefore, if the preexisting conditions of the person at risk were a serious health condition. (This is not common, however.)

Trying to avoid a COVID-19 infection alone would not be a serious health condition permitting FMLA leave.

What can a person do if he is denied unemployment compensation?

FFRCA supercharges unemployment compensation benefits.¹⁵ In the 2008 economic collapse, the federals rained money on large banks. In the 2020 pandemic, the federals trickled money on the unemployed. The program also allows unemployed, independent contractors to get compensation¹⁶ and, in Louisiana, it can quadruple unemployment compensation.

This, however, has crippled the Louisiana Workforce Commission as it tries to process numerous claims. If a client’s claim is denied or it appears denied, I suggest you review posts on the Louisiana Coronavirus Unemployment Legal Advice Group Facebook page for advice. Then phone the Workforce Commission. Failing that, file a formal appeal to the commission’s Appeals Unit.

Still nothing? File suit.

Can a solo law firm without any employees get a forgivable loan through the Paycheck Protection Program?

Yes. Originally, the program administered by the Small Business Administration targeted businesses with fewer than 500 employees. In its second iteration, it was broadened to include those without employees.¹⁷

For a solo law firm without employees, the loan amount is calculated from the business’s net income on its 2019 income tax return and Schedule C, line 31.¹⁸ The

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Jesse Lee Wimberly IV

Jesse Lee Wimberly IV died on May 13, 2020, from injuries he sustained in a single-car accident while driving his antique Corvette. He was 39 years old.

An LAJ member, Wimberly earned his bachelor's degree from Louisiana State University in Baton Rouge and his J.D. degree from Loyola University New Orleans College of Law. He began practicing law with his father, Jesse L. Wimberly III, at the Wimberly Law Firm in Madisonville. Both were LAJ members.

His obituary said that he "immediately showed his incredible ability as an attorney handling hundreds of cases both simple and complex to excellent conclusions. Not only did Jesse's clients love him, but he also had the ability to make friends with his opponents. Many attorneys expressed how pleased they were to be able to work with him again on new cases."

The obituary also described him as a "true sportsman" who had a special love of

the water and was an "accomplished wakeboarder, scuba diver, and fisherman." He also enjoyed motorcycling, paddle boarding, and just about any activity that let him spend time outdoors.

An "avid animal lover," Wimberly was a supporter of the St. Tammany Humane Society. He enjoyed wood-working and working with his hands, and he built custom furniture.

"Jesse knew that his life was blessed, and he never took it for granted," the obituary said. "Because of this and his beautiful heart, he always tried to share his blessings with others. ... Jesse was a man of character and would do the right thing even when no one was watching. Jesse understood the value of love and his giving heart and bright smile were a beacon to us all."

In addition to his father, his survivors include his mother, Linda Erving; stepmother, Alysha Black Wimberly; siblings, Jonathan, Lauren, Jacob, Brandon, and Jesse; as well as other relatives and countless friends.

Unemployment law questions

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attorney can receive an amount equal to 2.5/12 of that income; that is equivalent to 2.5 months of income.

The attorney must use at least 75 percent of the loan on wages to get partial forgiveness.¹⁹ If a remainder of the loan is used for mortgage interest, rent, or utilities, then that amount may also be forgiven.

My business bank and my credit union were not taking applications for PPP loans in early May, and the funds may run out as they did in the first round. But if I get a loan? Looks sweet to me.

Endnotes

1. 29 C.F.R. §§826.10 - 826.160.
2. 29 C.F.R. § 826.40.
3. 29 C.F.R. § 826.30.
4. 29 C.F.R. § 826.40(b).
5. 29 C.F.R. § 826.20.
6. 29 C.F.R. § 826.150.
7. 29 C.F.R. §§ 826.40(b), 826.151.
8. EEOC. Transcript of March 27, 2020, outreach webinar. www.eeoc.gov/transcript_march_27_2020_outreach_webinar; view video at www.youtube.com/watch?v=i8bHOtOffJU&t=1589s.
9. 29 C.F.R. § 1630.15(f).
10. EEOC. 5/9/2016. Employer provided leave and the Americans with Disabilities Act. www.eeoc.gov/laws/guidance/employer_provided_leave_and_americans_disabilities_act.
11. EEOC. 3/27/2020. Transcript of March 27, 2020, outreach webinar.
12. 29 USC § 654.
13. *Rural Comm. Workers Alliance et al. v. Smithfield Foods, Inc.* 5/20/2020. Order. #20-6063, W.D. Mo.
14. 29 C.F.R. §§ 825.113, 825.114.
15. 20 C.F.R. §§ 625.1 - 625.30.
16. 20 C.F.R. § 625.5.
17. 85 FR 21747, 21749 (4/20/2020).
18. *Id.*
19. 85 FR 21747, 21750.