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LAW OFFICES

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*News and Information for Clients and Friends*


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# Common Questions Among Employees as States Begin to Roll Back COVID Shelter-In-Place Orders

By Lorrie T. Peeters

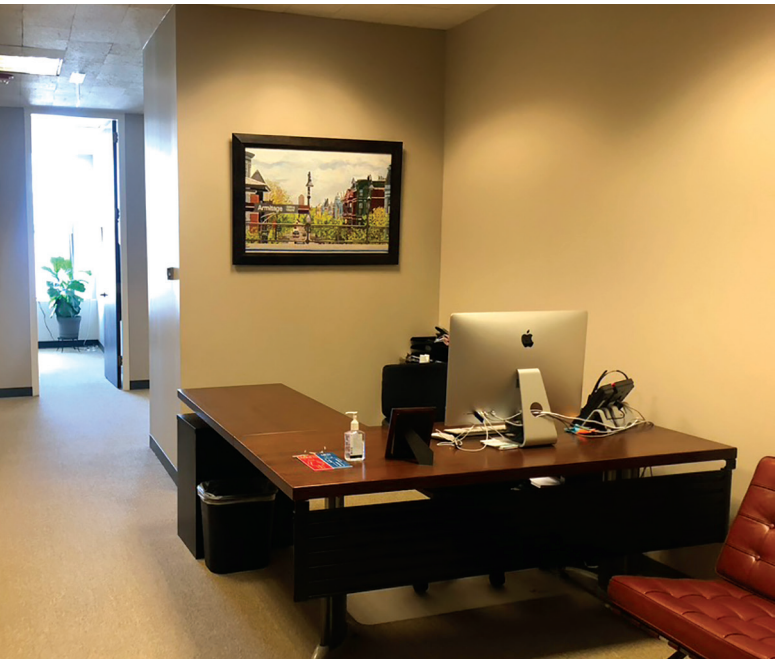
The past few months have been a turbulent time for the nation's workers. As states begin to "reopen," employees will continue to face difficult and confusing choices. Our Firm is committed to representing workers who face discipline or termination during the pandemic crisis, or who believe their rights have been otherwise violated during this time. For more detailed information, please visit our website at www.caffarelli.com or contact our office for a phone consultation with an attorney.

**My workplace has reopened and wants me to come back, but I am nervous. Can my employer fire me if I don't return to the office?**

This is a very difficult scenario, since most employment is "at will." Generally, just being nervous about returning to the workplace during this pandemic will not give you job-protected grounds for refusing to work, particularly if it is not feasible for you to continue to work from home or remain furloughed. Still, you may have some options - particularly if you and other employees have grounds to believe that returning to the workplace is unsafe and your employer is not acting in accordance with social distancing, PPE, and other safety and hygiene recommendations relating to COVID. At the federal level, employees have enhanced rights under the recently-passed Families First Coronavirus Response Act (FFCRA) and may qualify for job-protected leave under certain circumstances. The National Labor Relations Act (NLRA) and Occupational Safety and Health Act (OSHA) also provide protections and remedies for workers who face potentially unsafe work conditions and who refuse to work as a result.

**What if I have a condition that makes me more susceptible to complications if I catch the virus?**

Individuals with a disability and/or health condition rendering them particularly "at risk" of COVID complications may have special protections and rights under the Americans with Disabilities Act (ADA) and Family and Medical Leave Act (FMLA), including the expanded rights under the FFCRA. Depending on the circumstances, your employer may be required to provide you with an appropriate accommodation, including permission to work from home, adjust hours, or continue leave if available.



**My employer says I can't work from home, but I still have no childcare options.**

The FFCRA may provide you with job-protected leave from work if you are caring for a child whose school or care facility is closed because of coronavirus.

**I am due overtime, commissions, bonuses, and/or vacation pay but my employer is not paying me.**

Federal and state wage and hour laws require that your employer pay you for all the time that you spend performing work. If your employer knows or has reason to know that you are working, you must receive compensation – including overtime compensation, if appropriate, for hours worked in excess of forty per week (or eight per day, in California). Likewise, both Illinois and California law require that you are paid all earned wages, salaries, commissions, bonus payments, and vacation pay; nothing about the COVID shutdown automatically alters any prior agreements for these types of compensation.

**My employer refuses to reimburse me for work-related expenses incurred because of the COVID shutdowns.**

Many employees have incurred additional expenses as a result of working from home. These might include additional expenses for home internet, equipment, phone usage, subscriptions, and similar work-related items or services. Both Illinois and California law require that employers provide prompt expense reimbursements for any amounts that you have paid related to services performed for your employer.

## The USDOL's New Joint Employer Rule Amid the COVID-19 Pandemic

By Katherine E. Stryker

With an economic downturn on the horizon, it is important to consider the effect that this crisis will have on litigation; specifically, an employee's ability to collect back pay from their employer for wage violations. Collecting back pay from an employer that is going bankrupt often proves to be a losing battle. Therefore, it is crucial that there are avenues for an employee to recover wages in this situation, such as turning to joint employer liability.

Businesses are increasingly turning to a business model that utilizes temporary agencies to outsource work to third parties. Historically, this business model has opened the door for wage violations. Large corporations that are outsourcing work often turn a blind eye to workplace violations and, instead, shift liability to the smaller agency that is providing the workers.

In this scenario, the joint employer rule may apply. If two affiliated companies are found to be joint employers under the rule, both companies are held jointly and severally liable for wage violations. After decades of precedent from the U.S. Supreme Court, the U.S. Department of Labor ("USDOL") recently adopted its own test to determine joint employer liability under the Fair Labor Standards Act ("FLSA"). The test analyzes four factors for determining whether two businesses jointly employ workers. The four factors include whether the potential joint employer actually exercises power to hire or fire the employee, supervise and control the employee's work schedules or conditions of employment, determine the employee's rate and method of payment, and maintain the employee's employment records. The test largely strays away from the broader and more lenient interpretation of joint employer liability that courts implemented for years.

The USDOL's new rule went into effect on March 16, 2020—the same time local governments across the country started ordering the closures of businesses in an effort to maintain the COVID-19 outbreak. The implementation of this new rule, in combination with the COVID-19 pandemic, makes an already devastating circumstance even more difficult. The segments of the workforce that are the most economically vulnerable due to the pandemic are the same ones that are most affected by this rule: hourly, low-wage, and temporary workers. Needless to say, this new rule severely limits the circumstances in which many workers can collect back wages for wage violations.

In light of this dilemma, 18 Democratic state attorneys general ("AG"), including AGs from Illinois and California, filed a lawsuit in the Southern District of New York against the USDOL, requesting the judge to declare that the rule is arbitrary and capricious, and to vacate and set aside the rule. The AGs allege that the regulation will result in businesses being deemed joint employers "only in the narrowest circumstances," undermines the core purpose of the FLSA, and contradicts 75 years of judicial precedent. Illinois AG, Kwame Raoul, urged the USDOL to immediately stop the implementation of the rule, stating in a press release that "implementing a rule that strips protections from workers is particularly unconscionable during the COVID-19 crisis." On June 1, 2020, Judge Gregory H. Woods denied the USDOL's motion to dismiss, allowing the suit to continue.

In response to the USDOL's rule, the Illinois DOL issued a proposed regulation on joint employment liability under the Illinois Minimum Wage Law. The proposed rule establishes five factors to determine whether a joint employment relationship exists, which more closely resembles the decades-old, expansive and more lenient interpretation of joint employer liability. The Illinois DOL is taking comments on this proposed rule until July 6, 2020.

## Options for Paid Leave for Summer Child Care Amid the Pandemic

By Katherine E. Stryker

As we are faced with the reality that the ongoing pandemic will largely disrupt our normal summer plans, many working parents who usually rely on day camps for child care during the summer are struggling to figure out alternative plans. If you are a working parent faced with this dilemma, there are two key provisions of the recently enacted Families First Coronavirus Response Act (FFCRA) that you should be aware of: The Emergency Paid Sick Leave Act (EPSLA) and the expansion of the Family and Medical Leave Act (FMLA).

The EPSLA, among other things, provides employees up to two weeks of paid leave at two-thirds the employee's regular pay if the

## Options for Paid Leave for Summer Child Care Amid the Pandemic (cont.)

employee has to care for a child whose school or child care provider is closed or unavailable due to COVID-19. Similarly, under the FFCRA's expansion of the FMLA, eligible employees are entitled to up to 10 weeks of paid leave at two-thirds the employee's regular pay for the same reason. An employee can take leave under both the EPSLA and FMLA, for a total of 12 weeks of paid leave.

Here are some **FAQ** for employees trying to navigate this law:

**What information do I need to give my employer?**

Exercising the right to take paid leave under the FFCRA can be as simple as providing your employer, either orally or in writing, your name, the dates you are seeking leave, the reason for the leave, and a statement that you are unable to work due to that reason. Additionally, you should provide the name of your child, the name of the school, place of care, or child care provider that has closed or become unavailable, and a statement that no other suitable person is available to care for your child.

**Am I an eligible employee for paid leave?**

Generally, the provisions of the FFCRA apply to employers with fewer than 500 employees. Under the EPSLA, all employees of covered employers are eligible. Under the expanded FMLA, you must have been employed for at least 30 calendar days to be eligible.

**What if I have already used FMLA leave prior to the FFCRA being enacted?**

You are eligible to take two weeks of paid leave under the EPSLA regardless of how much FMLA leave you have already taken. However, if you have already exhausted all of your FMLA leave for the current 12-month period, you are not entitled to any additional leave under the FFCRA.

**Do I need to show that my child was actually enrolled in summer camp before requesting leave under the FFCRA?**

As of now, there does not seem to be a definitive answer to this question. However, the Department of Labor's guidelines do not suggest that this is a requirement for leave.

If you have additional questions, or believe your employer has violated your rights to leave or pay under the FFCRA, contact our office to schedule a consultation with an attorney.

## Proposed Federal Laws Would Expand Workers' Rights

By Madeline K. Engel

Two proposed pieces of federal legislation, if passed, will provide for marked improvements in protections available to pregnant and many other workers.

The Pregnant Workers Fairness Act ("PWFA") will require private employers with 15 or more employees and all public employers to provide reasonable accommodations for prospective and current employees with pregnancy or childbirth related work limitations and/or medical conditions. Importantly, the PWFA would prohibit employers from requiring these employees to take leave where another accommodation is available. This legislation would fill a gap in existing federal protections for pregnant workers, which do not currently include any stand-alone obligation to accommodate pregnancy-related limitations in the workplace. While some pregnant workers may be eligible for federally protected job leave when they cannot work, doing so often reduces or eliminates the time available for leave after the birth of a child, either to recover from childbirth or bond with a new baby. The legislation passed in committee in January and will advance to the House for a vote.

Separately, the House has passed the Forced Arbitration Injustice Repeal ("FAIR") Act, which seeks to bar mandatory arbitration of employment, civil rights, and consumer claims against corporations. Corporations are increasingly availing themselves of mandatory arbitration clauses in employment relationships and terms of use for consumer products and services. These agreements close the courthouse doors to employees and consumers, and often bar potential plaintiffs from utilizing class action procedures to join similar claims together in one action. Businesses use these agreements to shield themselves from the full scope of liability and the exposure of a public proceeding in court for unlawful employment and other practices. This is particularly so in the wake of the Supreme Court's 2019 decision in *Epic Systems v. Lewis*, which upheld the use of arbitration agreements, including class waivers, in the employment context. The FAIR Act would restore workers' and consumers' to hold companies fully and publicly accountable for their actions in court.