

# Civil Rights & Employment

## Workers' Rights and the Coronavirus

We hope that you and yours are safe and well and during this unprecedented moment.

**Cohen Milstein is a law firm specializing in class action litigation on behalf of employees and other groups of individuals. If you have questions related to the issues raised above, or believe you and your colleagues' workplace rights have been violated in connection with the COVID-19 pandemic, you can reach out to us via e-mail at [information@cohenmilstein.com](mailto:information@cohenmilstein.com).**

**Q: I have incurred employment-related expenses (desk, computer, phone and internet service) resulting from a direction from the employer to work from home during the coronavirus pandemic. Am I entitled to reimbursement?**

A: Your employer is responsible for the expenses necessary for you to do your job at home. Generally, your employer must reimburse you for those expenses during the week when you incur them. However, federal and many state laws require reimbursement only if the expenses bring you below the federal or state minimum wage or cut into your overtime pay. Some states, such as California, require you be paid for all the employment related expenses in addition to your regular wages.

**Q: I am a delivery worker with very long hours but not being paid overtime. What am I entitled to?**

A: Drivers and others delivery workers are entitled to overtime in most instances. This means that you must be paid time and one half for all hours over 40 in a workweek under federal and most state laws. Some states, such as California (8 hours in a day) or Colorado (12 hours in a day) require overtime be paid based on daily hours, not just weekly hours.

**Q: Most of my pay is in tips for food deliveries I am making to people staying at home due to the coronavirus pandemic. Should my employer pay me the minimum wage?**

A: Tipped employees' minimum cash wage varies significantly from state to state. Some states require tipped workers be paid the full state or local minimum wage. Other states and federal law allow the employer to pay a lower minimum cash wage under certain circumstances. In all instances, the tips belong to the employee and the employer has no right to keep any portion of the tips.

**Q: I work in a business deemed essential, and I am required to report to work, and have contact with the public (e.g. in a grocery store, or delivering food from a restaurant). Given CDC guidelines, I need a mask, gloves, and hand sanitizer to perform my job safely, but my employer says it's up to me to buy any supplies I want. Is my employer required to provide these items for me? Or reimburse me if I buy them myself?**

A: During this COVID-19 pandemic, most essential workers cannot safely perform their job without proper personal protective equipment (PPE). Your employer should provide these safety-related items at no expense to you. Unlike other job expenses discussed in question 1 above, PPE should always be provided by the employer at no cost. If not, the employer is in violation of state or federal wage and occupational safety law.

**Q: What constitutes compensable hours worked when you are working from home due to the coronavirus?**

A: All time that you spend performing work is compensable time. That includes anything "integral" to your work. For example, if you must log in to your employer's computer system in order to work, the time spent logging into the system is part of your work time. If your employer asks you to perform tasks outside your usual workday, those additional tasks are additional compensable time. However, if you take time during your usual workday to attend to personal business, that may be deducted from your compensable time.

**Q: I am working long hours as a homecare worker. Am I entitled to overtime pay?**

A: If you are employed by someone other than the household where you provide homecare services, then you are entitled to overtime when you work over 40 hours per week. You may have more than one "joint employers," such as the person who you provide homecare services for and an agency that pays you and controls other parts of your employment. In those circumstances, you are entitled to be paid overtime by the agency.

**Q: I heard employees are entitled to paid sick leave under new laws enacted to address the spread of COVID-19. My employer told me that, if I get sick, I'll first have to exhaust my leave before I can avail myself of paid sick time. Is that right?**

A: No. The Families First Coronavirus Response Act (FFCRA) provides up to 80 hours of paid leave in addition to any other leave you are entitled to. Your employer may not require you to use accrued paid time off—like vacation or sick leave—before the paid sick leave kicks in. But,

if you and your employer agree, you may use your accrued leave to supplement the amount you receive from paid sick leave under the FFCRA.

**Q: The new paid sick leave program is very confusing to me. How do I qualify and what should I expect from my employer?**

A: To qualify for paid sick leave under the FFCRA, you have to be prevented from working either on location or from home due to a COVID-19 qualifying reason such as you: 1) are subject to a quarantine or isolation order related to coronavirus; 2) have been told to self-quarantine by a health care provider related to coronavirus; 3) are experiencing [symptoms of COVID-19](#); 4) are caring for someone subject to a quarantine or isolation order, or someone who has been told to self-quarantine by a health care provider related to coronavirus; or 5) are caring for your child if the child's school or childcare has been closed or is otherwise unavailable because of coronavirus. Some employers are not covered, and their employees are not entitled to sick leave, including large employers (with 500+ employees), and employers of health care or emergency workers. If you meet the above criteria, you are eligible to receive up to two weeks' wages—up to 80 hours—at your regular rate of pay subject to a cap of \$511/day, and \$5,110 total.

The FFCRA applies to [employees](#) only and does not cover independent contractors.

**Q: The Family and Medical Leave Act (FMLA) has recently been changed because of the coronavirus pandemic. What do I need to know about taking leave?**

A: The FFCRA modifies the FMLA to cover an expanded group of employees under a broader set of circumstances. If you have been working for your employer for 31 calendar days and have a child in your care who is out of school or daycare due to COVID-related closures, you are eligible for up to 12 weeks of job-protected leave.

The first 10 days of expanded FMLA leave are unpaid. During this time, you can choose to use accrued paid leave, or to supplement your pay with the emergency sick leave program described above. After the first 10 days, you are entitled to 2/3 your regular rate of pay, up to a maximum of \$200/day and \$10,000 total. For caretakers who are able to continue working part-time, and where the employer and employee agree to the terms, FMLA leave can be taken intermittently. For example, a parent who is able to work 4 hours a day from home may do so and take the balance of the day as FMLA leave.

**Q: I started to exhibit symptoms like coughing, and my boss told me the company has a policy of sending home employees who are sick. Is this legal? What are my rights if I'm fired?**

A: Under the CDC guidelines, your employer is permitted to send you home if you become ill with symptoms associated with COVID-19. If you believe you do not have COVID-19, consider consulting with a medical professional to obtain testing and/or other documentation that may demonstrate your status. Your rights if you are terminated because of a COVID-19 diagnosis

depend upon the severity of your symptoms, whether you have an underlying condition that may be exacerbated by COVID-19, and the nature of your work. The Americans with Disabilities Act (ADA) applies to employers with 15 or more employees and prohibits employers from taking negative workplace actions, like termination, because an employee has a disability or because the employer believes the employee has a disability. Some state laws have even greater protections for employees.

Under the ADA, a disability is any condition that limits a major life activity, such as breathing, walking, or sleeping. In general, an employer must provide a reasonable job accommodation to an employee who has a disability unless it would cause undue hardship. Whether a communicable illness like COVID-19 qualifies as a disability under the ADA depends on the severity of your symptoms, how long they last, and whether you have a pre-existing condition that may be exacerbated your illness. Additionally, the type of reasonable accommodation your employer may be required to provide you will be impacted by the nature of your work—for example, whether your job can be done remotely.

If you believe you have been treated unfairly because of an actual or perceived disability related to COVID-19, please consult with an attorney for more information about your rights and the options available to you.

**Q: My family is from a country where the coronavirus has devastated the population. My employer has made comments about this to me and other workers, and he recently reduced my hours. What can I do?**

A: Under federal and most state laws, it is illegal for employers to mistreat employees because of their race, ethnicity, or national origin. These laws protect employees who have experienced negative employment actions—such as a reduction in hours, demotion, denial of a promotion, or termination—and employees who have been subjected to severe, repeated harassment on the job.

If you believe you believe you and other co-workers have been treated worse than other employees or subjected to unfair action during the COVID-19 pandemic because of your race, ethnicity, or national origin, you should contact an attorney for more information about your rights and the options available to you.

**Q: I meet the criteria for expanded FMLA leave under the FFCRA. I am worried that if I take time off to care for my family, my employer will hold it against me. Does the law protect against this?**

A: Yes. It is unlawful for any employer to interfere with, restrain, or deny the exercise of any right provided by the FMLA. Further, an employer is prohibited by law from using your request for—or use of—FMLA leave as a negative factor in employment actions such as hiring, promotion, or disciplinary actions. Under the original and expanded terms of the statute, an employer that targets employee(s) for mistreatment because they took leave pursuant to the FMLA is acting in violation of the antiretaliation provisions of this law, and could be subject to government enforcement action or a private lawsuit.

**Q: I am pregnant and work in a job that requires me to come in contact with the public (e.g. cashier, cleaning services). What laws can I avail myself of to protect my health during the pandemic, without risking losing my job?**

A: The Americans with Disabilities Act may entitle you to a reasonable accommodation, but only under certain circumstances. To invoke the ADA, you must have a pregnancy-related impairment, for example: a high-risk pregnancy, gestational diabetes, or preeclampsia. Once you are deemed eligible, a reasonable accommodation related to COVID may include: making changes to your workplace to reduce contact with others such as installing a plexiglass barrier; temporarily changing some of your job duties; modifying your work schedule (e.g. staggering commuting times); or temporarily transferring positions.

The Pregnancy Discrimination Act says that your employer cannot treat you worse than other employees due to your pregnancy. You can seek any accommodation that your employer is providing to others—e.g. protective equipment, temporarily moving positions—with the same ability or inability to work. You do not need to have a pregnancy-related impairment to seek accommodations under this law, and you are entitled to the same as your peers.<sup>[1]</sup>

You may have additional rights if your state or city has passed a Pregnant Workers Fairness Law. Under these state laws you may seek accommodations whether or not your employer provides them to others.

**Q: My company, which closed in response to the pandemic, has announced plans for a phased re-opening. Only employees who are not at higher risk for severe illness from COVID-19 are eligible for re-hiring during the first phase. Is this allowed?**

A: Maybe not. The Americans with Disabilities Act prohibits discrimination in hiring due to an applicant's disability, or perceived disability. The CDC has designated older adults and people of any age who have serious underlying medical conditions as being at higher risk for severe illness from the novel coronavirus. It is not, however, the employer's prerogative to exclude individuals with disabilities—or those perceived as having disabilities—from the workplace for health or safety reasons. (There is an exception when someone poses a "direct threat", i.e. a significant risk of substantial harm even with reasonable accommodation). Moreover, the ADA requires reasonable accommodations for individuals with disabilities (absent undue hardship to the business), such as the ability to telework, even during a pandemic. If a job applicant is screened out based on their perceived or actual health condition and without consideration for their ability to do the job with or without a reasonable accommodation, it is possible that the employer's policy runs afoul of federal law. State laws may also be implicated, as well as the federal Age Discrimination in Employment Act, if the employer's policy has a disparate impact on employees over age 40.

[1] "KNOW YOUR RIGHTS: Pregnancy, Workplace Rights, & COVID-19 FAQ." A Better Balance, 1 May 2020, <https://www.abetterbalance.org/resources/know-your-rights-pregnancy-workplace-rights-covid-19-faq/#q03>.