

EMPLOYMENT LAWSCENE ALERT: DOL UPDATES FFCRA LEAVE REGULATIONS

On September 11, 2020, the Department of Labor issued updated regulations regarding the Families First Coronavirus Response Act and leave available under that law. These updates were issued in response to a recent federal district court ruling out of the Southern District of New York that invalidated portions of DOL's original rules under the FFCRA because the agency exceeded its authority in issuing certain portions of its rules. These updated regulations are effective on September 16, 2020.

Most notably, the new DOL regulations update the definition of "health care providers" that are excluded from the FFCRA. The original definition included anyone employed at a hospital, medical school, and a variety of other places where medical services are provided, as well as individuals employed by a business that produced medical equipment. This definition was criticized as being overbroad and including many more workers than the traditional FMLA definition of health care provider. DOL has revised the definition to include both those who meet the traditional FMLA definition of health care provider who can issue an FMLA certification, as well as individuals capable of providing health care services such as diagnostic services, preventative services, treatment services, or other services that are integrated with and necessary to the provision of patient care. Non-medical personnel such as IT professionals, building maintenance staff, human resources personnel, food services workers, records managers, consultants, and billers are no longer considered health care providers, even if they work at a hospital or other medical service provider.

Employers should take notice that the DOL clarified its stance on intermittent leave under the FFCRA. While intermittent leave is still available only with the agreement of the employer, the DOL clarified that if a child is going to school under a school-mandated hybrid model (e.g., in person two days per week and remote learning three days per week), an employee's need for leave only on those days that their child is home engaged in remote learning would not be considered intermittent leave, and, therefore, the employer's agreement for such a leave schedule would not be necessary. On the other hand, the DOL explained that if it is the parent's choice to have the child attend remote learning instead of in person classes, rather than the change being imposed by the school, then the parent would not be eligible for any FFCRA leave because the school is not "closed" due to a COVID-19 related reason. Under those circumstances, the employer could lawfully deny the employee's request for FFCRA leave.

O'Neil, Cannon, Hollman, DeJong and Laing remains open during this time. We encourage you to reach out with any questions, concerns, or legal issues you may have, including those related to COVID-19.

20 OCHDL LAWYERS SELECTED AS 2021 BEST LAWYERS®; ANOTHER 5 NAMED BEST LAWYERS: ONES TO WATCH

We are pleased to announce 20 of our lawyers have been included in the 2021 Edition of *The Best Lawyers in America*, and an additional five have been selected as 2021 *Best Lawyers: Ones to Watch*.

The following are the O'Neil, Cannon, Hollman, DeJong and Laing lawyers named to the 2021 lists:

Best Lawyers in America

- Douglas P. Dehler - Litigation - Insurance
- James G. DeJong - Corporate Law, Mergers and Acquisitions Law, and Securities / Capital Markets Law
- Seth E. Dizard - Bankruptcy and Creditor Debtor Rights / Insolvency and Reorganization Law and Litigation - Bankruptcy
- Peter J. Faust - Corporate Law and Mergers and Acquisitions Law
- John G. Gehringer - Commercial Litigation, Construction Law, Corporate Law, and Real Estate Law
- Joseph E. Gumina - Employment Law - Management and Litigation - Labor and Employment
- Dennis W. Hollman - Corporate Law and Trusts and Estates
- Grant C. Killoran - Commercial Litigation and Litigation - Health Care
- JB Koenings - Corporate Law
- Dean P. Laing - Commercial Litigation, Personal Injury Litigation - Plaintiffs, and Product Liability Litigation - Defendants
- Gregory W. Lyons - Commercial Litigation and Litigation - Insurance
- Patrick G. McBride - Commercial Litigation
- Thomas A. Merkle - Family Law
- Joseph D. Newbold - Commercial Litigation
- Chad J. Richter - Business Organizations (including LLCs and Partnerships) and

Corporate Law

- John R. Schreiber – Bankruptcy and Creditor Debtor Rights / Insolvency and Reorganization Law and Litigation – Bankruptcy
- Jason R. Scoby – Corporate Law
- Steven J. Slawinski – Construction Law

Best Lawyers: Ones to Watch

- Kelly M. Spott – Trusts and Estates
- Trevor C. Lippman – Litigation – Trusts and Estates
- Erica N. Reib – Labor and Employment Law – Management and Litigation – Labor and Employment
- Christa D. Wittenberg – Commercial Litigation

About Best Lawyers

Best Lawyers has published their list for over three decades, earning the respect of the profession, the media, and the public as the most reliable, unbiased source of legal referrals.

Best Lawyers: Ones to Watch recognizes associates and other lawyers who are earlier in their careers for their outstanding professional excellence in private practice in the United States.

Lawyers on *The Best Lawyers in America* and *Best Lawyers: Ones to Watch* lists are divided by geographic region and practice areas. They are reviewed by their peers on the basis of professional expertise, and they undergo an authentication process to make sure they are in current practice and in good standing.

EMPLOYMENT LAWSCENE ALERT: WISCONSIN FACE COVERING ORDER ISSUED - EFFECTIVE AUGUST 1, 2020

Today, Wisconsin Governor Tony Evers declared a Public Health Emergency and issued an Emergency Order requiring individuals to wear face coverings. This Emergency Order goes into effect at 12:01 a.m. on Saturday, August 1, 2020 and will expire on September 28, 2020, unless there is a subsequent superseding emergency order.

The Emergency Order applies to all individuals over the age of five when they are indoors or in an enclosed space with anyone outside of their household, other than when inside a private residence. “Enclosed space” is defined in the Emergency Order as “a confined space open to the public where individuals congregate, including but not limited to outdoor bars, outdoor restaurants, taxis, public transit, ride-share vehicles, and outdoor park structures.” Additional guidance included in the [Face Covering FAQs](#) states that, even if individuals can socially distance indoors, unless that person is the only person in the room, a face covering must be worn and that the Emergency Order requires face coverings inside businesses and office spaces, unless an exception applies. Exceptions to the face covering requirement include, among other things, the following:

- when an individual is eating, drinking, or swimming;
- when an individual is obtaining a service that requires temporary removal of the face covering, such as dental services; and
- individuals with health conditions or disabilities that would preclude safely wearing a face mask.

Therefore, the Emergency Order will require employees to wear face coverings in most workspaces, unless the employee is in a room and is the only person in that room.

The Emergency Order supersedes local orders that are less restrictive, but those that are more restrictive than the Emergency Order, like that issued by the City of Milwaukee, are not superseded and remain in force. Therefore, it is important to check local guidelines to ensure that all requirements are complied with. The Emergency Order will be enforced by local and state officials, and the penalty for violation of the Emergency Order is a fine of not more than \$200.

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OCHDL CREATES NEW HEALTH CARE LAW BLOG

Welcome to the first edition of the O’Neil, Cannon, Hollman, DeJong and Laing Health Care Law Advisor. We have created this blog as an informational and educational resource for our clients and contacts. The health care industry changes often and quickly, and we seek to help keep you apprised of important legal developments in the health care field.

Over the past few months, we have spent significant time advising clients on issues relating to the COVID-19 pandemic. We include in this inaugural blog post links to some of our recent

writings regarding COVID-19 issues, including links of two cover stories in *The Wisconsin Lawyer* magazine. *The Wisconsin Lawyer* is the monthly publication of the State Bar of Wisconsin and addresses issues of interest throughout the state and country.

Christa Wittenberg and Grant Killoran authored the cover article in the April, 2020 edition of *The Wisconsin Lawyer* entitled “Due Process in the Time of the Coronavirus.” Their article analyzes legal concepts governing the measures utilized by public health officials to combat an outbreak of contagious disease, focusing on COVID-19. Their article can be found [here](#).

Grant Killoran, Joe Newbold and Erica Reib authored the cover article in the June, 2020 edition of *The Wisconsin Lawyer* magazine entitled “The New Wave of Litigation: An Early Report on COVID-19 Claims.” Their article analyzes the types of claims being made related to the COVID-19 pandemic. Their article can be found [here](#).

We also include a link to a recent article on our firm’s Employment LawScene blog related to the COVID-19 pandemic entitled [IRS Says Reduced-Cost or Free COVID-19 Testing or Treatment Won’t Prevent Individuals from Making or Receiving HSA Contributions](#).

Lastly, in conjunction with last week’s start of the Major League Baseball season, we include a link to an article recently posted in our newsroom by Attorney Pete Faust entitled [COVID-19 Raises Privacy Issues for Major-League Baseball](#). The article discusses not only the current state of privacy policy in the baseball world, but also reviews the obligations of other businesses under the ADA, FMLA, CARES Act, GINA, and HIPAA.

We hope you enjoy this blog. If you have any questions about any of the articles or issues discussed in it, please feel free to contact the authors.

EMPLOYMENT LAWSCENE ALERT: SUPREME COURT RULES THAT TITLE VII PROHIBITION ON SEX DISCRIMINATION PROTECTS GAY AND TRANSGENDER EMPLOYEES

Today, June 15, 2020, the United States Supreme Court issued a landmark ruling holding that an employer who fires an individual based on his or her sexual orientation or transgender status violates Title VII’s prohibition against discrimination “because of . . . sex.” In a 6-3 decision, the majority found that “[s]ex plays a necessary and undisguisable role” in a decision to terminate an individual for being homosexual or transgender, which is “exactly

what Title VII forbids.” Although the Court recognized that “homosexuality and transgender status are distinct concepts from sex . . . discrimination based on homosexuality or transgender status necessarily entails discrimination based on sex; the first cannot happen without the second.”

Title VII requires the Court to apply a but-for test, under which an employer violates the law if the employment decision is based in part on sex. Therefore, the Court concluded that if you change *only* the individual’s sex and it results in a different outcome, that is a violation of Title VII. So, the fact that a man who is attracted to men is treated differently from a woman who is attracted to men means that sex is the but-for cause of the decision. Justice Gorsuch, who wrote the majority opinion, analogized this to an employer firing female employees who were Yankees fans but not male employees who were Yankees fans. Sex does not have to be the sole or even the primary cause of the adverse action. There may be two or more reasons for the termination, but if a different outcome would have been reached if the individual’s sex was changed, sex is the but-for cause of the decision. Therefore, because “homosexuality and transgender status are inextricably bound up with sex,” a decision based on homosexuality or transgender status takes sex into account in a way that is impermissible under Title VII. Additionally, the Supreme Court did not find it persuasive that homosexual men and homosexual women would be treated the same. Instead, the Court stated that the focus of Title VII is on the individual and how the individual is treated.

The Court found that this decision is in line with prior precedent finding that the following instances violated Title VII where, if the plaintiff had been a different sex, they would have been treated differently: a policy where women with young children were not hired when men with young children were; a policy where women were required to make larger pension fund contributions than men because of longer overall life expectancies; and an instance where a male employee was sexually harassed by male coworkers. In each of these situations, the Court found that there was a violation of Title VII because the result would have been different if the individual was a different sex.

Finally, the Court dismissed arguments that this interpretation was not what Congress intended. First, the Court reasoned that the term “sex” was broad and that, where there are no statutory exceptions to a broad rule, it is not the Court’s role to write in such exceptions. Additionally, the Court stated that, while this *result* may not have been what the drafters of Title VII anticipated in 1964, the *meaning* of sex has not changed, and the Court is bound to the plain meaning of the words contained in the statute.

The Supreme Court’s decision does not change business-as-usual for Wisconsin employers. In 2017, the Seventh Circuit ruled that sex discrimination under Title VII includes discrimination based on sexual orientation. In addition, the Wisconsin Fair Employment Act prohibits discrimination on the basis of both sex and sexual orientation, and since at least 2015, the EEOC has taken the policy stance that sexual orientation and transgender status were

protected categories under Title VII. The U.S. Supreme Court's ruling serves as a reminder for employers to stay vigilant about enforcing their anti-discrimination and anti-harassment policies and practices for all individuals.

ATTORNEYS ERICA REIB, JOE NEWBOLD, AND GRANT KILLORAN FEATURED IN WISCONSIN LAWYER

An article by Attorneys Grant Killoran, Joe Newbold, and Erica Reib entitled "The New Wave of Litigation: An Early Report on COVID-19 Claims" is featured as the cover story in the June edition of the State Bar of Wisconsin publication *Wisconsin Lawyer*. In their article they analyze the claims being filed relating to the ongoing COVID-19 pandemic in the United States.

Read the full article [here](#).

EMPLOYMENT LAWSCENE ALERT: WHEN ARE MY EMPLOYEES ENTITLED TO LEAVE UNDER THE FFCRA BECAUSE THEIR CHILDREN ARE HOME FROM SCHOOL OR DAYCARE?

As we previously covered [here](#), the Families First Coronavirus Response Act ("FFCRA") requires that, with certain exceptions, employers with 500 or fewer employees must provide employees with leave in certain circumstances pursuant to the Emergency Paid Sick Leave Act ("EPSLA") and Emergency Family and Medical Leave Expansion Act ("EFMLA"). Both the EPSLA and the EFMLA require leave if an individual is unable to work or telework because they need to care for their son or daughter under the age of 18 if the child's school or place of care has been closed or if the childcare provider of such child is unavailable due to reasons related to COVID-19.

The Department of Labor ("DOL") has issued some additional [guidance](#) regarding leave under the FFCRA. Included is guidance specific to the need for leave to care for a child whose school

or place of care has been closed or whose childcare provider is unavailable, further clarifying that (i) such leave is not available if another suitable person is available who can care for a child; (ii) such leave is not available to the extent that an employee can telework while caring for the child; (iii) such leave may be taken intermittently if the employee and employer agree to do so; and (iv) such leave may be taken for a child over the age of 18 if he or she has a disability and cannot care for him or herself due to that disability. The DOL also stated that employers should keep the following records for leave to care for a child whose school or place of care is closed: (i) the employee's name; (ii) the date(s) for which leave is requested; (iii) the reason for leave; (iv) a statement from the employee that he or she is unable to work or telework because of this reason; (v) the name of the child being cared for; (vi) the name of the school, place of care, or childcare provider that has closed or become unavailable; and (vii) a statement from the employee that no other suitable person is available to care for the child. This documentation will be necessary for employers who provide FFCRA leave to receive reimbursement of the costs of that leave through tax credits from the Internal Revenue Service ("IRS"). The DOL also stated that employers should consult IRS forms, instructions, and information for the procedures that must be followed to claim a tax credit, including any needed substantiation to support the credit.

The [guidance](#) published by the IRS for a leave requested based on a school closing or childcare provider unavailability includes all of the DOL information and also requires that the employee provide the **age** of the child. Additionally, if an employee claims that they are unable to work or telework because of a need to provide care for a child older than 14 during daylight hours, the employee must also provide a statement that special circumstances exist requiring the employee to provide care. Although there is no specific guidance regarding what is considered a "special circumstance," a reasonable interpretation would be that it requires some specific reason outside of typical circumstances, such as a disability or medical condition, that the child is not able to care for him or herself. If additional guidance becomes available, we will provide updates.

Employers must request accurate and complete documentation from employees requesting leave under the FFCRA. If that leave is to care for a child over the age of 14 because his or her school or place of childcare is closed, special circumstances must exist in order for the employer to grant such leave. If such leave is granted without proper documentation and appropriate special circumstances, the IRS will deny the employer tax credit for the amount paid for such leave.

O'Neil Cannon remains open during this time and is here to help. We encourage you to reach out with any questions, concerns, or legal issues you may have, including those related to leave under the FFCRA.

EMPLOYMENT LAWSCENE ALERT: WISCONSIN EXTENDS SAFER AT HOME ORDER

Today, April 16, 2020, the State of Wisconsin has extended the statewide Safer at Home Order through May 26, 2020, with some minor changes. The full text of the Extended Order can be found [here](#) and an updated FAQ can be found [here](#). The changes to the Safer at Home Order implemented by the Extended Order will go into effect on April 24, 2020 and will remain in effect until May 26, 2020 or until a superseding order is issued. During today's press conference, the Governor's Chief Legal Counsel, Ryan Nilsestuen, stated that, although the Governor needs the legislature's permission to extend the public health emergency, the Extended Order is legally permitted under the Governor's statutory authority.

Under the Extended Order, some businesses will be allowed to increase their services, including:

- Public libraries may now provide curbside pickup of books and other materials.
- Golf courses may open, although scheduling and payment must be done online or by phone, and clubhouses and pro shops must remain closed.
- The "Minimum Basic Operations" that Non-Essential Businesses are allowed to perform are expanded to include deliveries, mailings, and curbside pickup. Non-Essential Businesses must notify workers whether they are necessary for the Minimum Basic Operations.
- Arts and crafts stores may offer expanded curbside pickup of materials necessary to make face masks and other personal protective equipment.
- Aesthetic or optional lawn care and construction is allowed as long as it can be done by one person.

The Extended Order also includes additional safety practices for Essential Businesses and Operations, including:

- Essential Businesses and Operations must increase cleaning and disinfection practices, ensure that only necessary workers are present, and adopt policies to prevent workers exposed to COVID-19 or symptomatic workers from coming to work.
- Retail stores that remain open as Essential Businesses and Operations must limit the number of people in the store at one time, must provide proper spacing for people waiting to enter, and large stores (i.e., those with more than 50,000 square feet) must offer at least two hours per week of dedicated shopping time for vulnerable populations.
- Essential Businesses and Operations that are essential because they supply, manufacture, or distribute goods and services to other Essential Businesses and Operations can only continue operations that are necessary to those businesses they supply. All other operations must continue only as Minimum Basic Operations.

Additionally, the governors of Illinois, Michigan, Ohio, Wisconsin, Minnesota, Indiana, and Kentucky announced today that they will “work in close coordination to reopen the economy in the Midwest region.” These governors stated that they would consider four factors when determining when to reopen the economy: 1) sustained control of the rate of new infections and hospitalizations; 2) enhanced ability to test and trace; 3) sufficient health care capacity to handle resurgence; and 4) best practices for social distancing. The governors indicated that reopening may occur in phases and that, although they will be coordinating, each state may take a different approach.

O’Neil Cannon remains open during this time and is here to help. We encourage you to reach out with any questions, concerns, or legal issues you may have, including those related to coronavirus.

EMPLOYMENT LAWSCENE ALERT: DOL ISSUES FFCRA REGULATIONS ON PAID LEAVE

Yesterday, the Department of Labor (“DOL”) published its [temporary rules](#) regarding Paid Leave under the Families First Coronavirus Response Act (“FFCRA”). The 124-page temporary rule, which is immediately in effect, provided much of the same information we have already seen under the [questions and answers](#) DOL has been publishing, but also clarified some additional matters. The highlights:

- What is a “Federal, State, or local quarantine or isolation order”?
 - This *includes* “shelter in place” and “safer at home” orders. However, if such an order does not prevent the employee from attending work or if, because of such order, the employer is closed, the employee is not eligible for paid leave. So, if a business is considered “essential” under state orders and employees are allowed to travel to work, employees would not be entitled to paid leave due to such order under the FFCRA. Similarly, if employees are able to telework, a “shelter in place” or “safer at home” order would not prevent them from working remotely and would not entitle them to paid leave. Finally, employers that are completely closed due to such orders also would not have to provide employees with paid sick leave if there is no work for the employee to perform.
- What does it mean that an employee has been advised by a healthcare provider to self-quarantine?
 - This includes advice that the employee self-quarantine because he or she has coronavirus, may have coronavirus, or is particularly vulnerable to COVID-19. This may include employees who are older, pregnant, or suffer from particular medical conditions. However, employers should not make an assumption that any individual is unable to work based on their protected class (e.g., age, pregnancy,

disability).

- What does ability to telework mean?
 - This requires that the employer have work for the employee to perform, that the employer permits the employee to perform that work remotely, and there are no extenuating circumstances that would prevent the employee from performing that work.
- Who is an “individual” that the employee can care for and receive sick leave?
 - An immediate family member, a roommate, or a similar person with whom the employee has a relationship that creates an expectation that the employee would care for the individual if he or she self-quarantined or was quarantined.
- What does caring for a son or daughter whose school or place of childcare is closed mean?
 - This leave is not available if another suitable person is available who can care for the child during the period of leave.
- Can an employee take intermittent leave under the FFCRA?
 - In all situations, the employer and the employee must agree to intermittent leave; it is not required. Additionally, in instances where an employee is working at the employer’s facility (i.e., is not teleworking), intermittent leave can **only** be used to care for a child whose school or place of childcare is closed or whose childcare provider is unavailable due to COVID-19.
- Can employers require that employees use other paid leave while on EFMLA?
 - During the final 10 weeks of EFMLA, an employer may not require the substitution of paid leave. During these ten weeks, the sides may agree that available paid leave can supplement the 2/3 pay, such that the employee receives full pay. However, during the first two weeks of EFMLA, an employer **may** require substitution of paid leave. Therefore, employers can require that, during the first two weeks of EFMLA, employees use their paid sick leave under the FFCRA **and** any available paid leave, such that use of the additional leave would bring employees to their full wages. Employers should remember, however, that the tax credit will only be paid for 2/3 of the employee’s wages, up to \$200 per day.
- What are the notice requirements under the EFMLA?
 - Employers are not required to respond to an employee’s requests for EFMLA with the Notices of Rights and Eligibility and Designation Notices as they must with normal FMLA. However, employers should have an FFCRA request form that requests information and documentation regarding the request for leave. This will allow employers to provide such information to the IRS so that they can receive the tax credits under the FFCRA. Additionally, employers must retain this documentation for four years.

O’Neil, Cannon, Hollman, DeJong and Laing remains open during this time and is here to help. We encourage you to reach out with any questions, concerns, or legal issues you may have, including those related to coronavirus or the drafting of FFCRA policies or leave request forms.

EMPLOYMENT LAWSCENE ALERT: SAFER AT HOME FAQs AND COVID-19 RESPONSE PLANS

As we blogged about [here](#), the State of Wisconsin issued a statewide Safer at Home Order, which came into effect at 8:00 a.m. on March 25, 2020. Since then, Governor Evers has published [Safer At Home FAQs](#) regarding that Order. Some of the highlights are:

- Individuals do not need special permission or documentation to leave their homes, but they must comply with the Order regarding when they are allowed to leave their homes.
- Essential Businesses and Operations, as defined in the Order, do not need documentation or certification to continue work that is done in compliance with the Order.
- Essential Businesses and Operations that remain open must comply with social distancing requirements.
- Businesses that are not Essential Businesses and Operations under the Order can request to be designated as essential by the Wisconsin Economic Development Corporation (“WEDC”) at their [website](#).

Although not explicitly included in the Order or the FAQs, the WEDC encourages businesses to follow best practices related to the development of a [COVID-19 response plan](#). The WEDC recommends that each company develop a written plan, unique to the operations under its control, that documents the identification and mitigation measures taken, including all engineering controls, administrative controls, and safe work practices, and that the company updates that plan on a regular basis for the duration of the COVID-19 Situation. Potential inclusions in such plan include:

- Discontinuations of in-person meetings.
- Body temperature scans.
- Reduction of on-site hours or staggered shifts.
- Staggered use of shared spaces such as bathrooms, lunchrooms, and breakrooms.
- Mandatory work from home for all but essential employees.
- Sanitization processes implemented throughout the company’s facilities.
- Banning international and domestic travel and policies for employees returning from such trips.
- Banning all visitors.
- Employee reporting of COVID-19 symptoms and contact with individuals diagnosed with COVID-19.

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