

# **Refusals to Return to Work: Childcare, Vulnerable Populations, and Other Employee Challenges**

IFA CORONAVIRUS  
UPDATES



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INTERNATIONAL FRANCHISE ASSOCIATION

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## Today's Speakers



# Cepideh Roufougar

Principal, Jackson Lewis

Ms. Roufougar is Co-Leader of the California Advice and Counsel Resource Group. She advises and counsels management in all areas of labor and employment law, with a focus on identifying practical solutions to help ensure compliance with state and federal law. Ms. Roufougar positions herself as a strategic partner when providing advice and counsel about litigation avoidance, employee management issues, implementing disciplinary actions, and collective bargaining issues. Her ability to see the big picture clearly and understand her client's businesses in emotionally charged and highly complex disputes has helped her clients financially and prevented litigation. Her clients rely on her to guide them through both short-term and long-term planning to achieve their unique goals and strategies.

Ms. Roufougar has been successful in helping her clients prevail in numerous arbitrations and administrative appeals. She has extensive experience representing employers in labor and employment disputes and employment litigation matters.

Today's Speakers

# Margie Bassford

## HR Services HR Consultant



Margie Bassford has over 13 years of experience in the Human Resources field. Currently, Margie is a Human Resources Consultant at Paychex, so she is very in tune with the issues businesses face with respect to HR matters. She is a graduate of Keuka College with a degree in Organizational Communication, as well as a Master's of Science degree from Ithaca College in Strategic Communication with a concentration in HR Management. Margie is a member of the Society for Human Resource Management (SHRM) and has obtained the PHR and SHRM-CP professional certifications.

# Agenda

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Returning to Work (with Accommodations)

2

Who Will Watch The Kids?

3

Supporting Employees as They Return to the Workplace

4

Helpful Resources

5

Q&A



## Returning to Work







Returning to Work

# Employees Returning from Furlough

- Employees returning from furlough may have concerns about returning to work.
- They may have been caring for a child whose school or daycare is closed while on furlough
- They may have been caring for someone who is quarantined
- They may be members of a vulnerable population
- Recognize these employees might need time to make arrangements in order to return to work
- Be cognizant of their concerns and fears about returning to work

# Employees Returning After Telework

- May have similar concerns to those who are returning from furlough
  - May need to arrange child care or caregiver responsibilities in order to return to work
  - May be members of a vulnerable population
- Be flexible with return to work date and schedule, if possible
- Consider continuing telework or partial telework, if possible
- Offer flexible hours or a staggered weekly schedule





# Families First Coronavirus Response Act - Emergency Paid Sick Leave

All employees of a “covered employer” (fewer than 500 employees) are immediately eligible for EPSL

## Qualifying Reasons:

1. Employee is subject to a quarantine or isolation order related to COVID-19
2. Employee has been advised by a healthcare provider to self-quarantine due to concerns related to COVID-19
3. Employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis
4. Employee is caring for an individual who needs to quarantine, isolate, or self-quarantine under government order or health care advisor advice
5. Employee is caring for their son or daughter if the school or place of care of the son or daughter has been closed, or the childcare provider of the son or daughter is unavailable, due to COVID-19 precautions
6. Employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services, in consultation with the Secretary of the Treasury and the Secretary of Labor



# Families First Coronavirus Response Act - Emergency Paid Sick Leave

- Full-Time employee (normally scheduled to work  $\geq 40$  each workweek):
  - 80 hours of paid sick leave in total (not per qualifying event)
- Part-Time employee:
  - Number of hours equal to the average number of hours such employee works over a 2-week period
- Varying schedule employee:
  - See regulations for instructions on calculating average hours
- Compensation Amount:
  - Leave for Employee's own COVID-19 qualifying reason (#1 - 3):
    - Pay: Employee's regular rate of pay
    - Cap: \$511 per day and \$5,110 aggregate
  - Leave to care for family member's COVID-19 qualifying reason (#4 - 6):
    - Pay: 2/3 of Employee's regular rate of pay
    - Cap: \$200 per day & \$2,000 aggregate



Returning to Work

# What if the FFCRA Doesn't Apply?



- Review workplace policies regarding availability of any additional paid or unpaid leave time.
- Consider any applicable state or local laws providing for paid or unpaid leave.
- The Employer may need to consider FMLA if the employee suffers from a serious health condition. In this case, the Emergency FMLA would not apply and the employee would go through the standard certification process.
- The Employer may need to consider FMLA leave to allow the employee to care for a child, spouse, or parent if COVID-19 complications create a “serious health condition.”
- Even if no other leaves are available, consider allowing the employee to work remotely with the knowledge that if this is permitted it must be applied consistently to other employees



Returning to Work

# And ... Don't Forget The ADA

**A Reasonable Accommodation may be necessary for an employee who is unable or afraid to return to work due to a disability**

***Reasonable accommodation* may include but is not limited to:**

Making existing facilities used by employees readily accessible or safe; job restructuring; part-time or modified work schedules; providing PPE; reassignment to a vacant position; acquisition or modifications of equipment or devices; appropriate adjustment or modifications of examinations, training materials, or policies; the provision of qualified readers or interpreters; and other similar accommodations for individuals with disabilities

May also include an unpaid leave of absence





Returning to Work

# Interactive Process

Employers must engage in a good faith interactive process with an employee designed to identify possible accommodations. “Good faith” means direct communication and cooperative behavior that promotes identification of an appropriate accommodation.

- Step 1:** Determine the essential functions of the position and how those functions have been modified to minimize Covid-19 exposure.
- Step 2:** Consult with the employee to ascertain the precise job-related limitations and how they could be overcome with a reasonable accommodation.
- Step 3:** Identify potential accommodations and assess their effectiveness.
- Step 4:** Consider the preference of the employee to be accommodated and pick the accommodation that is most appropriate for both the employee and the Company.
- Step 5:** Document the process and the accommodations being offered.



# Employee says they are unable to work because...

## Health condition

**ABC Company issued a return-to-work notice to Sal, an employee who has been furloughed since early April 2020. Upon receiving the notice setting a return-to-work date of June 22, Sal calls his supervisor and informs her that he cannot return to work because of his diabetes. Sal never before informed anyone at ABC Company that he had diabetes.**

**Sal's supervisor tells Sal that if he does not return to work, he will be permanently separated from employment. Was the supervisor's response to Sal proper?**

## They are caring for someone

Bertrand has been furloughed from XYZ Corp. since late March, 2020. When his supervisor calls Bertrand to inform Bertrand that he can return to work next week because the state is moving to a "yellow" business opening phase, Bertrand tells his supervisor, "I feel like I cannot come back yet. My mother is now living at home with me, and she is 80 years old and has medical conditions. I don't want to bring the virus home and make her sick."

What should be the response of Bertrand's supervisor?

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Returning to Work

# Employee is making more on unemployment

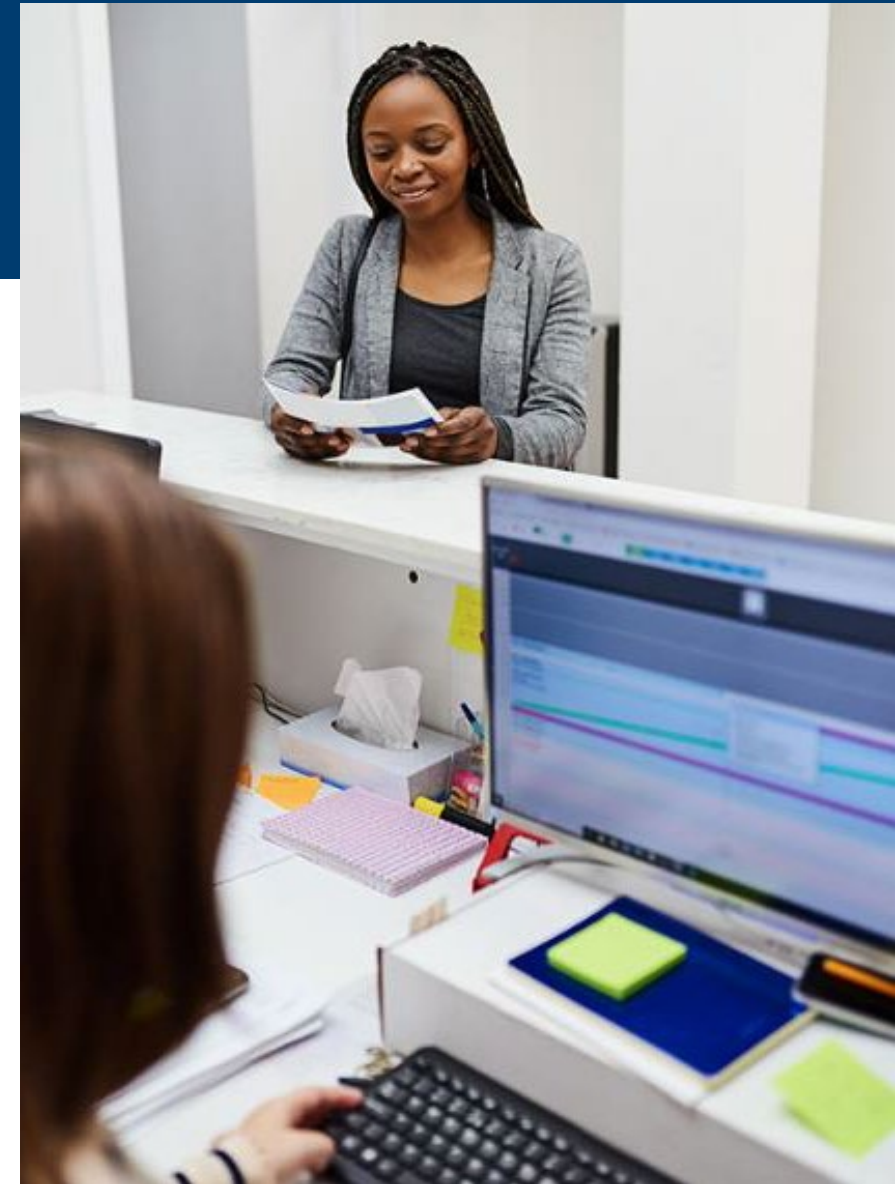
Annie's employer, an environmental non-profit called Cleaner Waters, had to furlough its employees when the State issued a Stay-At-Home and Business Closing order in late March 2020. While furloughed, Annie received unemployment compensation benefits, including the extra \$600/week under the CARES Act. When Cleaner Waters contacts Annie about opening the office back up under the new Business Openings Order, Annie thanks her manager for the call, but states, "Can I just stay out on furlough for a few more weeks, or even maybe all summer? I love my work, but I am making more on unemployment."

**Can Cleaner Waters simply let Annie remain on furlough to receive unemployment benefits?**

Returning to Work

# Considerations for Employees Who May Be Unable to Return for Medical Reasons

- Be sure to provide all legally required leaves and reasonable accommodations.
- If there is no basis to provide EPSL, EFMLA, leave required by state or local law, or any other leave or accommodation, discuss the employee's concerns and possible strategies to address them.
- Review workplace policies regarding availability of any additional paid or unpaid leave time or a flexible work schedule.
- Consider allowing the employee to work remotely with the knowledge that if this is permitted it must be applied consistently to other employees.
- Employers and employees are encouraged to collaborate to reach the best solution for maintaining the business and ensuring employee safety.







## Who Will Watch the Kids?





# Availability of Childcare - Remote Learning Ends, Do Camp and Daycare Begin?

## School's Out – Now What?

Returning To Work May Not Be A One Size Fits All Approach For Our Employees

- Will there be Summer School?
- Will Camps and Daycare Centers Open?
- If they don't, employees may need to recertify in order to use EFMLA





## Childcare Considerations

# Families First Coronavirus Response Act – Emergency FMLA Expansion

**Available to employees of an employer with fewer than 500 employees who are unable to work (or telework)**

**Must have worked for the employer for at least 30 days (no break in service for layoffs on or after March 1, 2020)**

**Leave is available in order to care for the employee's child (under 18 years of age) if the child's elementary or secondary school or place of care has been closed, or the childcare provider is unavailable for reasons related to COVID-19**

**First two weeks are unpaid, may use 80 hours of Emergency Paid Sick Time if it has not already been used**

**Up to 12 weeks of leave. Weeks 3-10 are paid at 2/3 rate, up to a daily maximum of \$200**

**EFMLA does not expand the 12 week entitlement to FMLA so an employee who has already utilized some FMLA leave is only entitled to the remaining balance.**



## Childcare Considerations

# It's Summer – Can an employee take EFMLA?

**Sally has been taking EFMLA leave since April 15, 2020 because her 11 year-old son's elementary school was closed due to the COVID-19 pandemic. The school year ended on May 29, 2020. Sally informed her supervisor that she needed to continue her EFMLA leave because she has no summer childcare available for her son. She typically sends her son to a summer day camp, but it is still closed with no indication of opening any time soon.**

**Does the employer have to provide Sally with additional leave?**





## Childcare Considerations

# But, someone else is home?

**As the employer reviews Sally's request for leave to continue over the summer, a supervisor mentions that she thinks Sally's husband is working remotely all summer.**

**Can the employer ask Sally if another adult is available to watch Sally's son?**



## Childcare Considerations

# But the employee has teenagers?

The employer then remembers that not only does Sally have an 11 year-old son, she also has a 16 year-old son. The employer wonders if the 16 year-old son can watch the 11 year-old son. When the employer mentions this to Sally, she simply states that she has to care for her 16 year-old son as well.

Can the employer deny the EFMLA leave to Sally because her 16 year-old son can probably watch his little brother?





Childcare Considerations

## What else do I need to consider?

**Are state or local leaves available?**

**What documentation do I need?**

**What documentation can I require?**

**Does the child have a disability that might qualify the parent for other types of leave benefits?**

# Creating Flexibility Towards Parents Returning to Work

## Being An Employer of Choice

### The Perks of Flexibility Can Be:

- INCREASED MOTIVATION
- ENHANCED PRODUCTIVITY
- RELIABLE ATTENDANCE
- ENGAGED/ MOTIVATED TO RETURN
- ENTHUSIASM FOR THE COMPANY'S DESIRE TO PUT ITS EMPLOYEES FIRST





Childcare Considerations

# Treating Everyone Equally

- Treat Everyone Equally With Respect To Caregiver Responsibilities
  - Avoid stereotypes of any kind
  - In some jurisdictions “familial status” and “caregiver” are protected characteristics
- No retaliation
- Policies and forms can ensure consistency in administering FFCRA
- Internal resolution procedures assist in the event someone brings forward any type of complaint.



# Considerations for Employees Who May Be Unable to Return for Childcare Reasons

**Employers should discuss the need for the leave with the employee to determine if the employee is able to telework, work a flexible schedule, use leave intermittently, etc.**

**Employers may ask the employee if there is another suitable adult who is able to care for the children**

**Employees must provide documentation to support the need for the EPSL or EFMLA**

**This is important in order to make the decision regarding the leave and to obtain tax credits**







# Supporting Employees as They Return to the Workplace



## Employee is scared to return to work

Pat's employer, Hats-R-Us, has been closed since mid-March. Mr. Hat, the owner, calls Pat to let Pat know that the business can now reopen under the State's new Opening Up Our State plan. Mr. Hat thought Pat would be excited to return to work, but Pat tells Mr. Hat, "That's the worst idea I have heard. I haven't left my home since mid-March. I can't go outside or come to work – the virus could be anywhere and I am afraid to catch it!"

**What should Mr. Hat do? Can Mr. Hat fire Pat?**

# Workplace Safety Legal Issues

## OSHA

**Refusal to return to work due to unsafe conditions could be protected.**

**General rule is that employees are only entitled to refuse to work if they believe they are in imminent danger.**

**“Imminent danger” is defined to include “any conditions or practices in any place of employment which are such that a danger exists which can reasonably be expected to cause death or serious physical harm immediately or before the imminence of such danger can be eliminated through the enforcement procedures otherwise provided by this Act.”**

**The threat must be imminent or immediate and the employee must believe that death or serious physical harm could occur in a short time.**

**Claims are already coming in.**

## NLRA

- Section 7 of the NLRA extends broad statutory protection to employees who engage in “protected concerted activity for mutual aid or protection.”
- Applies to employees in both unionized and non-unionized workplaces
- Examples include:
  - Talking with one or more employees about working conditions
  - Participating in a concerted refusal to work in unsafe conditions
  - Joining with co-workers to talk to the media about problems in your workplace.
- Employees are generally protected against discipline or discharge for engaging in concerted protected activity.

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Supporting Employees as They Return to the Workplace

# Addressing Employee Fears and Concerns

- Explain the procedures and safety precautions you've implemented.
- Identify contacts within your organization who can respond to COVID-19 questions.
- Share copies of your written safety protocol.
- Consider whether specific COVID-19 specific safety training is appropriate.
- Stay on top of these processes, and make sure everyone is complying.
- Maintain an open door policy to hear employee concerns, and do your best to address them.
- Remind employees about the EAP and other resources available to them, including the availability of parenting networks and child care councils in your region.

Supporting Employees as they Return to the Workplace

# Communicate with your employees

Maintain regular communications with employees

Give them weekly updates via text, email, or even mail

Have a point person or persons so that employees know who they can contact if they have a concern

Be open to discussing options with employees such as revised or flexible schedules, working remotely, and on -site childcare offerings, where possible

Provide as much advance notice as possible regarding re-opening plans to assist transitions for back to work and daycare routines.





Supporting Employees as They Return to the Workplace

## Employees Who Refuse To Return - Generally

Employers are not required to retain employees who refuse to work for reasons that are not protected.

Termination for job abandonment is a permissible but brings with it the risk of negative publicity and litigation.

If the employee's reasons are unreasonable such as, the employee makes more money collecting unemployment, then termination is less risky.





## Helpful Resources







# Government Resources

## [Centers for Disease Control and Prevention \(CDC\)](#)

- Interim guidance for businesses and employers
- Cleaning and disinfecting recommendations

## [World Health Organization \(WHO\)](#)

- How to protect yourself
- Situation updates

## [Small Business Administration \(SBA\)](#)

- Planning and responding to COVID-19
- Economic Injury Disaster loan program

## [US Dept. of Labor \(DOL\)](#)

- FLSA and wage/hour guidelines
- FFRCA Q&A

## [Equal Employment Opportunity Commission \(EEOC\)](#)

- Hiring during the COVID-19 pandemic

## [Occupational Safety and Health Administration \(OSHA\)](#)

- Guidance for employers on control and prevention of COVID-19 in the workplace

*Be sure to check your local city, county and state websites for additional, up-to-date guidelines surrounding COVID-19.*



# Paychex Resources

If you are an Oasis, SurePayroll or AdvancePartner client visit these sites:

Oasis:  
[Oasis COVID-19 Help Center](#)

SurePayroll:  
[Surepayroll Resources for Continuity and Funding](#)

AdvancePartners:  
[AdvancePartners Coronavirus Readiness](#)

## [Coronavirus \(COVID-19\) Help Center](#)

- Responding to COVID-19 at work, including helpful return-to-work resources
- Evolving legislation
- PPP loan application and loan forgiveness estimator
- Payroll processing
- Financial assistance tools and resources
- Health insurance and workers' compensation

## [Paychex's State-by-State COVID-19 Resource Page](#)

With information evolving rapidly about COVID-19, almost every state (and Washington, D.C.) has developed a resource page to address the specific FAQs of its residents, as well as unemployment insurance benefits, paid leave laws, closures, and more. Paychex has consolidated these resources into one, simple page.

## [payx.me/podcasts](#)

Are you interested in hearing more about today's top business and HR issues? Listen and Subscribe to our new "Paychex Business Series Podcast with Gene Marks - Coronavirus" and "The HR Leadership Series."

## [Paychex.com/WORX](#)

Provides the latest recommendations and instructions from trusted sources that could help protect your business and employees. Topics include:

- Business contingency planning;
- How to update handbook and workplace policies;
- Evolving federal, state, and local leave laws that cover sick leave, paid leave, and much more.

# Questions?



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