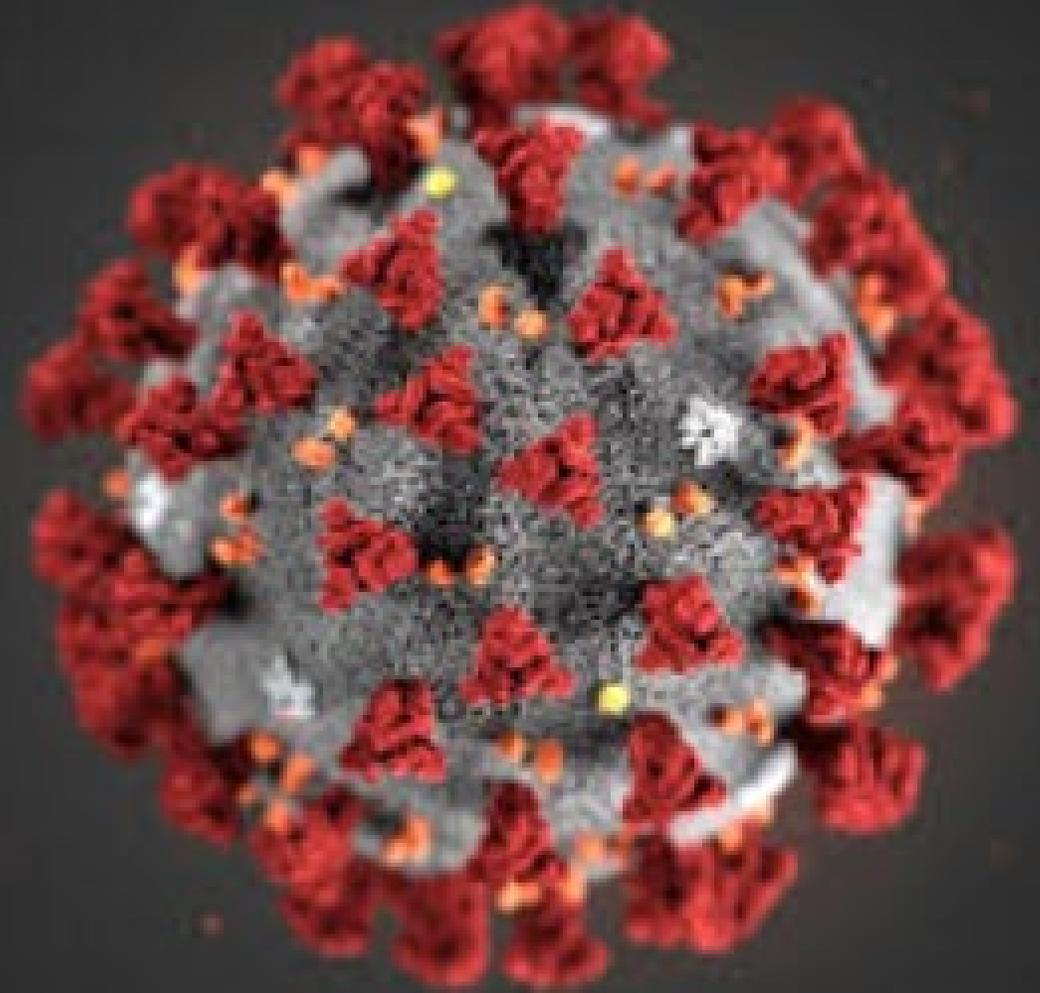


Return to Work Issues in a COVID-19 Universe



Agenda

- Governor's orders and face covering issues
- Safety considerations
- Lack of child care and FFCRA implications
- Disability accommodation, and employees refusing to return
- Harassment and discrimination



EO 20-12 Overview

**STAY HOME.
SAVE LIVES.**

Technical Assistance for Employers



Executive Order: Reopening Oregon

Oregon General Guidelines on Employers on COVID-19 in the workplace:

<https://sharedsystems.dhsoha.state.or.us/DHSForms/Served/le2342C.pdf>



Executive Order: Reopening Oregon Phase 2

Phase 2. Gatherings up to 50 allowed indoors, up to 100 outdoors, larger venues up to 250 if physical distancing can be achieved, non-essential travel resumes, schools, theaters and gyms open with physical distancing. Bars and restaurants may stay open until midnight.

Offices may reopen and employees may return to work with social distancing and other measures in place; telework is still encouraged

Deschutes County was authorized to enter Phase 2 June 6



Executive Order: Reopening Oregon - Face Covering

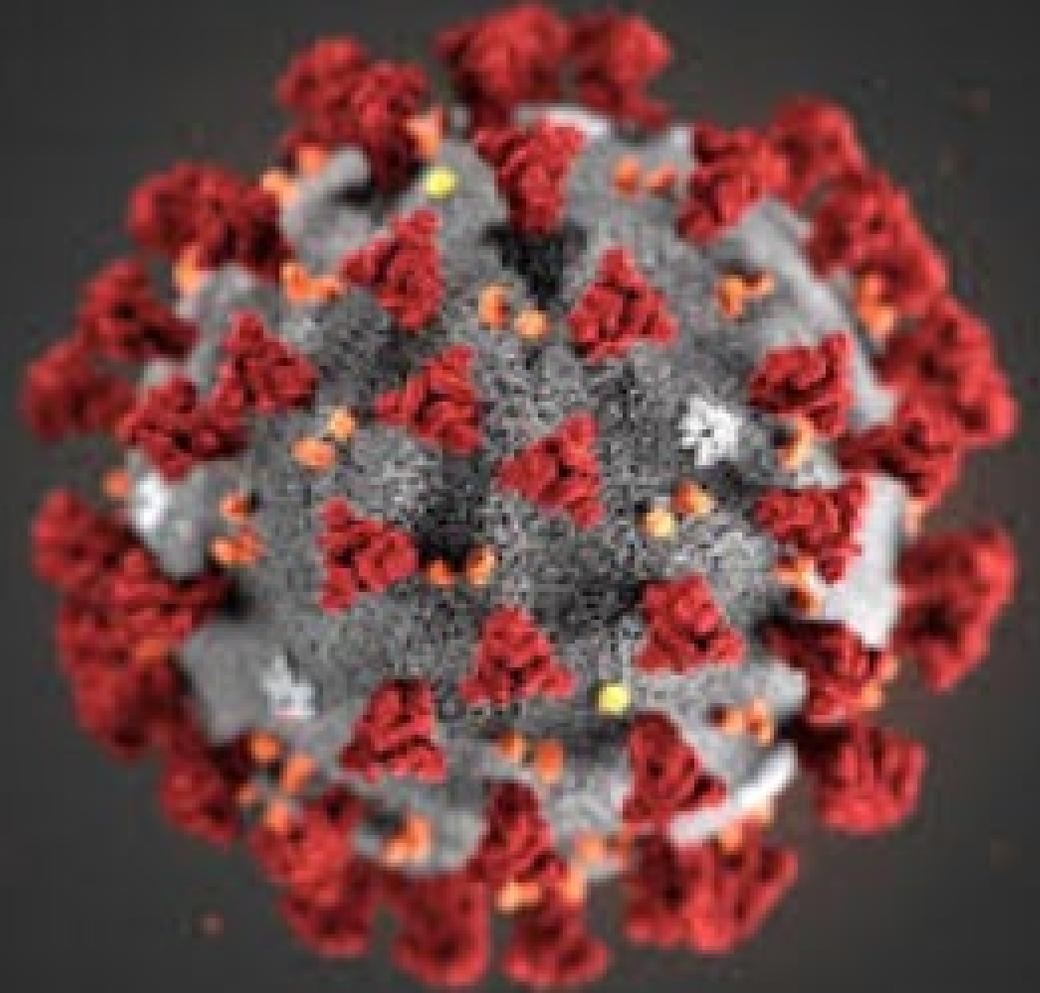
Businesses must require that employees, contractors and volunteers wear face coverings subject to exceptions for disabilities and where state or federal laws would require otherwise

Businesses should post signs and implement policies about whether customers and visitors should wear face coverings

Educate employees on procedures for safely working and communicating with people who cannot wear face coverings or who must read lips/facial expressions to communicate



CDC Best Practices



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CDC guidelines to keep employees safe

- Take employee's temperature and assess symptoms prior to their starting work.
- If an employee becomes sick during the day, send them home immediately.
- Increase air exchange in the building.
- Increase the frequency of cleaning commonly touched surfaces (copy machine, doors, etc.).



EEOC guidance around safety measures

- Employers may not ask about disability issues or immune issues during the hiring process.
- Post-offer medical inquiries are okay if all employees within the job category are treated equally.
- Employers may ask employees about influenza-like symptoms
- Medical information must be kept confidential



EEOC guidance around safety measures

- Employers may take temperatures of employees
 - Note that some infected workers will be asymptomatic
- Employers may require employees to wear masks or other protective equipment, but make reasonable accommodations for employees with disabilities.
- Employers should encourage employees to vaccinate when a vaccine is discovered, but the ER must make reasonable accommodations for disabilities and sincerely-held beliefs unless a hardship exists.



Communications and engagement

- Over-communicate:
 - What you're doing
 - Why you're doing it
 - Your commitment to keeping employees safe
- Encourage questions, two-way dialogue
- Reinforce your anti-discrimination, anti-retaliation policies



Child Care and the FFCRA; Disability Accommodation, and Refusal to Return

for the Bend Chamber of Commerce

by Kurt Barker

June 19, 2020



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FFCRA and child care needs

Protected, paid leave for COVID-19 related child care needs may be required by the Families First Coronavirus Response Act (**FFCRA**).

Emergency Paid Sick Leave (**EPSL**) is part of the FFCRA.

FFCRA applies to private employers with fewer than 500 employees, public agencies, and—for EPSL only—“any other entity that is not a private entity.”

Employees are eligible for EPSL on the first day of employment.



EPSL: Six Qualifying Reasons

Employees who are:

- 1) **subject to a federal, state, or local quarantine or isolation order related to COVID-19.**
- 2) **advised by a health provider to self-quarantine because of COVID-19.**
- 3) **experiencing symptoms of COVID-19 and is seeking a medical diagnosis.**
- 4) **caring for an individual subject to a quarantine order or who was advised to quarantine.**
- 5) **caring for a son or daughter under the age of 18 due to a COVID-19 related school (or care provider) closure or unavailability.**
- 6) **experiencing any other substantially similar condition (as specified by HHS).**



EPSL: What do they get?

Amount of Hours

- Full-time employees are entitled to 80 hours of paid sick leave.
- Part-time employees are entitled to the number of hours that the employee works, on average, over a 2-week period.

Amount of Pay

- For reasons 1-3, the employee is entitled to 100% of their regular rate, up to a max of \$511 per day (\$5,110 total).
- For reasons 4-6 (including **child care!**), the employee is entitled to 2/3 of their regular rate, up to a max of \$200 per day (\$2,000 total).



FMLA+ Overview

The Emergency Family Medical Leave Extension Act (EFMLEA, or simply “**FMLA+**”) is also part of the FFCRA.

Only expands FMLA for one reason, EPSL reason No. 5:

caring for a son or daughter under the age of 18 due to a COVID-19 related school (or care provider) closure or unavailability.

Any employee who has been on payroll for 30 calendar days is eligible.



FMLA+: 2 + 10 weeks for child care?

- The first two weeks are unpaid under FMLA+—but the employee may be entitled to 2/3 wages during that time under EPSL (running concurrently).
- The remaining ten weeks are paid at 2/3 of the employee's regular rate, for the number of hours the employee would otherwise be scheduled to work, up to a max of \$200 per day (\$10,000 total).

Employers get Tax Credits for both EPSL and FMLA+:

A dollar-for-dollar tax credit for qualified EPSL and FMLA+ leave paid to employees (plus a credit for health insurance premiums).



EPSL / FMLA+ Exceptions

- The employer has fewer than 50 employees; and
- Leave (EPSL or FMLA+) is for “reason #5” (child care); and
- The requirements of the FFCRA jeopardize business viability:

That means:

- Leave would result in expenses and financial obligations exceeding available business revenues and cause the small business to cease operating at a minimal capacity;
 - Employee’s absence would entail a substantial risk to the financial health or operational capabilities of the business because of the employee’s specialized skills, knowledge of the business, or responsibilities; OR
 - Insufficient employees able, willing, and qualified at time and place needed to perform labor or services provided by the employee, and these labor or services are needed for business to operate at a minimal capacity.
- Other exceptions: health care provider, emergency responder.



Verifying Child Care Need

Have the employee provide in writing:

- (1) name and the date(s) for which leave is requested;
- (2) a statement of the COVID-19 related reason for the leave, and written support for such reason;
- (3) a statement that the employee is unable to work (or telework) because of the qualified reason for leave;
- (4) the name and age of the son or daughter being cared for;
- (5) the name of the school, place of care, or child care provider that has closed or become unavailable;
- (6) a representation that no other suitable person will be caring for the son or daughter during the period for which the employee takes EPSL or FMLA+; and
- (7) *in the case of a child over 14* and when the employee is requesting leave to care for the child during daylight hours: a written statement that special circumstances exist preventing the employee from working (or teleworking) and requiring the employee to provide care.



Disability Accommodation

-Provide reasonable accommodation to an otherwise qualified individual with a disability.

- But not if (1) undue hardship or (2) a direct threat.
- Leave can be a “reasonable accommodation!”

-Medical inquiries: job related, consistent w/ business necessity.

-“Undue Hardship” is still a very high legal standard.

But some facts in support of that conclusion may be easier to establish during pandemic / downturn.

-Disability and age: avoid “protecting the vulnerable” with a unilateral decision (i.e., an adverse employment action).

See EEOC Guidance: last updated [June 11, 2020](#).



Employee Refusing to Return

- Pause: any legally-protected concerns?
 - FFRCA-related leave; disability accommodation; etc.
 - Does “fear” count as a disability?
- Consistency: are you applying a uniform expectation to return?
- If no such concerns exist: refusal to work can be a basis for termination.



Refusing to Return, cont.

Get some advice, and consider this template:

“As you know, we’ve been asking for you to return since [DATE]. In the meantime, we’ve also been working hard at making our workplace as safe as possible by actions including: _____. And in response to your concerns, we’ve also _____.

“We’re still open to discussing any further safety ideas you might have. But please keep in mind we have a business to run: if you do not report back by [DATE], we will be forced to end our employment relationship with you and will work fill your position.”

What about “please just let me stay on unemployment!?”

Preventing Discrimination



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Discrimination risk

- Employers cannot discriminate based on race, age, national origin, disability and whistleblower status or any other protected class
- Mixed motive still creates risk
- Use sound science, not stereotypes, for employment decisions
- As with disability protection, assumptions are not a substitute for accurate medical information and judgment



Be proactive with anti-retaliation policies.

- Employees have a right to be wrong
- Managers should be vigilant in looking for and preventing peer-to-peer retaliation
- Any adverse employment action can create risk if good faith reporting is a driver



Discrimination: Taking corrective action

- Take immediate and **appropriate action to end harassment** and prevent it from recurring
- Provide counseling and training in milder cases, while outlining the consequences if it happens again
- Take stronger action in more offensive cases and termination and/or suspension in extreme situations
- Monitor the situation to ensure no retaliation



A few do's and don'ts

Do:

- Send sick workers home
- Encourage teleworking
- Identify and mitigate risk and safety issues
- Overcommunicate
- Develop daily health checks

Don't:

- Make employment decisions based on protected class
- Fail to accommodate disability, religion
- Allow retaliation against whistleblowers



Technical Assistance for Employers

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- TA email bolita@boli.state.or.us
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- Jeff Burgess
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Thank you!

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