

When and How to Pay Quarantined Workers

By Allen Smith, J.D.

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If a company requires an employee to quarantine for 14 days, must it pay that employee for the time? Whether the quarantine is due to close contact with someone who tested positive, or because the employee traveled to a coronavirus hot spot (www.shrm.org/ResourcesAndTools/legal-and-compliance/state-and-local-updates/Pages/State-COVID-Quarantine-Mandates-Complicate-Business-Travel.aspx), the answer depends on several factors, including whether the employer is subject to the Families First Coronavirus Response Act (FFCRA).

Some employers choose to pay for quarantine time anyway, even if not required. All employers, however, should carefully craft quarantine pay policies to ensure consistency and avoid liability.

When Does the FFCRA Apply?

Angelo Filippi, an attorney with Kelley Kronenberg in Fort Lauderdale, Fla., said the FFCRA requires employers with fewer than 500 employees to provide:

- Up to two weeks—80 hours—of paid sick leave at the employee's regular rate of pay (www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/labor-department-updates-regular-rate-pay-rule-.aspx) when the employee is unable to work because he or she is quarantined under a government order or the advice of a health care provider, and/or is experiencing COVID-19-related symptoms and seeking a medical diagnosis.
- Up to two weeks—80 hours—of paid sick leave at two-thirds the employee's regular rate of pay when the employee is unable to work because of a need to care for an individual who is quarantined under a government order or the advice of a health care provider, or to care for a child whose school or child care provider is closed or unavailable for COVID-19-related reasons.
- Up to an additional 10 weeks of expanded family and medical leave at two-thirds the employee's regular rate of pay when an employee is unable to work due to a need to care for a child whose school or child care provider is closed or unavailable for reasons related to COVID-19.

These expenses are to be repaid to the business through federal tax credits. Very small employers—those with fewer than 50 employees—should consider seeking an exemption from these requirements (www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/coronavirus-ffcra-small-business-exemption.aspx) if, even with the tax credit, compliance with the FFCRA would be a hardship, said Meagan Garland, an attorney with Duane Morris in San Diego.

Some employees may try to take advantage of the situation, said Megan Toth, an attorney with Seyfarth in Chicago, and there may be little employers can do about it. "An employee returning from personal travel who is now subject to a state or county quarantine due to that travel would be covered under the FFCRA," she explained. "While we see some employers struggling with employees who are knowingly taking personal travel to a hot spot and 'reaping the benefit' of not being able to work for 14 days, assuming they cannot work from home, there has not been any guidance or amendments that would suggest that the FFCRA does not cover those individuals."

But under New York state law (<https://www.lexology.com/library/detail.aspx?g=009aab40-9469-4e92-a0a1-4beced64c67e>), any employee who voluntarily travels to a state with a high positive test rate is ineligible for New York's COVID-19-related sick leave.

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Pros and Cons of Voluntary Payment During Employer-Imposed Quarantine

Employers that aren't subject to the FFCRA because of their size or for other reasons still may want to pay employees who are quarantined and unable to work.

"As an employer, you want to encourage your employees to be honest and take the time away from work to ensure they are not infected," said Arielle Eisenberg, an attorney with Cozen O'Connor in Miami. "Employees oftentimes will not be honest about their potential exposure or travel if they have to quarantine without pay."

Employers are trying to find ways to support their employees during the pandemic, Toth noted, and providing additional paid time off, even when they aren't required to do so, has been one of them.

"The pros include employee satisfaction, retention and loyalty, as well as stopping employees from coming into the workplace when they have symptoms" and potentially spreading the virus, she said. "Some cons include the costs to the company and possible abuse by employees, which could result in businesses being understaffed."

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Tread Carefully Even If FFCRA Doesn't Apply

Garland cautioned that employers that voluntarily pay quarantined workers should clarify a few points to limit liability, including:

- Whether quarantined employees will continue to accrue vacation.
- Whether quarantined employees will receive full or partial wages.

If the employer decides to pay quarantined workers at less than their regular rate, it should be sure to comply with minimum-wage rules and threshold-pay requirements for exempt status, Garland said.

Be careful not to characterize the payments as bonuses, which could impact regular rate of pay calculations in the future, she cautioned.

The employer should note that any arrangement to pay employees during a quarantine is temporary and doesn't set precedent for any future, even seemingly similar, situation, Garland added.

Nonexempt employees should not be permitted to work during the quarantine, despite payment, she said. Otherwise, "employers could risk exposure for meal or rest-break premiums and accrued overtime wages."

Employers that voluntarily pay workers who are quarantining should make sure that the pay policy is administered objectively and consistently, said Brian Mead, an attorney with McDermott, Will & Emery in Chicago. "If employers are making inconsistent decisions, there is potential for legal exposure, including allegations of discrimination for providing certain leave benefits to some individuals but not others," he explained.

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