

COVID-19 & THE DEATHCARE PROFESSION

Q&A – The Impact of COVID-19 on the Deathcare Profession

A Look at Employer and Employee Questions

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The following is based on information available as of April 13, 2020.

1) How to handle an employee who does not feel safe in the working environment? What obligations do we have to provide equipment and a safe workplace?

Handling an employee's concerns is typically a delicate matter, but it becomes even more acutely sensitive during a pandemic, where fear and uncertainty abound. Many deathcare employees have been deemed as "essential" by their respective state governments, and many employees are still reporting to work. While employers should make every effort to provide the requisite safety equipment to their employees (including masks, gloves, hand sanitizer, soap, etc.) in order to ensure both their safety, and the safety of patrons, under the current regulatory framework (see OSHA), many employers aren't legally required to do that much to keep their employees safe from a coronavirus infection.

The Occupational Safety and Health Administration ("OSHA") recently released a set of guidelines specific to employer concerns for the Coronavirus Pandemic. It designated 4 categories of risk: Very High, High, Medium, and Low.

Deathcare workers likely fall into the "Medium" category, as such workers could "come into close contact with someone who might be infected with the coronavirus." OSHA recommends that employers whose workplace falls under the "Medium" category install basic engineering controls, such as sneeze guards, consider offering face masks to sick employees who are in the process of leaving the work premises, limit worksite access to the public, reduce travel, and minimize face-to-face contact among employees. In some situations, providing basic PPE (like goggles, a face mask, or a gown) to certain employees may be necessary.

2) What can we do about an employee's grievances/concerns during COVID-19 in the workplace, while still operating our business?

Legal requirements are one thing, but handling employee grievances in reality, are often another. As many members have probably witnessed in the cases of other companies, like Amazon or Instacart, employee issues can quickly balloon when such gripes are not handled satisfactorily when they present themselves as smaller, initial concerns. Thus, employers are encouraged to listen to what their employees have to say, and take whatever measures are practicable. Many

employers in the deathcare industry are already utilizing common sense “social-distancing” practices during services/memorials, such as:

- Limiting room occupancy to half-capacity
- Prohibiting physical contact
- Practicing safe “social distancing” by remaining 6-feet apart from each individual
- Regular hand-washing, no touching of faces, and the use of Personal Protective Equipment (“PPE”)

Funeral homes and cemeteries that feel that they have insufficient sanitary supplies, have staff members with COVID-19 symptoms or a confirmed diagnosis, or feel they cannot adequately ensure the safety of mourners or employees, should consider closing or modifying operations temporarily.

If employees still do not feel safe after the company has implemented appropriate prevention practices and provided the recommended sanitary equipment, there are a number of additional options. Employers can allow staff to make use of their banked sick time or paid time off (“PTO”). If such time is not available, and the employee’s fear is not based on a pre-existing medical condition or a doctor’s recommendation, employers may be able to discipline employees for not reporting to work. If there are legitimate concerns (such as the handling of a body that was infected with COVID-19, or contact with another infected staff member), deathcare employers should conduct a fact-specific analysis as to how to handle the situation. If the employee in question has a pre-existing medical condition that makes him or her more susceptible to COVID-19, the employer should discuss potential workplace accommodations, or a leave of absence, with the employee.

3) How do we handle an employee who has been diagnosed with

Coronavirus and must be quarantined at home?

Under the recently passed Families First Coronavirus Response Act (“FFCRA”), the right to Emergency Paid Sick Leave was widely expanded for American workers during the pandemic. Although the provisions of FFCRA apply to any employer with over 500 employees automatically, employers with under 50 employees will also be given the chance to opt out of FFCRA upon applying for a waiver to the Department of Labor (“DOL”). In order to opt out, small businesses with under 50 employees must demonstrate that the provision of sick leave and paid FMLA leave would jeopardize the viability of the business as a going concern. The DOL has posted a Q&A (available at <https://www.dol.gov/agencies/whd/pandemic/ffcra-questions>) advising employers seeking this exemption to “document why your business with fewer than 50 employees meets the criteria set forth by the Department, which will be addressed in more detail in forthcoming regulations.” In addition, employees who are health care providers or emergency responders are not entitled to FFCRA leave. On March 6, 2020, the DOL’s Wage and Hour Division (“WHD”) issued a temporary rule implementing these leave provisions (available at <https://www.federalregister.gov/documents/2020/04/06/2020-07237/paid-leave-under-the-families-first-coronavirus-response-act>). While deathcare workers are not explicitly listed as emergency responders in the current Department of Labor Q&A and WHD regulations, ICCFA is currently working with the DOL in an effort to have deathcare workers and supporting industries specifically designated as exempt in guidance accompanying the FFCRA.

Employers who are covered by the FFCRA (and who have not been granted a waiver) must provide emergency leave to eligible employees in six different scenarios: (1) employees who are subject to a government mandated isolation/quarantine; (2) employees who have been advised

by a healthcare provider to self-quarantine; (3) employees who have COVID-19 symptoms and are seeking treatment; (4) employees caring for an individual who is either subject to a government mandated quarantine or was advised by a healthcare provider to self-quarantine; (5) employees caring for their children at home as a result of their child's school closing; and (6) employees experiencing any other substantially similar condition as certified by the Department of Health and Human Services ("HHS").

Full-time employees who qualify under the first 3 scenarios are eligible for 80 hours (2 work weeks) of paid sick leave under FFCRA at up to 100% of their normal pay (capped at \$511/day and \$5,110 for the entire 80 hours). Full-time employees who qualify under the last 3 scenarios can receive up to \$200 per day (or \$2,000 for the entire 80 hours). While employers must initially cover these payments from their own funds, the cost is offset by refundable tax credits. Each quarter from April 1, 2020 through December 31, 2020, employers are entitled to a refundable tax credit equal to 100% of the qualified Emergency Paid Sick Leave wages paid to eligible employees. Employers subject to the FFCRA must post a Notice (available at https://www.dol.gov/sites/dolgov/files/WHD/posters/FFCRA_Poster_WH1422_Non-Federal.pdf) in a conspicuous and accessible workplace location.

4) How do we handle an employee who is caring for a sick family member or has no childcare available and can't come to work - even though we are deemed essential?

The FFCRA also provides Emergency Paid Sick Leave and Emergency Paid leave to parents of children whose school or normal childcare has been cancelled as a result of COVID-19. A state's designation of a business as "essential" does not nullify an Employee's rights under FFCRA. Steep penalties for non-compliance are expected, so members should pay careful attention to this

category of covered workers. Full-time employees seeking to take Emergency Paid Sick Leave under the school/childcare provision are entitled to 80 hours of paid sick leave at 66% of the employee's normal rate of pay, up to a max of \$200 daily, not to exceed \$2,000 over the 80 hours.

After exhausting the 80 hours of partially-paid leave, employees without childcare due to COVID-related cancellations may then opt to utilize Emergency Paid FMLA Leave under the FFCRA, for another 10 weeks (or 12 weeks in total). During this leave, employers must pay their employees 66% of their regular rate (capped at \$200 per day and \$12,000 for the entire leave period). The first 2 weeks of this leave is unpaid, but would typically be covered by emergency paid leave under the FFCRA (see above). Employers are prohibited from retaliating against any employee who seeks to invoke either of their rights to paid leave benefits under the Act.

However, as noted in the previous section, some employees, including "emergency responders," are not entitled to this leave. The WHD regulations define "emergency responder" broadly as "anyone necessary for the provision of transport, care, healthcare, comfort and nutrition of such patients, or others needed for the response to COVID-19." The regulations also include a non-exclusive list of examples of emergency responders, including law enforcement officers, emergency medical services personnel, doctors and nurses, and public works personnel. "Emergency responders" can also include individuals designated by the highest official of a State or territory.

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Please note that this is a developing area of law, concerning unprecedented public health challenges. This FAQ includes the most up-to-date information available as of the date of publication. However, laws and best practices are expected to continue to change rapidly going forward.

This FAQ should not be construed as legal advice. However, we invite ICCFA members to reach out with questions or concerns, so we can provide advice based on the particular facts at issue.



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