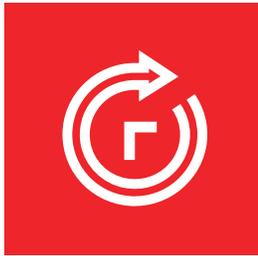


February 2021

Lincoln Absence Advisor: Compliance report



Lincoln's monthly compliance report provides you a summary of all the recent compliance news that may affect your business. We aim to keep you informed and updated on the latest news, from federal to state, courtroom to news.

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Updated as of February 23, 2021

Family and Medical Leave

Federal

January 28, 2021:

The Internal Revenue Service (IRS) issued guidance on frequently asked questions (FAQs) on COVID-19-related tax credits for small and midsize businesses.

The COVID-related Tax Relief Act of 2020 ("Tax Relief Act") extended employer tax credits for paid sick leave and paid family and medical leave voluntarily provided by employers under the same terms as the Families First Coronavirus Response Act (FFCRA) through March 31, 2021.

The refundable tax credits apply to qualified sick leave wages and qualified family leave wages paid for certain periods when an employee is unable to work during the period beginning April 1, 2020, and ending March 31, 2021, pursuant to amendments to the provisions of the FFCRA made by the Tax Relief Act. The full text of the FAQs can be found on the [IRS website](#).

Washington

January 29, 2021:

The Employment Security Department (ESD) filed emergency regulations to clarify what service is considered localized as it relates specifically to the temporary physical reassignment of an employee due to the COVID-19 pandemic:

WAC 192-510-091 Localization considerations due to COVID-19.

For the purposes of paid family and medical leave, an employee's service is localized in Washington if:

- Prior to March 23, 2020, the employee's service with an employer was considered localized in Washington under RCW 50A.05.010(8)(a);
- The employer requirements or the state's restrictions due to COVID-19 resulted in the employee temporarily working from a location that is not in Washington;
- The employee's residence or domicile was out of state prior to March 23, 2020; and
- The employer and employee intend for the employee to perform work exclusively or mostly in Washington once COVID-19 restrictions are lifted.

Employers with employees covered by the previous section must comply with all the rights and responsibilities under Title 50A RCW and submit amended reports and pay premiums for the affected quarters if applicable. Employers that acted on the advice of the department and did not previously report these employees are not required to amend reports.

This rule affects benefits eligibility, employer reporting, and premium payment considerations, especially as they relate to telework performed out-of-state during the COVID-19 pandemic. It is effective immediately and will expire after May 29, 2021.

February 9, 2021:

The ESD held a public rulemaking hearing on new draft regulations on definitions, "hours worked," small business grants and appeals. The PFML rules are expected to be adopted on or after February 16, 2021, with the effective date still to be determined. The full text of the draft regulations can be found on the [WA PFML rulemaking website](#).

February 11, 2021:

The ESD issued guidance on frequently asked questions (FAQs) on taxability of PFML benefits. The ESD decided to issue a 1099-G form to all customers who received family leave benefits in 2020 pending any guidance from the IRS on whether PFML benefits are considered as "taxable income". The ESD believes that it is likely that family leave benefits could be taxable and medical leave benefits would not, which is why they chose to provide 1099s for family leave only. The full text of the FAQs can be found on the [WA PFML website](#).

Massachusetts

February 12, 2021:

The Department of Family and Medical Leave (DFML) held a public rulemaking hearing on new draft regulations on additional covered individuals and employers. This rulemaking codifies the same text of the emergency rules from December 21, 2020 and makes the emergency rules permanent. Under the proposed permanent rules, personal care attendants and family child care providers would be considered covered individuals. The Department of Early Education and Care will be the employer of family child care providers; the PCA Quality Home Care Workforce Council will be the employer of personal care attendants, although consumers are considered the employers for the purpose of notice requirements. The full text of the regulations can be found on the [MA DFML website](#).

Connecticut

January 2021:

The Paid Family and Medical Leave Insurance Authority (PFMLIA) published the PFML Glossary of Terms. The glossary provides guidance to employers, third party administrators, insurers and employees about terms relevant to the paid leave benefits under the CT PFML law. The PFMLIA also considers the unpaid CT FMLA regulations as relevant when interpreting rights under the CT PFML law. The full text of the glossary can be found on the [CT PFMLIA website](#).

From the Courts

January 13, 2021

The case: An employee who requested but did not report their FMLA leave is not compliant with the employer's usual and customary notice and procedural requirements. Because the employee failed to report their absences in accordance with the employer's policies, the employee cannot show that they invoked their right to FMLA-qualifying leave.

The ruling: The Third Circuit ruled that an employee must comply with the employer's usual and customary notice and procedural requirements. Under the specific facts of this case and the employer's leave policy, the employee merely requested FMLA leave; however, they failed to report the absences as FMLA via the employer's call-off system. Following the request, approval, and designation, an employee must still report the absence as FMLA once the absence is taken. The district court held in favor of the employer, and the Third Circuit affirmed. (*Soutner v. Penn State Health*, No. 20-1763, 2021 U.S. App. LEXIS 867 (3d Cir. Jan. 13, 2021))

February 3, 2021

The Seventh Circuit ruled that the mandate of Uniformed Services Employee and Reemployment Rights Act (USERRA) requires that military leave be accorded the same "rights and benefits" as comparable nonmilitary leave and requires an employer to provide paid

military leave to the same extent that it provides paid leave for other absences, such as jury duty and sick leave.

The case: Under the employer's collective bargaining agreement, pilots receive pay when they take other short-term leaves of absence, such as jury duty or sick leave. Because these credits are based on wages, pilots who take paid sick leave or paid leave for jury duty earn credit toward their profit-sharing plan, while pilots who take short-term military leave do not. The employee brought a class action suit which alleged that the employer's failure to provide paid leave and profit-sharing-plan credit to reservists on military leave denies them "rights and benefits" that are given for comparable, nonmilitary leaves, thereby violating USERRA.

The ruling: The Seventh Circuit overturned the decision of the district court and held that USERRA defines the term "rights and benefits" broadly, and paid leave— i.e., compensation at the normal rate during a leave of absence—is included. However, the appellate court also held that the employee still has to show that any leave of absence for which his employer provides paid leave is comparable to any given stretch of military leave, which is a question of fact. The case was remanded back to the lower court for further proceedings. (*White v. United Airlines, Inc.*, No. 19-2546, 2021 U.S. App. LEXIS 2973 (7th Cir. Feb. 3, 2021))

In the News

January 26, 2021:

The EEOC announced that Gentiva Health Services, doing business as Kindred at Home, has agreed to pay a \$160,000 settlement in an employment discrimination lawsuit alleging that an employee was discriminated against due to their disability. The employee's doctor recommended that she stay off her feet due to her disability; so she initially requested an accommodation to work remotely for three weeks. The accommodation was granted but after a week the company changed its position and placed the employee on a four-month unpaid leave without benefits, even though the employee could perform essential job functions with this accommodation. In addition to monetary relief, Kindred at Home must conduct reports, monitor, provide yearly training, distribute ADA policies, and post a notice about the ADA.

In the Spotlight: COVID-19

Lincoln Financial is here to help you remain confident and prepared during this evolving situation. We're continuously monitoring the latest news, information from the Centers for Disease Control and Prevention and other regulatory and medical experts to offer targeted guidance and support.

New York

January 20, 2021

The Department of Labor (DOL) issued updated guidance on the use of COVID-19 sick leave in 2021. The new guidance supplements prior guidance on the application of COVID-19 sick leave. All prior guidance remains in effect. The new guidance is available on the [NY DOL website](#). Here is the text of the guidance:

1. An employee who returns to work following a period of mandatory quarantine or isolation does not need to be tested before returning to work, except for nursing home staff. However, an employee who subsequently receives a positive diagnostic test result for COVID-19 must not report to work. The employee shall be deemed to be subject to a mandatory order of isolation from the Department of Health and shall be entitled to sick leave as required by New York's COVID-19 sick leave law, whether or not the employee already has received sick leave as required by the law for the first period of quarantine or isolation. However, the employee must submit documentation from a licensed medical provider or testing facility attesting that the employee has tested positive for COVID-19. The employee does not need to submit documentation of a positive result if the employee's employer gave the employee the test for COVID-19 that showed the positive result.
2. An employee who is subject to an order of quarantine or isolation but continues to test positive for COVID-19 after the end of such quarantine or isolation period must not report to work. Please note that an employee is not recommended to be tested to discontinue isolation or quarantine. The employee shall be deemed to be subject to a second mandatory order of isolation from the Department of Health and

shall be entitled to sick leave as required by New York’s COVID-19 sick leave law for the second period of isolation. However, the employee must submit documentation from a licensed medical provider or testing facility attesting that the employee has received a positive diagnostic test for COVID-19 after completing the initial period of isolation. The employee does not need to submit documentation of a positive result if the employee’s employer gave the employee the test for COVID-19 that showed the positive result.

3. If an employer mandates that an employee who is not otherwise subject to a mandatory or precautionary order of quarantine or isolation to remain out of work due to exposure or potential exposure to COVID-19, regardless of whether such exposure or potential exposure was in the workplace, the employer shall continue to pay the employee at the employee’s regular rate of pay until such time as the employer permits the employee to return to work or the employee becomes subject to a mandatory or precautionary order of quarantine or isolation, at which time the employee shall receive sick leave as required by New York’s COVID-19 sick leave law, in accordance with this guidance, for the period of time the employee is subject to such mandatory or precautionary order of quarantine or isolation.
4. In no event shall an employee qualify for sick leave under New York’s COVID-19 sick leave law for more than three orders of quarantine or isolation. The second and third orders must be based on a positive COVID-19 test in accordance with paragraphs 1 and 2.

Connecticut

February 4, 2021:

The Governor of Connecticut signed **Executive Order No. 10 for the establishment of paid leave for staff of local and regional boards of education**. This order requires local and regional boards of education to continue to provide two weeks of paid leave (or equivalent for part-time staffers) for school district employees who have to miss work because:

- They were required to self-quarantine due to COVID-19
- The school closed because someone at the school was exposed
- They need to care for someone subject to quarantine
- They were diagnosed with COVID-19
- They are experiencing COVID-19 symptoms and seeking medical attention
- They were required to care for a child whose school or place of care was closed or unavailable for reasons related to COVID-19.

The full text of the Executive Order is available on the [CT Governor’s website](#).

Oregon

February 19, 2021:

The Bureau of Labor and Industries (BLI) held a public rulemaking hearing on the use of Oregon Family Leave Act (OFLA) sick child leave during a statewide public health emergency. This rulemaking codifies the same text of the temporary rules from September 11, 2020 and makes the temporary rules permanent. The proposed permanent rules provide definitional and operational clarifications to an existing administrative rule that that permits an employee to use OFLA sick child leave if their child's school or child care providers are entirely or intermittently closed in conjunction with a statewide public health emergency.

Updates and upcoming events with Lincoln

Season 2 of the *Lincoln Absence Advisor* podcast is here!

In Episode 1 and 2 we explore the definition of caregiving and the responsibilities of the employer. This premiere just went live, so be one of the firsts to listen. Subscribe on Apple, Spotify, or wherever you listen your podcasts.

Look for invites on our first quarterly webinar, *The Leave Balance*.

On March 30 and April 2, we will dive into some of the biggest areas discussed about the future of leave, from the impacts of the continuous state leave development to the future possibilities of company paid leave. Registration opens in a couple of weeks, so be on the lookout for your invite.

And don't miss us at [DMEC's 2021 Compliance Conference](#).

Our session, *Compliance Considerations in a Work-from-home Environment*, will be hosted on March 17. At this roundtable discussion we will talk about strategies for dealing with the added complexity of a work-from-home workforce and the compliance requirements HR faces.

Please note: This alert is provided for informational purposes only and should not be considered legal advice. This information is being provided to Lincoln Financial Group clients so they may conduct any necessary internal evaluation of their policies and procedures. This alert is designed to provide informative and current information as of the date of the alert. Please contact your legal advisor with any questions regarding the laws discussed in this communication. Lincoln continually monitors activity related to family and medical leave laws and as laws pass, we will determine any impacts to our suite of products. Lincoln does not currently administer or track paid sick leave. The information contained herein includes information on major cities and counties and is not all inclusive of all city and county laws.

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