

Solving Staffing Nightmares Created By State Travel Restrictions

Description

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Rhode Island and Massachusetts have joined the growing list of states that are enacting orders requiring citizens to quarantine for up to two weeks after traveling to other states. These travel restrictions often prohibit employees from even leaving their house to work. Given that many employees have more time in their vacation bank than normal at this time of year due to COVID-19, and that time spent in quarantine may be paid under the Families First Coronavirus Response Act ("FFCRA"), employers need to implement strategies to ensure their businesses are properly staffed.

Rhode Island Order. Per Governor Raimondo's July 29, 2020 [Executive Order 20-58](#), Rhode Island residents returning from a state with a COVID-19 positivity rate of 5% or more as determined by the Rhode Island Department of Health must self-quarantine for 14 days unless a negative test is obtained. There are currently 32 states that fall into this category, which oddly enough includes Puerto Rico, and the list is available at <https://health.ri.gov/covid/travel/>. The resident employee is allowed to return to work prior to the 14-day period only if the employee obtains a negative COVID-19 test result within 72 hours prior to arriving back to Rhode Island or thereafter. The restrictions do not apply to those who travel to a high-risk state to attend a funeral or memorial services, obtain necessities such as gas, groceries or medication, seek medical treatment, drop off/pick up children from day care, or to people who "must" work on their boat. The order also exempts public health, public safety and health care workers. Note that for international travel, the order requires a strict 14-day self-quarantine period with no exceptions and no allowance for a negative test. This travel order is set to expire on August 28, 2020 but may be renewed in some form.

Massachusetts Order. Similarly, Massachusetts requires a 14-day self-quarantine for those residents returning from any location that is not designated by the Massachusetts Commissioner of the Department of Public Health to be "lower-risk" unless a negative test is obtained. See [MA COVID Order No. 45](#). Currently, the "lower-risk" states are Connecticut, Maine, New Hampshire, New Jersey, New York and Vermont. As in Rhode Island, the Massachusetts resident is allowed to return to work prior to the 14-day period if the employee obtains a negative COVID-19 test 72 hours prior to returning to Massachusetts or thereafter. The restrictions do not apply to Massachusetts residents who "must" regularly commute to a fixed place of work or school in a restricted state or to anyone travelling to perform critical infrastructure work (defined broadly). Individuals subject to the restrictions, or those exempt due to testing, must submit a self-certification form. Employers in Massachusetts are required to take steps to ensure their employees comply with the orders for employer-paid or employer-reimbursed travel. This travel order remains in effect until rescinded or until the state of emergency ends, whichever occurs first.

Odd Effect of Orders. Unfortunately, the Rhode Island and Massachusetts orders are not matters of common sense and can have confusing impacts. The good news is that there are work exceptions for travel between the states of Massachusetts and Rhode Island. As such, a Massachusetts resident who regularly commutes to Rhode Island for work can continue this commute, work in Rhode Island, and return home each night without the need to quarantine even when – like now – Rhode Island is not on the "lower-risk" state list (but may only work in Rhode Island). Similarly, a Rhode Island resident who commutes to Massachusetts could continue the commute and work in Massachusetts without any quarantine requirement in Rhode Island even if Massachusetts is on the Rhode Island travel restriction list (Massachusetts is not on the list currently), but again may only work while in Massachusetts due to the Massachusetts order. The bad news is that, for many other purposes, the work exceptions do not apply. For example, the Massachusetts employee that visits his

family for a Sunday brunch in Rhode Island is subject to the quarantine or test requirement as soon as he passes into the border of Massachusetts to return home. Oddly, however, if the Massachusetts employee were to take a COVID-19 test on Thursday and got a negative result on Saturday, the employee would have no quarantine restriction upon his or her return from brunch to Massachusetts. Another example is that the Florida employee who visits the Rhode Island office for two weeks may work in the office without obtaining any negative test result but the Rhode Island employee returning from a Florida vacation *cannot* return to the Rhode Island office without obtaining a negative test. A third example is that a Massachusetts resident returning from Arkansas *cannot* work in Massachusetts (even in their own town) for 14 days unless a negative test is obtained, but could commute to Rhode Island for work (assuming the person regularly commuted to Rhode Island prior to the travel).

The Nightmare FFCRA Creates for Vacation Quarantine. As we have previously advised, any person working for a company with under 500 employees is entitled to take up to 80 hours of FFCRA emergency sick leave for various COVID-19 related reasons. One of these reasons is to comply with a state-issued isolation or quarantine order, including quarantines resulting from the Rhode Island and Massachusetts travel orders. FFCRA emergency sick leave due to an isolation or quarantine order entitles the employee to their full pay to a maximum of \$511 per day (meaning anyone making \$132,860 or less per year will be fully paid). The payment then can be taken as a dollar-for-dollar tax credit against the employer's payroll taxes.

Because the travel restrictions qualify the employee for paid FFCRA leave, employees understand that any one week vacation to a high risk state effectively means three weeks of vacation, all of it paid. While the employer should be reimbursed with tax credits for the second and third weeks leave under the FFCRA, the prospect of this long leave incentivizes, or at least does not disincentivize, employees to pick high-risk states for travel. Even employees with no vacation time or those getting their time off requests denied can potentially put themselves on a FFCRA paid leave by taking a quick weekend trip to Florida. These quarantines may create a real staffing issue for employers who must have staff on-site, such as retailers, restaurants, salons and other businesses that can only operate if they engage a consistent workforce with consistent scheduling. Office based businesses are also struggling with attendance, producing work with employees on staggered shifts or attempting to allow employees to work at home to the best of their ability (in many cases such jobs are ill-suited for telework).

Another problem for some employers may be the overlap of FFCRA available leave and an employer policy requiring employees to quarantine any time they travel to certain high risk areas. Employers need to understand that the FFCRA does not apply to employer-imposed quarantines, but rather only government-imposed quarantines. Thus, employers who have their own policy requiring employees to quarantine following travel are not necessarily eligible for any FFCRA reimbursement if they compensate those employees. For example, an employer may require an employee to stay out of work for two weeks upon finding that the employee spent a week in the Ozarks. However, if the employee receives a COVID-19 test a few days before leaving the Ozarks or a few days after, that employee is not "unable to work" under the FFCRA, so he or she is not eligible for FFCRA leave and the employer will not receive tax credit reimbursement for any portion of the employer-imposed quarantine not covered under the FFCRA.

How to Prepare

- **Manage employee vacations.** Employees are taking long overdue vacations. Many of these vacations were pre-planned and it may be difficult to even tell if the destination will be considered "restricted" on the employee's return date. Denial of vacations now may lead to payouts of vacation or larger requests later. However, employers need to be ready to deny requests when there is no staffing or at least put themselves in the best position to anticipate when an employee will not be able to work for several weeks. No law requires employers to allow employees to take vacations at a specific time – as long as the vacation bank is eventually paid or allowed to be used. In addition, neither Rhode Island nor Massachusetts law protect off-duty, legal conduct. Thus, at the bare minimum, employers should institute policies requiring employees to submit itineraries for out-of-state travel, regardless of whether the travel occurs during working hours. Human resources can, then, assess the risk of the travel and whether the time off (including any anticipated time off due to quarantine) may be accommodated. If too

many employees are taking time off for travel that is likely to result in quarantines around the same time, employers can deny vacation requests and fire employees who travel.

- **Employees who can work remotely should be set up to do so after travel.** For employees who can work remotely but are now back in the office, it is worthwhile ensuring prior to the employee leaving for vacation that they are able to work remotely upon their return in the event that they have to quarantine. Remember, FFCRA leave is not available if the employee can work remotely. While working from home may oftentimes not be ideal, the employer can avoid the prospect of having no work done for three full weeks by providing the employee with the temporary ability to work from home during the quarantine.
- **Require employees get a COVID-19 test.** Under current EEOC guidance, employers can require employees to be tested for COVID-19. In order to cut down on quarantine time, employers can consider implementing a policy requiring the employee get a COVID-19 test immediately upon their return (or if the employer is comfortable from a safety perspective, several days prior to their return from vacation). Close to the time of the employee's departure, human resources should research the fastest testing facilities and, if applicable, the availability of testing for non-residents at the place the employee is visiting. Be prepared that during peak vacation times (such as Labor Day), testing facilities may have a real lag in test and result timing. In addition, not all testing sites will test for travel purposes. Consult with legal counsel before terminating or taking adverse action against an employee who refuses to follow your recommended testing procedures.
- **Avoid unintended adverse consequences under the FFCRA.** While many employers are nervous about meeting staffing needs and making sure a one week vacation does not turn into a three week absence, some employers are more concerned about the risk of the employee returning to work too quickly after a trip. If this is the case, be clear with employees about your quarantine expectations so that the employees do not believe that they can immediately return to work following a vacation if they obtain a negative test result. Then review the specific order requirements with an employee intending to travel and explain if the employee receives a negative test result, the quarantine is no longer mandatory under the Rhode Island domestic travel order and Massachusetts travel order. Further explain that time spent quarantining under the employer's policy after the receipt of the test result cannot be paid under the FFCRA. Employers can choose to give the leave unpaid (on a daily basis for hourly employees and on a weekly basis for salaried employees) or require employees to take paid time off.

Final thoughts. At the end of the day, employers need to prepare the best they can for increased absences after scheduled vacations, take steps to avoid or minimize employee absences and diligently stay aware of the latest updates to the applicable state-ordered travel restrictions. As always, employers must make sure to apply their policies in a non-discriminatory and non-retaliatory manner. As there are a myriad of laws that impact all of these considerations, employers are encouraged to consult with their employment counsel when making such preparations.

Partridge Snow & Hahn's [Employment & Labor Practice Group](#) is ready to answer any questions you may have about state-ordered travel restrictions.

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