Post-COVID record keeping — what you're required to keep

Before the pandemic struck, employers already had to retain a long list of records. Then Congress passed a series of laws designed to protect employees, provide limited paid leave, and help employers pay workers. These all came with unique record-keeping requirements.

This article will look at the following records that need to be kept and the nuances that come with them.

- The Families First Coronavirus Relief Act.
- OSHA documents and regulations.
- Litigation records.

Employers should make sure they’re keeping the right documents for the right time period, otherwise, they may face penalties or challenges in court.

The Families First Coronavirus Relief Act (FFCRA)

Until the COVID-19 pandemic struck, there was no federal law requiring most private-sector employers to provide paid leave. The Fair Labor Standards Act (FLSA), which governs minimum wage and overtime, does not mandate any paid time off. The Family and Medical Leave Act (FMLA) doesn’t either. Instead, it allows some employees to take 12 or 26 weeks of unpaid job-protected leave depending on the reason. Federal employees

did get the right to 12 weeks of paid parental leave before the pandemic struck. But that leave wasn't scheduled to go into effect until October 2020.

Then Congress passed the FFCRA, providing new paid leave effective April 1, 2020. It provided fully or partly paid leave for most employees for COVID-related absences. These included absences to care for infected workers or family members and school shutdowns. The FFCRA expired at the end of 2020 though employers can voluntarily provide the leave through September 2021.

While the law expired, record-keeping requirements did not.

Here are the documents you need to have if you had employees request or use FFCRA:

- You are required to *create* certain documents if employees either requested or were approved for FFCRA leave. If an employee asked orally for time off for an FFCRA covered reason, you must document the request in writing. If you then *denied* the request, you must also produce a written document stating so. Although the FFCRA is silent on what you must do if you *approved* the request, document that too. Both documents must be kept for four years.
- If you paid FFCRA benefits but didn't claim the fully refundable tax credit, you do not need to do anything else.
- If you claimed or will claim the tax credit, you must provide other records and retain them for four years. These include:
    - Proof of how you calculated FFCRA paid leave including timesheets for on-site or telework hours.
    - Documents showing how you allocated qualified health plan expenses to wages. This is for employers that already were providing health insurance coverage. If you did, you had to continue doing so during FFCRA leave. Your documentation must tell the IRS how you came up with the figure you are claiming for the tax credit.
    - You must also keep the completed IRS form (Form 7200) for the credit that you submitted to the IRS.
    - Employers should assume that if they voluntarily extend FFCRA and claim the credit, they must keep the same records.

Other than IRS forms to claim the FFCRA credit, employers do not need to submit FFCRA records. You should keep them as you would any other records under the FLSA since DOL administers the FFCRA. Have them readily accessible for DOL investigators should they request access.

The Occupational Safety and Health Administration (OSHA)

OSHA has also added or expanded record-keeping requirements during the pandemic. OSHA administers the Occupational Safety and Health Act (OSHA Act). Since COVID-19 can be, and has been, acquired from workplace exposure, the OSHA Act applies. Generally, records of workplace injuries and illness must be created and kept for five years.

In the case of COVID-19 infections, OSHA wants records when:

- An employee develops a confirmed case of COVID-19 that is work-related. OSHA doesn't require employers to keep the same records if it's merely a case of suspected infection or exposure. While employers likely quarantined those workers, if they don't get sick, the list of exposed workers needn't be retained for OSHA.
- The case is work-related. If a worker is COVID-19 confirmed, the employer next needs to investigate whether there was workplace exposure. If so, the confirmed case requires record-keeping. If the investigation finds no workplace exposure, no record-keeping is required.
- The confirmed case requires missed workdays or medical treatment. Of course, this will always be the

case with a confirmed case. Workers would either miss work to avoid spreading the virus or require medical treatment even if only for testing.

Many employers have had their workers monitor their health or have temperature-screened arriving workers. Fortunately, these efforts likely don't constitute OSHA health records. If so, they would have to be retained for the length of employment plus thirty years. Unless you are using a doctor or nurse to do the screening, you won't have to keep screening records.

Litigation records

There is required COVID-19 record-keeping and then there is defensive record-keeping. One of the fastest growing areas of employment litigation is COVID-19 liability. Thousands of employers have already been sued by workers, their relatives, and customers or clients. Often the claims involve workplace exposure. Sometimes relatives claim that employees were exposed at work and brought the virus home. And customers have sued, alleging lax safety measures led to an infection. In all these cases, employers will have to prove they did all they reasonably could. Having good records showing you followed all COVID-19 best practices will help defeat weak claims.

What records might you consider retaining?

- Comprehensive list of safety protocols, including when they were created or modified. If based on CDC, OSHA, EEOC, or other federal agency guidelines, state so.
- Records showing your safety protocols were followed regularly.
- Records of any workplace outbreak and what you did to contract trace, isolate, and contain the outbreak.
- Any other records your counsel may recommend.

Also remember that if you are notified that a complaint or suit has been filed, you must retain all records in place. Deleting or destroying records can be disastrous. A court may assess penalties or conclude that the destruction creates a presumption of wrongdoing.

Final notes

Employers should also check to see what their state or city agencies may also require. Start with the state's department of labor and OSHA equivalent. For example, California has additional exposure record-keeping requirements. Beginning January 1, 2021, employers have to keep records for three years if they learn a worker has COVID-19. Those records have to show that all workers at the same worksite who were exposed to the infected worker were notified.