

## **HUMAN RESOURCES:**

COVID-19 & Paid Leave Considerations:

[View this COVID-19 Employment Law Update for detail](#)

### **Paid Time Off**

Review your paid time off policies as it relates to sick leave and err on the side of the employee when determining use. Under current CDC guidelines and in line with most state laws, employers may not require employees to provide a doctor's note to substantiate a call-in due to an illness. However, under the EEOC's ADA pandemic guidance, employers may ask specific questions about symptoms and it is recommended that information be documented. Ensure you remain HIPAA compliant and retain information confidentially. Additionally, the Department of Labor has recently issued regulations regarding the paid leave provisions of the FFCRA, which states that employees must give notice to their employers of their need to take sick or family leave and provide documentation to support that request. [See sample Employee Leave Election Request Form, provided by the DOL.](#)

### **Families First Coronavirus Response Act (FFCRA)**

On March 19th the President signed into law the FFCRA with several paid leave provisions, as outlined below:

#### **Emergency Paid Sick Leave Act (EPSLA)**

The Act provides that covered employers must provide to all employees:

Two weeks (up to 80 hours) of expanded family and medical leave at the employee's regular rate of pay where the employee is unable to work because the employee is quarantined (pursuant to Federal, State, or local government order or advice of a healthcare provider), and/or experiencing COVID-19 symptoms and seeking a medical diagnosis; or

Two weeks (up to 80 hours) of expanded family and medical leave at two-thirds the employee's regular rate of pay because the employee is unable to work because of a bona fide need to care for an individual subject to quarantine (pursuant to Federal, State, or local government order or advice of a healthcare provider), or care for a child (under 18 years of age) whose school or child care provider is closed or unavailable for reasons related to COVID-19, and/or the

employee is experiencing a substantially similar condition as specified by the Secretary of Health and Human Services, in consultation with the Secretaries of the Treasury and Labor.

### **Who is covered?**

Employers with fewer than 500 employees and public agencies with at least one employee.

### **What is the effective date?**

The-paid-sick leave provisions took effect April 1, 2020 and expire on December 31, 2020.

### **What are the qualifying reasons for leave?**

Qualifying reasons for this paid sick leave include:

1. The employee is subject to a federal, state, or local quarantine or isolation order related to COVID-19.
2. The employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19.
3. The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis.
4. The employee is caring for an individual who is subject to either number 1 or 2 above.
5. The employee is caring for his or her son or daughter if the school or place of care of the son or daughter has been closed, or the childcare provider of such son or daughter is unavailable, due to COVID-19 precautions.
6. The employee is experiencing any other substantially similar condition specified by the secretary of health and human services in consultation with the secretary of the treasury and the secretary of labor.

### **What is the Duration of the Leave?**

For reasons (1)-(4) and (6): A full-time employee is eligible for up to 80 hours of leave, and a part-time employee is eligible for the number of hours of leave that the employee works on average over a two-week period.

For reason (5): A full-time employee is eligible for up to 12 weeks of leave at 40 hours a week, and a part-time employee is eligible for leave for the number of hours that the employee is normally scheduled to work over that period.

### **How is the pay calculated?**

For leave reasons (1), (2), or (3): employees taking leave shall be paid at either their regular rate or the applicable minimum wage, whichever is higher, up to \$511 per day and \$5,110 in the aggregate (over a 2-week period).

For leave reasons (4) or (6): employees taking leave shall be paid at 2/3 their regular rate or 2/3 the applicable minimum wage, whichever is higher, up to \$200 per day and \$2,000 in the aggregate (over a 2-week period).

For leave reason (5): employees taking leave shall be paid at 2/3 their regular rate or 2/3 the applicable minimum wage, whichever is higher, up to \$200 per day and \$12,000 in the aggregate (over a 12-week period—two weeks of paid sick leave followed by up to 10 weeks of paid expanded family and medical leave).

Regular rate of pay is determined by calculating all regular pay to include overtime and any non-discretionary bonuses.

### **What if the employee has other paid leave available?**

An employer may not require an employee to use other types of paid leave provided by the employer before the employee uses the paid sick time available under this law.

## **The Emergency Family and Medical Leave Expansion Act**

### **What is expanded?**

The Emergency Family and Medical Leave Expansion Act amends the current Family and Medical Leave Act (FMLA), allowing leave for eligible employees who can't work (or telework) because their minor child's school or childcare service is closed due to a COVID-19 emergency declared by a federal, state or local authority.

### **Who is eligible?**

Eligible employees include employees who work for an employer with fewer than 500 employees and who have been on the payroll for at least 30 calendar days.

### **What is the effective date?**

April 1, 2020 and expires on December 31, 2020.

### **Is this paid leave?**

The first 10 days of this leave may be unpaid; however, employees may elect to substitute available paid time off, such as vacation, personal or sick leave, during this time. AND they would most likely be eligible under the EPSLA, as defined in above in #5.

After the initial 10 days, employers must pay eligible employees at least two-thirds of the employees' regular rate of pay (as defined under the Fair Labor Standards Act) based on the number of hours the employees would otherwise have been scheduled to work. These paid-family-leave benefits are capped at \$200 a day (or \$10,000 total).

### **Are there exceptions?**

An employee working for a health care provider or an emergency responder can be excluded from these requirements by his or her employer.

A small employer with fewer than 25 employees is not obligated to reinstate an employee at the end of his or her leave if the employee's position has been eliminated due to economic conditions or other changes in operating conditions of the employer caused by COVID-19, and the employer is unable to reinstate the employee to an equivalent position.

Small businesses with fewer than 50 employees may qualify for exemption from the requirement to provide leave due to school closings or child care unavailability if the leave requirements would jeopardize the viability of the business as a going concern.

### **Tax Credits:**

Covered employers qualify for dollar-for-dollar reimbursement through tax credits for all qualifying wages paid under the FFCRA. Qualifying wages are those paid to an employee who takes leave under the Act for a qualifying reason, up to the appropriate per diem and aggregate payment caps. Applicable tax credits also extend to amounts paid or incurred to maintain health insurance coverage. For more information, please see the Department of the Treasury's website.

### **Employer Notice:**

Each covered employer must post in a conspicuous place on its premises a notice of FFCRA requirements.

### **Prohibitions:**

Employers may not discharge, discipline, or otherwise discriminate against any employee who takes expanded family and medical leave under the FFCRA and files a complaint or institutes a proceeding under or related to the FFCRA.

## **Paid Leave vs. Unemployment**

### **How is determined if an employer is over or under 500 employees?**

The 500-employee threshold is determined at the time your employee's leave is to be taken. If you employ fewer than 500 full-time and part-time employees within the United States, which includes any State of the United States, the District of Columbia, or any Territory or possession of the United States, then you would need to comply. In making this determination, you should include employees on leave; temporary employees who are jointly employed by you and another employer (regardless of whether the jointly-employed employees are maintained on only your or another employer's payroll); and day laborers supplied by a temporary agency (regardless of whether you are the temporary agency or the client firm if there is a continuing employment relationship). Workers who are independent contractors under the Fair Labor Standards Act (FLSA), are not considered employees for purposes of the 500-employee threshold.

### **What if I am an essential business and remain open but I have had to lay off some of my workforce – do I have to provide paid leave or is the employee eligible for unemployment?**

Under HR 6201, layoffs are not one of the criteria for being eligible for paid leave. Employees laid off are eligible to file for unemployment benefits.

### **We are planning on continuing health coverage for our employees while we are closed. Are employees still eligible for unemployment benefits if we are paying their health insurance premiums?**

es, employees are still eligible for unemployment benefits. Health insurance coverage and unemployment are separate. Unemployment has to do with job loss and is a partial income replacement.

### **We are an essential business and remain open. We do not have the option to telework or work remotely. I have an employee that is concerned about being exposed and does not want to interact with customers. Can I make them work? What are my options?**

If the employee is concerned about being exposed, then you could offer the employee the option of staying home and using any paid time off benefits they may have or take the time as unpaid leave. This circumstance would not be covered under the new FFCRA law described above.

You may also require the employee to work and failure to do so could be grounds for termination; however, this option is not recommended. Try to work with the employee as much as possible and accommodate if you can.

**Can we require an employee to self-quarantine after traveling outside of the United States?**

Yes. All U.S. citizens, legal permanent residents, and their immediate families who are returning from a [restricted country](#) must self-quarantine in their homes for 14 days after their arrival. In order to ensure compliance, local and state public health officials will contact individuals in the days and weeks following their arrival.

**I have an employee that states they have an underlying medical condition and wants to be sent home. Can I ask what the condition is?**

This could be a reasonable accommodation and fall under the ADA, so I would recommend engaging in the interactive process and determine if a leave is a reasonable accommodation. In light of the circumstances, I would take the information at face value and not request a doctor's excuse. Document the information and maintain it confidentially in their medical file.

**We are reducing our staff for a short duration of time, can we require those we feel that may be more vulnerable to COVID-19, such as someone who is pregnant or older to take the layoff and use their paid leave?**

It's possible this could fall under the Direct Threat provisions under the EEOC in a pandemic situation. You can get more information on the guidance from the EEOC [here](#). You could request the employee received a medical note as to whether or not they could be vulnerable to an exposure. However, I would not require them to take their paid leave.

**We wanted to inquire if we were to have an employee who has either tested positive for COVID-19 or has symptoms, is there a template letter that we can use to send to employees that may have worked closely with that employee as an advisement.**

Yes, you can find that letter [here](#).

**If I have a child that becomes symptomatic and is tested but comes out negative, will I qualify for the 80 hours PTO FFCRA?**

The employee could receive the Emergency Paid Sick Leave to take care of the affected child until such time that the test is concluded as negative. It is typically taking 48 hours to get the results of the test. They would not be entitled to all 80 hours. However, please note that this law is through December 31, 2020, so they could use some of that EPSLA time later in the year. There is a cap of \$511 per day or \$5,110 total over the entire paid sick leave period.

What if I have 4 children and each one becomes sick; will I qualify for the additional 10 weeks? No, the 10 weeks applies to only when the school or daycare is closed. If so, do I need proof my child is sick? Under the provisions of the Employee Paid Sick Leave, the DOL recently issued regulations stating that an employer should [request documentation to support their request for leave](#).

### **If I get sick, will I qualify for the 80 hours PTO FFCRA?**

Yes.

What if I can't get in to see my doctor? What if I can't get tested due to the shortage? What if it's not COVID?

If the symptoms appear to be COVID (i.e. fever, dry cough, tight chest, difficulty breathing) then they should self-quarantine and would be eligible under the EPSLA.

### **What if I'm afraid to come to work due to exposure to the virus, can I collect unemployment?**

If there is work available, and the employee cannot telework, then they would not be eligible for unemployment. Nor would they be eligible for any of the paid leave provisions under the FFCRA. They could take any accrued, unused PTO they may have.

### **We have a half dozen employees that stopped coming to work due to fear of getting sick. I was authorized to answer their UI claims "temp lay-off" so that they could get UI benefits. Now I have a warehouse full of people that are asking this same question. What should I do?**

If they are afraid to come to work, allow them to take PTO or unpaid time. You can require employees to come to work if there is no telework, and as long as you are complying with the social distancing and sanitation guidelines.

**I just had an employee that claims they were pulled over and threatened to get "cited" for being out and about. He's asking for a letter that states he is still working. Is this something we should be concerned about? I haven't heard that**

**people are getting pulled over, however there is a letter circulating that employees can have on hand that states they work for an essential business.**

You can find that [here](#) and it should be customized to suit your industry/business.

[CARES Act SBA Flow Chart](#)

[Paycheck Protection Program—Fact-Sheet](#)

[Small Business Owners Guide to the CARES Act](#)