



EMPLOYER CONSIDERATIONS IN THE WAKE OF COVID-19

Telecommuting – if employees cannot telecommute, consideration should be given to:

- Layoffs – whether full or partial (reduction in force)
 - Best for complete shutdown of operations and uncertain future.
 - May trigger the federal and/or a state’s mass layoff laws – called “WARN” Acts.
 - No obligation to pay sick or medical leave.
 - Requires payment of final wages, and in some states, all earned but unused PTO.
- Temporary unpaid leave of absence – sometimes called a “furlough”
 - Keeps employees on the payroll if your business is closed for lack of business or if required to close pursuant to Federal, State or local directive.
 - Beneficial if you expect business operations to resume and do not want to rehire employees.
 - If worksite is closed temporarily pursuant to Federal, State or local directive, no obligation to pay sick leave or provide expanded medical leave (discussed below).
- Reduction in pay or hours/conversion of exempt to hourly
 - Best if your business is deemed “essential” or you have teleworking employees so that employees may continue to work but if income is down, you may reduce pay or hours.
 - Employees not entitled to federal sick or medical leave for reduced hours.
 - Employees may seek unemployment.

Federal Sick Leave – the Families First Coronavirus Response Act (FFCRA) becomes effective April 1, 2020

- Employers of up to 500 employees (see below for calculation method) must provide 80 hours of paid sick leave for full time employees (average hours worked over two weeks for part time) if there is work for the employee available *and* the employee is unable to work (or telework) because:
 1. The employee is subject to a Federal, State, or local quarantine or isolation order related to COVID-19. (This includes any government order directing people to remain at home unless they work for an essential business);
 2. The employee has been advised by a healthcare 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 an order as described in subparagraph 1 above or has been advised as described in paragraph 2 above; or
 5. The employee is caring for a child of such employee if the school or place of care for the child has been closed, or the childcare provider for the child is unavailable, due to COVID-19 precautions.
- If your business closed before or after April 1 due to lack of business or if required to close pursuant to Federal, State or local directive, sick leave is not due.

- Intermittent sick leave is permitted with the consent of the employer (it is not required).
- If business closes while an employee is on FFCRA sick leave, they must be paid for leave through the date of closure.
- Businesses with **less than 50 employees** should document any hardship presented by providing this leave (after considering the impact of potential tax credits). According to the DOL's guidance issued March 27, 2020, An authorized officer of the business must determine that:
 - The provision of paid sick leave or expanded family and medical leave would result in the small business's expenses and financial obligations exceeding available business revenues and cause the small business to cease operating at a minimal capacity;
 - The absence of the employee or employees requesting paid sick leave or expanded family and medical leave would entail a substantial risk to the financial health or operational capabilities of the small business because of their specialized skills, knowledge of the business, or responsibilities; or
 - There are not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services provided by the employee or employees requesting paid sick leave or expanded family and medical leave, and these labor or services are needed for the small business to operate at a minimal capacity.
- Employees may use FFCRA paid sick leave **before** using state or local paid sick leave, or accrued PTO.
- Paid leave provided prior to April 1, 2020, does not count to fulfill obligations under the FFCRA.
- Employers may require documentation of school or daycare closures in support of a request for sick or medical leave to care for a child out of school when no daycare is available. A previous version of this guidance indicated that employers could request documentation supporting any of the first five qualifying reasons identified in the EPSL.
- If you intend to claim a tax credit under the FFCRA for payment of sick leave wages, you should retain the FFCRA documentation in your records.
- Employees must be restored to an equivalent position unless certain exceptions apply. See Department of Labor Q&A No. 43.

How Much to Pay – Employees must be paid based on their required compensation as follows:

- Regular rate of pay subject to a limit of: \$511 per day and \$5,110 in the aggregate for a use described in paragraph (1), (2), or (3) above; or
- Two-thirds of the regular rate of pay subject to a limit of: \$200 per day and \$2,000 in the aggregate for a use described in paragraph (4), (5), or (6) above.

Federal Medical Leave Expansion Act (EFMLE) – the EFMLE becomes effective April 1, 2020

- The EFMLE applies under the following circumstances:
 1. The EFMLE applies to employers with **fewer than 500 employees** (see below);
 2. Employees must be employed *at least 30 calendar days at the time leave is requested* (employees laid off after March 1 who had worked 30 days prior to layoff who are then rehired are eligible);
 3. The need for leave must be a Qualified Need Related to A Public Health Emergency (“PHE”);
 4. A PHE exists when declared by a Federal, State or local authority due to COVID-19; and
 5. The employee must be restored to their position upon return from leave.
- An employee can request this leave for a very narrow reason: if there is work for the employee *and* they are unable to work (or telework) due to the need to care for their child under 18 years of age if the child's elementary or secondary school or place of care is closed, or the care provider of such child is unavailable, due to a PHE.

- Intermittent expanded medical leave is permitted with the consent of the employer (it is not required).
- If your business closed before or after April 1 due to lack of business or if required to close pursuant to Federal, State or local directive, expanded medical leave is not due.
- If your business closes while an employee is on expanded medical leave, employees must be paid for leave through the date of closure.
- Businesses with **less than 50 employees** should document any hardship presented by providing this leave (after considering the impact of the tax credits) based on the provisions described above under sick leave.
- The first 10 days of leave is **unpaid**. However, the FFCRA as discussed above covers this period of time (because lack of childcare or a closed school is a qualifying reason for sick leave) at 2/3 the employee's regular rate of pay (capped at \$200/day, \$10,000 total/aggregate).
 - An employee may elect to use vacation, personal, medical, or sick leave in place of unpaid leave. The employer cannot require this.
 - After 10 days the remaining leave is paid at two thirds (2/3) the regular rate of pay multiplied by the number of normally scheduled hours.
- The text of the EFMLE provides an example for how to calculate rate of pay if the employee's scheduled hours vary. The link is here: <https://www.congress.gov/bill/116th-congress/house-bill/6201/text>

Tax relief?

- There is potential tax relief for employers who keep employees working and provide them with leave under the FFCRA. The IRS advisory can be found here: <https://www.irs.gov/newsroom/treasury-irs-and-labor-announce-plan-to-implement-coronavirus-related-paid-leave-for-workers-and-tax-credits-for-small-and-midsize-businesses-to-swiftly-recover-the-cost-of-providing-coronavirus>

Does Your Business Employ 500 people or less?

- You have fewer than 500 employees if, at the time your employee's leave is to be taken, you employ fewer than 500 full-time and part-time employees within the United States (including territories and possessions). 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. Do not include independent contractors.
- Typically, a corporation/business (including its separate establishments or divisions) is considered to be a single employer and its employees must each be counted towards the 500-employee threshold. Where a corporation has an ownership interest in another corporation, the two corporations are separate employers unless they are joint employers or are so integrated in their management, operations, control of employees and finances to be considered one entity.
- The DOL has the following guidance: <https://www.dol.gov/agencies/whd/flsa/2020-joint-employment/fact-sheet>. Your employment law counsel should also be able to assist your analysis.
- Most corporations take care to be distinct from their parents, so err on the side of caution that if two entities function as separate businesses, the DOL may find your business is a covered employer for purposes of the FFCRA.

Don't Forget the Poster!

- Covered employees must distribute the FFCRA Poster to all active employees by April 1. This notice must be posted in a conspicuous place, emailed or direct mailed, or it can be posted on an employee information internal or external website. The poster is found here: https://www.dol.gov/sites/dolgov/files/WHD/posters/FFCRA_Poster_WH1422_Non-Federal.pdf

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<https://www.grsm.com/publications/2020/employer-considerations-in-the-wake-of-covid-19>