



Employer COVID-19 Resource Guide:

What you need to know about changes to FMLA, unemployment, layoffs and paid leave

**Disclaimer: Hamilton Tharp, LLP has put together this guide from various resources that are publicly available as a means to help address the many questions we are getting from our business owners. This is not a substitute for professional advice from an employment attorney. We recommend you seek out advice from your employment attorney.*

The COVID-19 virus has made fast, drastic changes to how we live and work. State-mandated business closures are creating challenges and generating many questions on how to preserve business continuity during this period. On March 18, 2020, President Trump signed the Families First Coronavirus Response Act (FFCRA) which takes effect on April 2. The bill expanded paid sick leave and unemployment benefits, impacting employees and employers, among other provisions.

In an effort to help consolidate the various pieces of legislation and important information from the Department of Labor (DOL), we've created a list of the most frequently asked questions regarding unemployment insurance benefits, the Family and Medical Leave Act (FMLA), and the changes made by the FFCRA and the Fair Labor Standards Act (FLSA). Frequently asked questions included in this document are:

UNEMPLOYMENT INSURANCE BENEFITS

- How is federal law affecting how states handle unemployment insurance benefits related to COVID-19?
- What is the difference between a furlough and a layoff?
- Can a furloughed employee receive unemployment benefits?
- An employee is receiving paid sick leave or paid family leave: Are they eligible for unemployment insurance?

FAMILIES FIRST CORONAVIRUS RESPONSE ACT (FFCRA) AND THE FAMILY AND MEDICAL LEAVE ACT (FMLA)

- How does the FFCRA impact paid sick leave and FMLA?
- Who is eligible for FMLA vs the FFCRA?
- Are employers required to grant sick leave to ill employees or those caring for ill family members?
- Can I require a doctor's note or medical exam to grant leave or a symptom-free period before returning to work?
- Can a paid sick leave policy be changed if it becomes too costly?
- What about layoffs?
- Can employees showing signs of illness be forced to take sick leave and be prevented from working?
- Does leave taken to avoid exposure qualify for FMLA?
- If a school closes and parents must stay home to provide childcare, are they covered?
- How will I cover the costs of this paid leave?
- What benefits are available for the self-employed?

FAIR LABOR STANDARDS ACT & REDUCING HOURS OR CLOSING

- What is the treatment of hourly/non-exempt employees during business closures?
- What options do I have for reducing hours or pay for non-exempt employees?
- What is the treatment of exempt employees during business closures?
- What options do I have for reducing hours or pay for exempt employees?
- Can you reclassify exempt employees as non-exempt?
- What are my requirements for notification?
- I have an employee under government-imposed quarantine: What are my obligations?
- Can I require work outside of an employee's job description during this time?
- Can I encourage my employees to telework to follow CDC guidelines?
- Do I have to pay the same hourly rate if employees are working from home?
- What if my employees are unable to work from home, but I am closing the office to them?
- Am I required to cover additional costs as a result of working from home?

UNEMPLOYMENT INSURANCE BENEFITS

How is federal law affecting the way states handle unemployment insurance benefits related to COVID-19?

The FFCRA granted \$1 billion in unemployment insurance benefit cost coverage for state grants. Certain conditions apply. Half of the provisions are allocated to provide immediate relief for state administrative costs that meet certain requirements, while the other half is reserved for emergency grants to states who experience a 10% or greater increase in claims above the same quarter last year.

Guidance released by the Employment and Training Administration is providing states significant flexibility in amending their unemployment insurance benefit laws in the wake of the virus. For example, according to the DOL, "federal law allows states to pay benefits where:

- An employer temporarily ceases operations due to COVID-19, preventing employees from coming to work;
- An individual is quarantined with the expectation of returning to work after the quarantine is over; and
- An individual leaves employment due to a risk of exposure or infection or to care for a family member.

In addition, federal law does not require an employee to quit in order to receive benefits due to the impact of COVID-19."

What is the difference between a furlough and layoff?

Furlough - Temporary reduction in hours or weeks of work. For example, we only need you 15 hours this week or we are closing the office for a week.

Layoff - There are two options for layoffs. 1) temporary layoff where the intent is to rehire, generally within 6 months. 2) permanent layoff with no anticipated rehire date.

Can a furloughed employee receive unemployment?

Yes, unemployment does not require that you were terminated to receive benefits. They can apply for partial unemployment benefits. Refer to your specific state unemployment website for more details (resource links below).

An employee is receiving paid sick leave or paid family leave: Are they eligible for unemployment insurance?

If an employee is receiving paid sick or family leave, they are not considered “unemployed” as they are still receiving pay and would thus be ineligible for unemployment benefits. Layoffs or furloughs allow for unemployment insurance benefits. Consider using sick pay or family leave pay, as instated by the FFCRA, before turning to unemployment. States seeking assistance in implementing flexibilities can receive assistance from the DOL’s Employment and Training Administration.

FAMILIES FIRST CORONAVIRUS RESPONSE ACT (FFCRA) AND THE FAMILY AND MEDICAL LEAVE ACT (FMLA)

How does the FFCRA impact paid sick leave and FMLA?

For employers and employees, the updates made by the FFCRA to paid sick leave and typical FMLA provisions covers companies with up to 500 employees with no 50-person minimum. Companies with over 500 employees are not covered in the bill. Some assistance is also available for self-employed individuals.

Typically, covered employers under FMLA must provide job-protected, unpaid leave for employees with specified family and medical reasons, which may include the flu. Under the FFCRA, paid leave is now mandated for coronavirus-related illness. Employees are entitled to continuation of group health insurance under the same terms on FMLA leave.

Who is eligible for FMLA under the FFCRA guidelines?

[FMLA states](#) that “employees are eligible to take FMLA leave if they work for a covered employer and:

- Under FFCRA have worked for their employer for at least 30 days and is taking leave for a qualified reason under FFCRA;
- work at a location where at least 50 employees are employed by the employer within 75 miles.”

FFCRA grants paid leave to full and part-time employees who are:

- Subject to federal, state or local quarantine or isolation
- Advised by a health care provider to self-quarantine
- Experiencing symptoms of COVID-19 and seeking diagnosis
- Caring for an individual subject to quarantine order or advised to self-quarantine
- Caring for their own children if the school or childcare facility is unavailable as a result of COVID-19
- Experiencing any other substantially similar condition specified by Health and Human Services (HHS) in consultation with the Department of the Treasury and DOL

Are employers required to grant sick leave to ill employees or those caring for ill family members?

While FMLA allows for ill employees or those caring for ill family members unpaid leave under certain circumstances, the FFCRA mandates that employees who are sick or caring for sick family members are eligible for their full pay for up to two weeks (up to \$511 per day, \$5110 total) for coronavirus-related illness.

Can an employer require a doctor's note or medical exam to grant leave or symptom-free period before returning to work?

While normally under FMLA, a doctor's note could be required, the FFCRA does not require coronavirus to be present to begin receiving benefits. Orders to quarantine, signs of symptoms, or simply virus exposure qualifies. The DOL reminds employers that health care resources may be stretched causing difficulties in achieving these requirements for your employees.

FMLA does grant that, following the period of leave, employees must be notified in advance if a fitness-for-duty certification is required to return to work. State and local law or collective bargaining agreements may come into play as well. These regulations may change due to current conditions – always consult your specific state labor boards for guidance.

Can a paid sick leave policy be changed if it becomes too costly?

Under FMLA, employer-sponsored paid sick leave policies can be changed as long as they are not discriminatory, and it does not conflict with state and local laws. Labor unions and collective bargaining agreements may prevent changes or the manner of changes. Sick leave policies must also follow FMLA requirements for covered employees and should be consistent with the ADA.

What about layoffs?

Federal laws prohibit discrimination when layoffs are considered, and the Worker Adjustment and Retraining Notification (WARN) requires advance notices of plant closings and mass layoffs. Employees requesting FMLA leave and past members of the armed forces may not be discriminated against.

Employees caring for sick family members who are unable to come to work may not be laid off if they are covered and eligible under FMLA. For those not covered, employers are encouraged to consider alternate working options first.

Can employees showing signs of illness be forced to take sick leave and be prevented from working?

Yes, with considerations. Employees should be notified of any policy changes permitting sending employees home prior to enforcement. Employers cannot discriminate in decisions to exclude employees from the workplace based on race, sex, age (40 and over), color, religion, national origin, disability, union membership or veteran status. However, the DOL says "you may exclude an employee with a disability from the workplace if you:

- obtain objective evidence that the employee poses a direct threat (i.e. significant risk of substantial harm); and
- determine that there is no available reasonable accommodation (that would not pose an undue hardship) to eliminate the direct threat."

FFCRA and FMLA-protected leave regulations apply if qualified.

Does leave taken to avoid exposure qualify for FMLA?

No, FMLA is for employees who are ill with a "serious health condition" or those caring for ill family members. The FFCRA requires that employees be confirmed to have the virus, be exposed to it, experience symptoms, or be caring for a family member.

If a school closes and parents must stay home to provide childcare, are they covered?

The FFCRA grants paid leave for childcare as a result of school or childcare facility closure for up to 12 weeks at two-thirds the employee's regular pay and up to \$200 per day, \$10,000 total. FMLA does not typically grant paid leave for childcare closures, so this is an expanded benefit as a result of the FFCRA.

How will I cover the costs of this paid leave?

Tax credits are available for 100% of what is paid out to employees with the above noted limits on the tax paid. The credit is applied against the employer portion of Sec. 3111(a) or Sec. 3221(a) taxes (Social Security taxes). The credit amount is increased by the amount of Sec. 3111(b) Medicare tax imposed on the qualified family leave wages for which credit is allowed. Double benefits will be prevented by increasing the employer's gross income by the amount of the credit, and no credit is allowed for wages where Sec. 45S family and medical leave credit is claimed. Certain qualified health plan expenses allocable to qualified sick leave wages can increase the credit.

Exemptions may be granted by the Secretary of Labor for employers with fewer than 50 employees. Employers with fewer than 25 employees are not required to restore employees to previous positions.

What is available for the self-employed?

For self-employed individuals who also work for another employer (such as Lyft, Uber, caterers, events), the FFCRA makes a tax credit available for up to two weeks of sick pay at their average rate and family leave pay at two-thirds the normal rate. The same caps apply, and these individuals must provide evidence of self-isolation recommendation or school/childcare closure to receive the FFCRA credit. The credit is applied against the individual's income taxes, and any leave pay that is greater than their tax bill qualifies for a government rebate.

FAIR LABOR STANDARDS ACT & REDUCING HOURS OR CLOSING

What is the treatment of hourly/non-exempt employees during business closures?

Employers are not required to pay non-exempt employees for the hours they would have otherwise worked during a business closure. FLSA generally applies to hours worked.

What options do I have for reducing hours or pay for non-exempt employees?

Non-Exempt employees only need to be paid for hours worked, unless you send them home mid-day. If you do, you may owe them reporting time pay.

You can adjust the hours that non-exempt employees work at any point, regardless of the expectation when you hired them. For example, if you hired them at 40 hours a week, you could move them to 30 hours a week.

Depending on state laws, you may be able to change their rate of pay. You need to notify employees in advance and provide them with the opportunity to agree to a rate change. You cannot do this retroactively. You can change it mid-pay period as long as you ensure they are paid the new amount starting on the date of agreement and it is not retroactive.

What is the treatment of exempt employees during business closures?

Very limited exceptions exist for not providing exempt, salaried employees their full salary in any week in which they perform any work. It is not a requirement to pay exempt salaried employees in weeks where they perform no work.

FLSA does not require employer-provided vacation time. If a bona fide benefits plan or vacation package is provided, employers can require that accrued leave or vacation time be taken on specific days.

Exemption status is upheld for employees required to take accrued leave/vacation time as long as employees are paid an equal amount to their guaranteed salary in the event of an office closure. For employees without enough accrued leave, their salary must also be maintained during a mandated office closure in order to remain exempt.

What options do I have for reducing hours or pay for exempt employees?

You can implement pay cuts for exempt employees as long as it isn't discriminatory. You may apply pay cuts across the board or for certain departments on a whole.

Your exempt employees need to remain above federal minimum salary for exempt employees or the higher state minimums.

Can you reclassify exempt employees as non-exempt?

Yes, you can reclassify exempt employees as non-exempt as long as it is not done to avoid any salary requirements under FLSA. If this is done, you must ensure it's done for a specified period of time (e.g. months instead of weeks). Converting back and forth is not permitted. If you are changing status, ensure your state notice requirements are met.

What are my requirements for notification?

You will want to confirm your state requirements and speak with an employment attorney, however, as a best practice you will want to communicate in writing the furlough or temporary layoff along with details for paid leave and any special options.

I have an employee under government-imposed quarantine: What are my obligations?

The FCCRA grants two weeks of paid sick leave for full and part time employees who are under mandated quarantine at their full pay rate up to \$511 per day, \$5,110 total. Employers are encouraged to be accommodating and flexible to quarantined workers. Alternative working arrangements may be considered.

Can I require work outside an employee's job description during this time?

Employees aged 18 and over are not limited in the work they can be required to perform. Consult with your human resource specialists and/or bargaining unit representatives before assigning work outside the job description.

Can I encourage my employees to telework to follow CDC guidelines?

Teleworking provisions are allowed as a means of infection control. However, Equal Employment Opportunity (EEO) laws must be upheld, and employees cannot be singled out to telework or report to work if it violates EEO laws.

Do I have to pay the same hourly rate if employees are working from home?

The hourly rate must be upheld in cases of qualified disability or under union or employment contract. In other cases, FLSA generally requires payment only for hours worked regardless if the location is at home or in the office. FLSA does require at least minimum wage for all hours worked and time and half for hours above 40 in a workweek. FLSA regulations to not override or nullify the Service Contract Act or state or local laws regarding payment of wages.

What if my employees are unable to work from home, but I am closing the office to them?

Payment regulations apply as stated in the above: Hourly employees must be paid for hours worked - at least minimum wage or greater for hours over 40, and salaried employees should receive their full salary. However, employers are encouraged to consider all options for employees to work such as staggered work shifts in-office that follow social distancing recommendations.

Am I required to cover additional costs as a result of working from home?

According to the DOL, employees covered under FLSA are not required to pay or reimburse the employer for business expenses of the employer "if doing so reduces the employee's earnings below the required minimum wage or overtime compensation." This also applies to employees with reasonable accommodation under the Americans with Disabilities Act (ADA).

Advising Your Business Through COVID-19

Hamilton Tharp LLP is here to help advise your business through these unprecedented times. For further guidance and assistance on these questions, state-specific information, and other business matters or options, contact your Hamilton Tharp CPA advisor.

Resources/Links:

- **State Unemployment Insurance Sites**
- [CDC Guidance for Businesses and Employers](#)

Coronavirus HR Resources:

- [SHRM Coronavirus Resource Center](#)
- [EEOC: Employers now may take employees' temperatures](#)
- [DOL Answers Questions on FLSA Compliance During the Pandemic](#)
- [Health, Wellness and Leave Benefits Help Employees with Coronavirus](#)
- [Immigration and Customs Enforcement to Halt Deportation Efforts](#)
- [U.S. Small Business Administration](#)
- [Occupational Safety and Health Administration](#)
- [Environmental Protection Agency List of Disinfectants](#)