



COVID-19 Real World Questions

from Clients and Partners

A Collection of Q&A from Our COVID-19 Webinar Series

HUMAN CAPITAL
A Vensure Employer Services Company

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Business Specific Questions

1. We are a janitorial business and have clients suspending service with no advance notice. For the employees who are being left without work, is it recommended we furlough the employee or perform a layoff? Also, if you furlough an employee do you provide a final paycheck at the time of notice?

a. Under the FFCRA, the Department of Labor sees a furlough equally the same as a layoff. Employees on furlough would not be entitled to take paid sick leave or expanded family and medical leave, thus, they would have absolutely no income or relief. However, they may be eligible for unemployment insurance benefits. Most companies are laying off employees and once the situation changes, they will be rehiring those laid off employees.

2. If we're a clinic, are all employees in our company exempt from this?

a. Only employees fitting the “healthcare provider” or the “emergency responder” definition may be exempt if the employer chooses to do so. For the purposes of employees who may be exempted from Paid Sick Leave or Expanded Family and Medical Leave by their employer under the FFCRA, a healthcare provider is anyone employed at any doctor’s office, hospital, healthcare center, clinic, post-secondary educational institution offering healthcare instruction, medical school, local health department or agency, nursing facility, retirement facility, nursing home, home healthcare provider, any facility that performs laboratory or medical testing, pharmacy, or any similar institution, employer, or entity. This includes any permanent or temporary institution, facility, location, or site where medical services are provided that are like such institutions.

This definition includes any individual employed by an entity that contracts with any of these institutions described above to provide services or to maintain the operation of the facility where that individual’s services support the operation of the facility. This also includes anyone employed by any entity that provides medical services, produces medical products, or is otherwise involved in the making of COVID-19 related medical equipment, tests, drugs, vaccines, diagnostic vehicles, or treatments.

As for emergency responders who may be excluded from Paid Sick Leave or Expanded Family and Medical Leave by their employer under the FFCRA, an emergency responder is anyone necessary for the provision of transport, care, healthcare, comfort and nutrition of such patients, or others needed for the response to COVID-19. This includes but is not limited to military or national guard, law enforcement officers, correctional institution personnel, fire fighters, emergency medical services personnel, physicians, nurses, public health personnel, emergency medical technicians, paramedics, emergency management personnel, 911 operators, child welfare workers and service providers, public works personnel, and persons with skills or training in operating specialized equipment or other skills needed to provide aid in a declared emergency, as well as individuals who work for such facilities employing these individuals and whose work is necessary to maintain the operation of the facility.

3. We have less than 50 employees in one area and we have a total of 90 employees. Do we qualify for EFMLA?

a. Yes, you are subject to the law since 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, which includes any State of the United States, the District of Columbia, or any Territory or possession of the United States, you are subject to the law.

4. We are a tax-exempt non-profit, so does this mean we will not get the reimbursement as we do not pay taxes?

- a. You should consult with your accountant and determine if your non-profit has been exempted from FUTA (if a 501c3 this exemption is mandatory). You may have also elected to be SUTA exempt. If so, you may not obtain reimbursement of these taxes. You may however be eligible to obtain reimbursement of the employer portion of FICA and Medicare taxes under the rule.

5. Is there any information on temporary employees and whether or not these new acts regarding COVID-19 apply to them as well?

- a. As the regulations are written staffing agencies would be subject to FFCRA. As such, tax credits for EPSL and EFMLA, as well as the forgivable components of the PPP loan, would be the Staff Agencies as they maintain the employment relationship with the temp. employee. This is not to say that there may be further clarification regarding this in the coming days and weeks.

6. How does all this apply to a staffing company? If we cannot bill our clients, we do not get paid, but our contractors are our W2 employees.

- a. There are no exclusions for any employer below 500 employees. An employer with less than 50 employees may eventually be able to seek an exemption relative to child-care issues as the reason, though the process is not yet made clear by the DOL. The only other available exemption is for staffing agencies' healthcare contracted-out workers (described in the question below). Aside from those factors, if a number of your clients close down due to being non-essential as a result of an order, or have any other reason why they cannot obtain workers from you, then you can look at tax credits for EPSL and EFMLA as well as forgivable components of the PPP loan.

7. Do staffing agencies have to comply with the Family First Act?

- a. Yes, staffing agencies that employ under 500 employees are subject to the FFCRA. Agencies who staff only healthcare workers may be able to exempt those contracted-out workers from the provisions of the law if they meet the descriptions of "healthcare worker" and "emergency responder" as clarified in the DOL FFCRA FAQs. However, even those agencies will be subject to the law for their internal employees at the staffing firm (administrative/office personnel, staffing agents, etc.)

8. Are produce farms with seasonal employees exempt in any way due to having to harvest when crop is ready? How are number of employees determined when it changes, depending on if we are in growing vs. planting vs. harvesting?

- a. Produce farms and any other employer with seasonal employees are not exempt because the fluctuation. Per the DOL, 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. This seems to suggest that if your business is seasonal, such that you have fewer than 500 employees on the FFCRA's effective date, and for example, your business ramps up to 500 or more employees for the summer, the FFCRA will no longer apply to your workforce after you onboard your 500th employee. Similarly, if you presently have 500 or more employees, your employees will not be entitled to paid leave under the FFCRA, but if you implement workforce reductions in the future, once your workforce shrinks to fewer than 500 employees, your employees will be eligible for paid leave under the FFCRA.

9. We are a hotel that has just temporarily closed and laid off the majority our employees. Do we need to bring all employees back with their full regular schedule in order to qualify for the loan for payroll and mortgage and to make the loan forgivable. If so, does that include bringing back employees used from a contracted staffing company?

- a. No. As currently written, you must be at 75% of your pre-crisis staffing on 6/30/2020. This means your FTE and payrolls are both at least 75% of their prior levels. Staffing is considered and outside services expense thus is not a payroll expense.

10. How do you calculate salary for employees who are working remotely?

- a. If an employee is “salaried”, that language suggests that you are referring to the employee being an “Exempt” employee under the FLSA (Fair Labor Standards Act). For such employees, regardless of whether they work at your location or at a remote location, they must be paid their FULL salary when they perform ANY work during a workweek. Location doesn’t change that, and neither does a reduction in hours of business or workload. If the Exempt employee was working 40 hours per week prior to this and now you have less business and thus have only 20 hours for this employee, they are to be paid the same full salary.

A solution for this would be to convert the Exempt employee to a Non-Exempt hourly employee, not changing any of their duties, thus preserving their exemption status. Instead of paying a salary, pay them their hourly rate equivalent; you would of course have to keep track of their time, pay overtime if due, and depending on which state the employee is performing work in, see if there are break and meal period laws that they may need to abide by. When everything goes back to normal, simply switch them back to Exempt status.

Regarding the CARES Act, eligible employers may take an immediate and refundable credit against the employer portion of their Social Security payroll tax equal to 50% of qualified wages. Qualified wages for eligible employers who average more than 100 full-time employees are wages paid to employees during the period between March 12, 2020, and January 1, 2021 who are not working. Thus, for example, salaries paid to employees who are working from home are not qualified wages for purposes of the credit.

11. What is the exemption for businesses with less than 50?

- a. An employer, including a religious or nonprofit organization, with fewer than 50 employees (a small business) is exempt from providing (a) paid sick leave due to school or place of care closures or child care provider unavailability for COVID-19 related reasons and (b) expanded family and medical leave due to school or place of care closures or child care provider unavailability for COVID-19 related reasons when doing so would jeopardize the viability of the small business as a going concern. However, a small business may claim this exemption if an authorized officer of the business has determined that:
- i. 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;
 - ii. 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

- iii. 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.

The DOL has not yet provided guidance on how a business would go about seeking the exemption. The guidance is to keep records until we are informed by the DOL what the steps are for this process.

12. Do private non-profit schools qualify for the Disaster Relief Loan?

- a. Yes, The EIDL is made available to all non-profit entities. The PPP is being made available only to 501c3 and 501c9 entities. We are seeking additional clarity around this and hope to have it very soon.

13. What if your company is deemed Critical Essential Infrastructure Supplier? Does this change qualifications for these new laws?

- a. There is no exclusion for such a company. The law applies to all employers who are under 500 employees. 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 employees on leave, temporary employees who are jointly employed by you and another employer, 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), rather than employees, are not considered employees for purposes of the 500-employee threshold.

14. Since you employ our employees, will you be advancing the sick pay and taking the credit on your 941?

- a. No, by utilizing the proper pay code that corresponds to the qualifying reason the employee is being paid EPSL or EFMLA, you will receive an immediate line item credit on your invoice. Be sure to use the correct pay code when you report the payroll. For assistance please reach out to your Client Relations Manager.

15. I have a new operations manager. She worked 2 days before becoming sick. She requested COVID-19 test but was not given a prescription for the test. She has been out of work for over 2 weeks. What she or the company qualify for?

- a. The only possible way that your employee could receive paid sick leave under the FFCRA is if she is out for one of the following qualifying reasons: (1) has been advised by a health care provider to self-quarantine due to concerns related to COVID-19; (2) is experiencing symptoms of COVID-19 and is seeking a medical diagnosis. The employee would have to show documentation for this, as per the DOL's newest regulations.

16. How can we handle our temps in a manufacturing or WH?

- a. Temps are employed by the staffing agency and are not generally considered a bona-fide payroll expense, Check with your CPA.

17. Are the companies we supply staff for required to reimburse us for the wages we are required to pay?

- a. If a company asks you to provide staffing, they are required to pay you for it.

18. Hi! We are a Healthcare staffing agency, are we required to pay temporary employees as well? What is our responsibility as a joint employer?

a. If you place a temp on duty with a client, you are required to pay the employee per the staffing contract.

19. Does this PSL/FML apply to temp staffing agencies. We have temps with a specific state/end date. They know they're at-will and contract can end for any valid reason.

a. This applies to all employers who have less than 500 employees as of the date of the request, temp staffing agencies are covered as well.

20. It states we have to pay up to 80hrs at regular taxable rate. Our travel nurses get a taxable pay and stipend tax free pay. Please Confirm the tax-free stipends is EXCLUDED from PSL/FML pay.

a. The regular rate of pay is defined by the Fair Labor Standards Act. The regular rate must include "all remuneration for employment paid to, or on behalf of, the employee." The Department of Labor provides additional clarification here: <https://www.dol.gov/agencies/whd/fact-sheets/56a-regular-rate>.

21. If a staffing agency's employee's assignment ends abruptly, would it be best to furlough, prepare a final pay check and then layoff when the final pay checks ready?

a. This is a business decision the employer must make based on the specific facts and circumstances related to furloughs and layoffs. Regardless of an employee is laid off or furloughed the employer need to comply with federal/state final wage requirements.

22. Does the CA state order to stay home count as "isolation" and employees can choose to stay home even if employer is still working?

a. No. The stay home order will only cover staff directly if they are the subject of the order. So if the business is open, and work is available, and the employee refuses to work, that is not protected leave unless it is for a qualifying reason.

23. We are planning on filing for an exemption. Should I still post the notice and what if someone inquires about the ePSL and eFMLA and wants to take advantage but we are going to file and exemption?

a. Even if you are filing for the exemption, you still must post the notice. You should notify your staff in writing that you are considered exempt from the Act.

24. For PEO relationship, does employee count go by total employees under Human Capital's EIN or the

staffing companies employees even though they do not report under their federal EIN? Do they average the # of employees over a period of months?

a. The PEO client uses its own employee count, not that of Human Capital.

25. What are the qualification to be considered a Small business or Medium business?

a. The SBA has published several rules regarding this. The size standards vary by NAICS Code. Size standards can be viewed here:

<https://www.sba.gov/federal-contracting/contracting-guide/size-standards>

PTO, Sick/Paid Leave, and Employee Benefits

Related Questions

- 1. Can the emergency paid sick leave hours be used intermittently? For example, could an employee use 2 days of EPSL and in another month, then use 1 week of EPSL?**
 - a. The EPSL and EFMLA have specific qualifying factors. For some factors such as “Subject to a Federal, State or local quarantine...” that wouldn’t be intermittent. However, factor #3 “Experiencing COVID-19 symptoms and is seeking a medical diagnosis” could theoretically be intermittent. Factor #5 in relation to the use of EFMLA can definitely be intermittent. so long as it is approved by the employer per the DOL.
- 2. What if employees have been off before the bill passed? Can they still apply for unemployment or FMLA and back date the first day they were off?**
 - a. Prior to the effective date of 04/01/2020 employees would be eligible for unemployment, standard FMLA and can utilize any available Sick, Vacation or PTO, if applicable.
- 3. What if an employee has already exhausted their PTO or accrued vacation time? What options can we provide for our employees?**
 - a. This is dependent on many factors. Assuming this employee is not off work for a qualifying reason under the FFCRA law, and the business is an essential business that is open if that employee has exhausted all paid leave from their employer’s existing plans, there is no other pay available.
- 4. Are we responsible for notifying employees that have been recently laid off that someone, who may or may not have worked with the former employees, has a confirmed COVID-19 diagnosis?**
 - a. You’re not required to notify them, but it may be kind gesture to do so. Do not share specific names, as that should remain confidential.
- 5. If I have an employee that must stay home due to both exposure and childcare and she can work part time by telehealth, can she use the sick time to make up the hours?**
 - a. Yes, intermittent leave is allowable as long as both the employee and employer agree – over a 14-day period (2 weeks) for PSL, and then 10 weeks for EFMLA (only for childcare).
- 6. If you have to reduce a full-time employee’s hours from 40 hours per week to 25 hours, are they entitled to benefits to make up the difference in pay?**
 - a. Not under EFMLA or PSL. This is only available if they are unable to work.
- 7. What if the company doesn’t currently have a paid sick leave in place? Does Emergency Paid Sick Leave apply to those businesses?**
 - a. Yes, anyone with less than 500 employees has to comply with EPSL requirements.
- 8. We have full time staff who typically works from home and we have part time staff who work partly from home, and partly at different locations. Who can utilize the sick leave?**
 - a. Anyone who has a qualifying reason and is unable to telework. If everyone can telework, they are not eligible for this leave.

- 9. Why are employers with more than 500 employees exempt from Emergency Paid Sick Leave?**
- a. The government made that decision, as that is how the law is written.
- 10. What if a recent new hire had a surgery and some other health issues come up right before COVID 19's quarantine started and is unable to work from home? Would she qualify for the Emergency Sick Leave or just FMLA?**
- a. She would only be eligible if the reason for leave was directly related to COVID-19. This leave would probably not qualify her for PSL or EFLMA, and just traditional FMLA.
- 11. When someone is part time, how should you pay COVID-19 sick pay, for instance if someone works 3 hours per day?**
- a. Follow DOL rules for calculating regular hours. If 3 hours is regular schedule, employee would be eligible for 3 hours of PSL/day.
- 12. If the employee decided to stay home because he is afraid to leave this house related to the virus, what we should do?**
- a. This is not protected leave under EFMLA or PSL, so you could furlough or layoff due to his refusal to work.
- 13. What if we close during event? Are we still liable for paid leave?**
- a. If the business is closed and no work available, then they are not eligible.
- 14. Even if people can work remotely, can they take leave to care for their kids that are out of school?**
- a. Staff who can telework are not eligible for this leave.
- 15. If we cannot ask employees about their diagnosis if the diagnosis is required for the emergency paid sick leave, how do we manage that?**
- a. You will need documents for IRS evidence, but you can approve EPSL without doctor's note, based on a statement from employee.
- 16. If someone had a telemedicine appointment for fever and cough but had no confirmed diagnosis, how would we handle possible compensation?**
- a. Having symptoms and seeking diagnosis are a covered reason under PSL.
- 17. We already provide our employees with 5 sick days for the year. Are we required to pay an employee for additional days under the new Paid Leave law?**
- a. Yes, if they qualify for the leave.
- 18. How about if we start reducing hours, can the employees apply to anything to help with reduce hours?**
- a. Yes, they can apply for partial unemployment.

19. Is the 80 hours emergency paid sick leave on top of paid sick leave we already have in place?

a. Yes, and need to pay PSL first.

20. Does an employee need a COVID-19 diagnosis to qualify for EPSL, or just exhibiting those symptoms?

a. If they are exhibiting symptoms and are seeking medical diagnosis, they are covered. But if they are just experiencing symptoms and are not seeking medical diagnosis, leave is not covered.

21. What if partner of employee wants employee to stay home because of fear of bringing “something” home due to working? Do they qualify for leave?

a. Does not qualify for leave, limited to only 6 bulleted items.

22. Do employees have to apply for the 80 pay after being sent home, or do we just pay them for the 2 weeks (80 hrs.) after sending them home?

a. If speaking of the PSL provision, the employee must have a qualifying COVID-19 reason for asking for it. If you have sent an employee home due to lack of work, this is not a qualifying event under PSL.

23. If there are employees laid off prior to April 1, do they qualify for the benefits under the PSL?

a. No, only employees active after April 1, 2020.

24. For the PAID Sick Leave, employees may substitute regular Sick or PLT at regular pay instead of getting 2/3 of pay for reason of staying home with kids?

a. Yes, they may. When exhausted, the provision of FFCRA then apply.

25. What about an employee that wants to take off due to compromised immune system at an essential business working regular hours? Does the FMLA apply?

a. Only if ordered to stay home due to doctor’s order. Otherwise it would not qualify.

26. What if an employee is allowed to work from home, but has children needing to be homeschooled per the school regulations, which is making it difficult to work from home?

a. If employee is unable to work due to needing to watch children, we will need to have a letter from the employee stating they cannot work due to reason 5, along with evidence that their childcare provider (school) is closed.

FMLA, EFMLA, and Compliance Related Questions

1. Do you have to post this notice if under 50 employees?

a. If you are referring to the DOL notice regarding the availability of EPSL and EFMLA, then yes. FFCRA is applicable to all small employers from 1-499 employees.

2. If the government has closed non-essential businesses or the business cannot accommodate the COVID-19 health guidelines so they cannot come into work does that mean the employee is subject to a “local quarantine or isolation related to COVID-19?”

a. No – The subject of the order is the business, and not the employee.

3. For employers with less than 50 employees that do not have to comply with FMLA, does the EFMLA apply?

a. Yes, EFMLA and EPSL apply to all small employers from 1-499 employees.

4. If a company has always allowed an employee to take 12 weeks off for the FMLA but it is without pay, does the company now have to pay for all employees covered under this type of FMLA?

a. The regulations regarding standard FMLA still remain. The paid portion of EFMLA is only for employees of employers that employ 1-499 employees who “Are caring for a child whose school or place of care is closed (or childcare provider unavailable) for reasons related to COVID-19.”

5. For the family medical leave, if someone has no more normal PTO time, would they not be paid for their first two weeks?

a. If you are referring to EFMLA, assuming the employee qualifies under reason #5, they would be eligible for 2-weeks of sick pay under EPSL during their 10-day wait period, then they would be eligible for 10-weeks of paid EFMLA. These two paid leaves types are above and beyond any existing paid time off plan the employee may have.

6. For the family medical leave, is there a deadline for when they can elect in? Could someone elect in on April 10th, for example, if their childcare issues won't start until then?

a. Yes, leave requests under this should be treated just like a request to use FMLA. The notice needs to be provided “as soon as practicable” to comply with the DOL regulations.

7. Is the Emergency FMLA in addition to FMLA? So, if someone already used their 12 weeks say 10 months ago, can they take this one now?

a. No, EFMLA and FMLA are combined for a total of 12 weeks within a 12-month period. So, if they have used 6 weeks of FMLA, they can only use 6 weeks of eFMLA. However, they are still eligible for 2 weeks of PSL.

8. If someone is home because of school is closed, are we required to pay them for ten weeks?

a. Not if a parent or legal guardian needs to watch their kids and are unable to telework. If they can work from home, or another parent or individual is able to watch the children, they are not eligible for this leave.

9. I have a small hair salon and the stylists are paid by commission. How will their benefits be paid under FMLA?

- a. If referring to EFMLA, they would need to calculate their regular rate (commissions received in a period of 6 months) divided by number of hours worked. Total compensation in the workweek (except for statutory exclusions) / Total hours worked in the workweek = Regular Rate for workweek.

10. How can we make sure a childcare note from an employee is for their child and not relative's child?

- a. Childcare leave is allowable if the child's care provider is unavailable, as per DOL - #68. A "childcare provider" is someone who cares for your child. This includes individuals paid to provide childcare, like nannies, au pairs, and babysitters. It also includes individuals who provide childcare at no cost and without a license on a regular basis, for example, grandparents, aunts, uncles, or neighbors.

11. Do our employees qualify for the new emergency FLMA if they have been off from work from the initial mandate of schools being closed and they had to stay home?

- a. If they are the subject of the stay home order, and are unable to telework, then they would be eligible. In this case, the school EEs are not eligible because the closure was focused on the school, and not the individual themselves.

12. Can an employee apply for EFMLA if she already applied for unemployment?

- a. Yes, they can apply, then would be evaluated if they would qualify. If they qualify, they will be paid under FFCRA (whether PSL or EFMLA).

13. Please confirm: Companies that are part of a PEO, their total employees are not counted within the PEO's total employee count. Those who have less than 500 employees themselves are to comply with 'under 500 employees' rules.

- a. Correct – There are two tests (1) joint employer test, and (2) integrated employer test. Only employees that fall under those definitions will count towards the 500 employees. a. Correct – There are two tests (1) joint employer test, and (2) integrated employer test. Only employees that fall under those definitions will count towards the 500 employees.

14. I work for a company who has 7 employees. Would we need to abide emergency paid sick leave and emergency FMLA?

- a. Yes, anyone with less than 500 employees. The employer may be exempted from these payments if it creates a hardship that would jeopardize the business as a going concern.

15. What if these provisions impose a hardship on my company? What do we do? Is there anyone we can reach out to?

- a. Per DOL, only if you have less than 25 employees:

Your employer may also refuse to return you to work in your same position if you are a highly compensated “key” employee as defined under the FMLA, or if your employer has fewer than 25 employees, and you took leave to care for your own son or daughter whose school or place of care was closed, or whose child care provider was unavailable, and all four of the following hardship conditions exist:

- › Your position no longer exists due to economic or operating conditions that affect employment and due to COVID-19 related reasons during the period of your leave;
- › Your employer made reasonable efforts to restore you to the same or an equivalent position;
- › Your employer makes reasonable efforts to contact you if an equivalent position becomes available;
- › Your employer continues to make reasonable efforts to contact you for one year beginning either on the date the leave related to COVID-19 reasons concludes or the date 12 weeks after your leave began, whichever is earlier.

16. Are FMLA days/weeks are paid? Could have total of 12 paid weeks?

- a. Only for #5, leave to care for child where place of care is closed. Any other reason would receive a max of 2 weeks of paid leave.

17. If an employee already took leave prior to April 1st, when does the two-week clock begin?

- a. This qualifies as covered leave under COVID-19 related illness. The qualifying reason for the leave must be covered under FFCRA. The law is effect April 1, so all leave will apply after that.

18. All this goes into effect on 4/1/2020, correct? What if employees have already been off in March?

- a. The reason for the leave must be analyzed. Is the reason for the leave qualifying under FFCRA? Per DOL #77 - If your leave of absence is voluntary, you may end your leave of absence and begin taking paid sick leave or expanded family and medical leave under the FFCRA if a qualifying reason prevents you from being able to work (or telework).


However, you may not take paid sick leave or expanded family and medical leave under the FFCRA if your leave of absence is mandatory. This is because it is the mandatory leave of absence—and not a qualifying reason for leave—that prevents you from being able to work (or telework). In the instance of a mandatory leave of absence, you may be eligible for unemployment insurance benefits.

19. If an employee is teleworking to be home with their kids, and they can only telework for 6 hours instead of the usual 8 hours, the unworked 2 hours would fall under expanded FMLA?

- a. Correct, unless you are able to work out a varying schedule with agreement between the employee and employer. Say from 8 AM-2 PM, and then another 2 hours from 9 PM-11 PM for a total of 8 hours. Exempt employees are excluded.

20. Even though expanded FMLA says the first 2 weeks are Unpaid, this is not accurate because we must adhere to Paid Sick Leave Act, so must pay the first 2 weeks 2 separate types of leaves acts. So PSL is one act, and eFMLA is another part of the act. PSL is available even if total of FMLA has been used.

- a. Correct. Two different sections of the same Act.

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- 21. I have an employee that has school age children that are now at home with schools closed. She can work remotely, but she has chosen to work half time. Am I to pay for the other half of her hours?**
- a. Only if she produces documentation to show she is unable to work due to caring for her child.
- 22. Do employees who work 10 hours a week fall under Paid sick leave, FMLA, or loan forgiveness if we keep them on payroll?**
- a. They would fall under PSL and EFMLA.
- 23. Would there be a need for a 3rd code for COVIDFMLA one for indirect care and the current one being for direct care?**
- a. No
- 24. Can we ask for documentation for the EFMLA, even if local orders have been updated to say that you cannot request doctor's notes for absences? This order was made law in San Diego prior to H.R. 6201 being passed.**
- a. You will need to adhere with the order given by San Diego for local guidance. However, you may ask for documentation before an employee returns to work. Do not wait to receive a doctor's note before approving the leave.
- 25. When can you request documentation from any employees requesting any time off for the ACT to ensure they qualify for the ACT?**
- a. Anytime, unless it goes against guidance of local or state ordinances. It is also recommended that you do not wait for the doctor's note before you approve the leave.
- 26. What if someone is currently not working because they have children and their school closed? Can the emergency FMLA be backdated?**
- a. The law is effective as of April 1st. If you realize that you should have paid an employee, make the correction now, and a good faith effort to make the employee whole.

Employee Head Counts and Payroll Costs

1. Can independent contractors/subcontractors be included in employee head counts and payroll calculations?

a. Based on the FAQs from the U.S. Department of the Treasury dated 04/06/2020, the answer would be no. See question #15

i. Question: Should payments that an eligible borrower made to an independent contractor or sole proprietor be included in calculations of the eligible borrower's payroll costs?

ii. Answer: No. Any amounts that an eligible borrower has paid to an independent contractor or sole proprietor should be excluded from the eligible business's payroll costs. However, an independent contractor or sole proprietor will itself be eligible for a loan under the PPP, if it satisfies the applicable requirements.

2. What if subcontractors aren't 1099 but provided by another company temporarily?

a. There has yet to be clarity surrounding temporary employees. As the regulations are written the Staffing company may claim their own temp. employees, the client utilizing the temp. may not.

3. Do payroll costs under the PPP loan include 1099 employees?

a. No, see question above, U.S. Department of the Treasury FAQs #15.

4. Do employees with non-resident IDs get covered under the loan qualifications?

a. Calculate Payroll Costs for all employees that have the legal right to work in the United States that you have a valid I-9 on file for.


5. Is payroll cost the gross payroll or does it include taxes and fees?

a. It is the gross payroll, see U.S. Department of the Treasury FAQs #16:

i. Question: How should a borrower account for federal taxes when determining its payroll costs for purposes of the maximum loan amount, allowable uses of a PPP loan, and the amount of a loan that may be forgiven?

ii. Answer: Under the Act, payroll costs are calculated on a gross basis without regard to (i.e., not including subtractions or additions based on) federal taxes imposed or withheld, such as the employee's and employer's share of Federal Insurance Contributions Act (FICA) and income taxes required to be withheld from employees. As a result, payroll costs are not reduced by taxes imposed on an employee and required to be withheld by the employer, but payroll costs do not include the employer's share of payroll tax.

For example, an employee who earned \$4,000 per month in gross wages, from which \$500 in federal taxes was withheld, would count as \$4,000 in payroll costs. The employee would receive \$3,500, and \$500 would be paid to the federal government. However, the employer-side federal payroll taxes imposed on the \$4,000 in wages are excluded from payroll costs under the statute.

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- 6. Can health insurance be included in payroll cost for average monthly payroll expenses? What about other benefits, like retirement?**
- a. Yes. The employer paid portion of health insurance is to be included as are payroll costs associated with vacation, PTO and retirement payments.
- 7. What about workers comp insurance, unemployment, and the like?**
- a. No. These amounts must be excluded, also excluded are PEO admin charges. We are seeking further guidance as there are some dissimilarities between PPP and EIDL when it comes to these costs
- 8. Can you include full time employees that are consultants from another company in your headcount?**
- a. No, not as of 4/6.
- 9. For the past 12 months of payroll history, should you use all 4 quarters of 2019, or the last 3 quarters of 2019 and Q1 of 2020?**
- a. As of 4/6/2020, both options are acceptable. Clients should make a business-based decision.
- 10. Is there an individual employee income cap on the payroll that qualifies for these programs?**
- a. Yes, \$100,000 cash compensation is the cap. Noncash benefits are excluded.
- 11. Can payroll costs include money spent on payroll via a temp agency?**
- a. As of 4/6/2020 the answer is no. However, there is additional clarity needed for these situations. We recommend clients provide this information to the lender, and seek the counsel of their lending institution until we know more.
- 12. If employees have been furloughed and the PPP loan is accepted within the same month, is the business required to bring them back to work as soon as the loan is provided?**
- a. No. In order for PPP loan forgiveness to be granted, staffing levels need to at pre-crisis levels by 6/30/2020.
- 13. Are owners' and partners' income allowed to be including in payroll cost? If so, are there any limitations or specific qualifications?**
- a. Yes, but they are subject to the \$100,000 cap.

Loan Applications and Eligibility

1. What are the qualifications for each loan?

a. A detail listing of eligibility can be found on the SBA Website. www.sba.gov/disaster5

2. Are non-profits eligible for loans?

a. Yes. Under current EIDL rules, all non-profits are eligible. Further PPP guidance per IFR dated 4/6, only 501c3 and c9 types are included. We are seeking more clarity.

3. Are companies based in the US but partially or completely foreign owned eligible for relief?

a. Yes, but only those employees who are SBA eligible American Citizens, permanent resident aliens or others legally permitted to work in the USA

4. If a company has yet to be impacted by the COVID-19 crisis, can they still apply for a loan, just in case?

a. Yes, SBA has indicated that availability of credit from other sources does not disqualify an employer from eligibility. We strongly recommend that this be disclosed to your lender, however.

5. If some employees have decided to not come to work, will that impact the company's ability to apply for loans?

a. This will not impact the ability to obtain the loan, but it may impact the forgivable amount if the average number of FTEs during the 8-week covered period is less than the average number of FTEs during the chosen choice period (either 02/15/2019 - 06/30/2019 OR 01/01/2020 - 02/20/2020).

6. Are publicly traded companies eligible?

a. Possibly. Under normal circumstances, publicly owned companies cannot perfect personal guarantees, thus they are ineligible. That requirement has been stayed for COVID-19 relief. However, very few publicly owned companies meet SBA Size standards (13 CFR 120.201) or Affiliation Rules (13 CFR 121.103) and are ineligible for this reason.

7. Which businesses and industries are ineligible for loans?

a. There are specific industries which are not eligible, e.g. illegal businesses, (Cannabis business come to mind here, they are not legal under federal law), gambling institutions, and business which are speculative in nature.

The complete list can be found on the PPP application at:

<https://www.sba.gov/sites/default/files/2020-04/PPP%20Borrower%20Application%20Form.pdf>

Loans Questions

1. How do these loans work if you're self-employed?

a. The type of business entity is not a factor. The application is completed the same way for any business.

2. Can both the PPP and EDIL be applied for? If you get approved for both, can you take both loans?

a. Yes, and if both are approved, the PPP will fund and payoff to close the EIDL.

3. What is the difference between the loan options?

a. There are two major differences: 1. EIDL has a 10,000 forgivable advance feature which is not available in PPP. 2. The basis for calculation of the final approved loan amount is done differently. There are numerous other smaller differences.

4. Can you get the PPP loan forgiven and then apply for an EDIL?

a. No

5. What do you need to do to get the loans forgiven? What is forgiveness based on?

a. Application must be made with the lender (PPP) or with the SBA (EIDL) not sooner than 6/30/2020. The procedure has not been finalized at this time.

6. Do employers with existing SBA loans qualify for the new SBA loans?

a. Yes

7. Can funds from the new SBA loans be used to pay for existing SBA loans and monthly payments?

a. No. But existing SBA obligations can be deferred during the relief period. Awaiting final guidance.

8. Where can you find the list of SBA lenders?

a. An SBA prepared list of Lenders can be found here:

<https://www.sba.gov/funding-programs/loans/coronavirus-relief-options/paycheck-protection-program-ppp#section-header-3>

9. How do layoffs impact the loans and applications?

a. Layoffs would not affect your ability to obtain a loan, however, it may impact your forgivable amount. You have until 06/30/2020 to cure employee levels and pay without it negatively impacting your forgivable amount. Your average FTEs for the 8-week cover period need to be no less than your average FTEs for the chosen choice period (either 02/15/2019 - 06/30/2019 OR 01/01/2020 - 02/20/2020).

Additionally, each individual employee must not have a greater than 25% decrease in pay during the 8-week covered period when compared to the chosen choice period. Both these scenarios may reduce the forgivable amount.

10. What are the terms and interest rates for each loan?

- a. EIDLs are 15-30yr terms at a rate of 3.75% (2.75% for non-profits). The PPPs are 2yr terms at a rate of 0.5%.

11. How do you determine if you need to apply for a loan?

- a. This is a business decision that would be specific to each owner's individual situation. We recommend partnering with your chosen CPA or financial advisor to determine if either of these loans are right for you.

The purpose of the EIDL or PPP loan is to provide emergency financial relief to businesses negatively impacted by COVID-19. If your business has not been negatively impacted by the pandemic, then you might not need to apply.

Loan Application Questions

1. How and where do loan applications need to be submitted?

- a. EIDLs need to be applied for online directly through the SBA at <https://covid19relief.sba.gov/#/> PPP loans need to be applied for through your local SBA approved lender utilizing the loan application found on the Human Capital COVID-19 Resources page or directly through the U.S. Department of the Treasury here: <https://home.treasury.gov/system/files/136/Paycheck-Protection-Program-Application-3-30-2020-v3.pdf>. We recommend utilizing the bank that you have a current relationship with first.

2. How long does it take for loans to be approved?

- a. Based on client feedback we have not yet heard of any clients receiving funding from an EIDL which most started around 3-weeks ago. However, we have heard of funding activity from clients that applied for the PPP, which was about a 3-4 business day turnaround.

3. How do you apply for each loan?

- a. IDLs need to be applied for online directly through the SBA at <https://covid19relief.sba.gov/#/> PPP loans need to be applied for through your local SBA approved lender utilizing the loan application found on the Human Capital COVID-19 Resources page or directly through the U.S. Department of the Treasury here: <https://home.treasury.gov/system/files/136/Paycheck-Protection-Program-Application-3-30-2020-v3.pdf>. We recommend utilizing the bank that you have a current relationship with first.

4. How will loan applications be prioritized: on a first come, first served basis or are clients prioritized?

- a. As we understand it, EIDL requests are processed as received by the SBA. PPP applications may be prioritized by the respective bank, whereby they process current customers first. We have heard that larger national banks will be processing loans for their customers only for the first 2-weeks. However, this is specific to each bank and may vary.

Loan Forgiveness

1. How do later lay-offs (after the end of the loan application and receiving funds) impact loan forgiveness?

a. As it is written in the regulations, the average monthly FTEs during the 8-week covered period will be compared against the average FTEs during the chosen choice period (either 02/15/2019 - 06/30/2019 OR 01/01/2020 - 02/20/2020) and averages during the 8-week covered period that are below the chosen choice period will impact the forgivable amount. It is recommended that head count is replaced if possible.

2. If an employee resigns voluntarily, how does that impact the PPP and loan forgiveness? Does this count against the employer?

a. As it is written in the regulations, the average monthly FTEs during the 8-week covered period will be compared against the average FTEs during the chosen choice period (either 02/15/2019 - 06/30/2019 OR 01/01/2020 - 02/20/2020) and averages during the 8-week covered period that are below the chosen choice period will impact the forgivable amount. It is recommended that head count is replaced if possible.

PPP Specific Questions

1. Is K-1 Income covered under PPP?

a. Based on attorney reviewed it is understood that owners providing a service to the business CAN include those wages in the calculation. Whereas owners that are just collecting profits from the business, should not. The spirit of the law is to provide forgiveness for actions that keep a business, and thus the economy, moving forward.

2. Although you can't get the 50% tax credit if you get the PPP Loan, can you still defer payments to 2021 and 2022?

a. No. If an employer elects to receive the Employer Tax Credit for Employee Retention Related to COVID-19 OR the deferral of Social Security Tax they cannot also request loan forgiveness under the PPP.

EIDL Specific Questions

1. Must I apply for a loan to get the \$10,000 grant?

a. Yes

2. Can you receive the \$10K advanced portion of the EIDL without having to take the loan?

a. Based on reliable sources from the Small Business Development Center (SBDC), yes. However, this has right to be seen.

3. If you applied for this loan before the changes, do you have to apply again?

a. No, provisions that were in place at the time the loan was applied for would remain valid.

Employee Related Questions

1. How should 1099 employees apply for unemployment?

a. Check with their state's unemployment office.

2. Where should they apply if they live in a state other than where the business is registered?

a. They should apply in the state in which they work, not where they live.

3. What is the maximum weekly amount that employees on unemployment can get?

a. The maximum weekly benefit varies by state. For instance, in Florida, it tops out at \$275 while in Oregon, the maximum is \$648. But under the federal relief bill, everyone will get an additional \$600 a week until July 31st.

4. Can employees with reduced hours and salary get unemployment benefits?

a. Yes, they are eligible for partial unemployment insurance.

5. Do shelter-in-place rules qualify for paid sick leave under FFCRA?

Not if the employer has no work that can be done because of the order. Under the FFCRA, Shelter in Place qualifies as a protected leave, but only if the employee is the subject of the order. This is answered under #60 of the DOL FAQ on FFCRA. For example:

- a. A restaurant is ordered to close as a “non-essential business” under a stay home order. The restaurant decides to remain open, but for takeout only. Due to the order, business falls, and they also do not need waiters at their location anymore, so most staff are told to not to report to work. In this situation, there is no requirement for the business to pay these staff, because the shelter in place dictated the business to be closed, not for the employees themselves to stay home.
- b. Florida issued an executive order stating anyone who is a senior citizen or has significant underlying medical conditions shall stay at home. If a company is open, has work for the senior citizen employee to perform, and the employee cannot telework, then they are covered under the mandatory quarantine and must be paid under Extended Paid Sick Leave. This is because the employee themselves are subject to the order.
- c. Last example. Michigan ordered that flooring stores are to be closed through April 30, 2020. Since the business will be non-operational, and there is no work for employees to complete during this time, none of the staff at this location are eligible for Extended Paid Sick Leave. This is because the subject of the order was the business, and not directed at the employees.

6. How would you respond to employees that are fearful but not currently sick?

a. Practice safety precautions while at work. Employer should have extra sanitizing practices in place and require employees to follow them.

Employee Related Questions

7. How do you determine if your employees should be laid off or furloughed?

- a. Employers who apply for the SBA loan should probably furlough employees because the loan is supposed to be used to pay the employees. Also, because it's easier to get them back to work when the shelter-in-place orders are lifted. Employers who aren't going to apply for the loan should lay off employees so they can file for unemployment.

8. Can laid off employees who are already receiving social security get unemployment benefits at the same time?

- a. Yes.

9. Is the paid sick leave in addition to sick paid time off already granted to employees?

- a. Yes

10. If an employee is unable to work due to having to care for children, do they qualify for paid leave? What resources are available to them?

- a. Yes. Paid sick leave (2 weeks) and, if they have been employed for at least 30 days, expanded family and medical leave (10 additional weeks) is available.

11. Can you pay all payroll in one lump sum or does it need to be evenly distributed throughout the 8-week period?

- a. Either way is fine.

PEO Related Questions

1. How do co-employment arrangements impact the aid application process?

- a. PEO relationships will not impact an employer's ability to apply for a loan. U.S. Department of the Treasury has even addressed the specific topic in their FAQs dated 04/06/2020, question #10:
 - i. **Question:** What if an eligible borrower contracts with a third-party payer such as a payroll provider or a Professional Employer Organization (PEO) to process payroll report payroll taxes?
 - ii. **Answer:** SBA recognizes that eligible borrowers that use PEOs or similar payroll providers are required under some state registration laws to report wage and other data on the Employer Identification Number (EIN) of the PEO or other payroll provider. In these cases, payroll documentation provided by the payroll provider that indicates the amount of wages and payroll taxes reported to the IRS by the payroll provider for the borrower's employees will be considered acceptable PPP loan payroll documentation. Relevant information from a Schedule R (Form 941), Allocation Schedule for Agate Form 941 Filers, attached to the PEO's or other payroll provider's Form 941, Employer's Quarterly Federal Tax Return, should be used if it is available; otherwise, the eligible borrower should obtain a statement from the payroll provider documenting the amount of wages and payroll taxes. In addition, employees of the eligible borrower will not be considered employees of the eligible borrower's payroll provider or PEO.

Department of Labor (DOL) Notice Questions

Do we have to post the FFCRA poster if we employ more than 500 employees?

No, although it is recommended for you to carefully check your employee count to ensure it is accurate.

How do I know if my business is under the 500-employee threshold?

The count is based on each employer's total employees, which includes all the locations the employer owns. For businesses who are part of a PEO, the count is not subject to the PEO's numbers, but rather, each client's total employees.

Inclusive of that count are full-time and part-time employees within the United States, employees currently on a leave of absence for any reason, and temporary employees. Workers who are independent contractors under the Fair Labor Standards Act (FLSA), are not considered employees for purposes of the 500-employee threshold.

Where do I post this notice? If I have employees currently teleworking, do I electronically "post" this notice?

If you are a covered employer (which means you have under 500 employees) you must post the Families First Coronavirus Response Act (FFCRA) notice in a conspicuous place such as next to where you have your Labor Law Poster, preferably. If you have remote employees, whether temporarily during this time or existing, you can satisfy this requirement by emailing the notice to your employees, or directly mail it, or posting this notice on your intranet, external website, or HRIS system. This would be needed only for existing employees including new hires, but not for applicants.

Do I have to post this notice in other languages that my employees speak? Where can I get the notice in other languages?

You are not required to post this notice in multiple languages, but the Department of Labor (Department) is working to translate it into other languages.

Did the DOL make a mistake on the Employee Rights Poster listing a \$12,000 cap for paid family leave?

The actual law limits paid family leave under the amended FMLA to \$200 per employee per day (and \$10,000 per employee in total). The DOL Notice states that the total for paid family leave under the FMLA is \$12,000. It certainly is unclear but it actually is not a typo. Got word from DOL that the poster was discussed in depth and it is correct as posted and cleared through solicitor's office. The DOL is going with the \$12,000 number because that's the total amount of paid leave available for an employee taking a childcare related leave under the Act.

Specific Bill Questions

What is the actual effective date when this law will take effect?

The DOL now takes the position that the new laws become effective on April 1, 2020, rather than April 2, 2020. This will apply to leave taken between April 1, 2020, and December 31, 2020.

How do small employers request an exemption?

Well, the Secretary of Labor will have the authority to issue regulations for good cause to exempt small employers with fewer than 50 employees from the requirement of providing paid time off for child care disruption and expanded family and medical leave if providing it would jeopardize the viability of the business as a going concern. Such employers are going to have to document why the business qualifies for the exemption. Unfortunately, nobody knows at this point, how to request the exemption or what information must be provided. It is also unclear how long it will take for a determination on the request, or whether the employer is required to pay the employee for the time during which the exemption request is pending. The DOL is expected to provide additional guidance on how to elect this exemption in forthcoming regulations.

Are the paid sick leave and expanded family and medical leave requirements retroactive?

No. In the initial bill, this provision was included, but when the bill was revised by the House before going over to the Senate, this was removed. If someone is on leave right now for a qualifying reason under the Act, the provisions of paid leave would NOT apply to any leave duration that occurs prior to April 1st.

How do I count hours worked by a part-time employee for purposes of paid sick leave or expanded family and medical leave?

A part-time employee is entitled to leave for his or her average number of work hours in a two-week period. Therefore, you calculate hours of leave based on the number of hours the employee is normally scheduled to work. If the normal hours scheduled are unknown, or if the part-time employee's schedule varies, you may use a six-month average to calculate the average daily hours. Such a part-time employee may take paid sick leave for this number of hours per day for up to a two-week period, and may take expanded family and medical leave for the same number of hours per day up to ten weeks after that.

If this calculation cannot be made because the employee has not been employed for at least six months, use the number of hours that you and your employee agreed that the employee would work upon hiring. And if there is no such agreement, you may calculate the appropriate number of hours of leave based on the average hours per day the employee was scheduled to work over the entire term of their employment.

What is covered under the “catch-all” category for FFCRA?

Under the new law, the 6th reason an employee can take leave for is if “the employee is experiencing a substantially similar condition to COVID-19 as has been identified by the Secretary of Health and Human Services.” There is not yet any guidance on what this means, as the Secretary of Health and Human Services has not yet identified any conditions similar to COVID-19. Thus, employers are not yet required to grant an employee leave under this provision until “substantially similar” conditions have been identified by the Secretary. So that concrete answer is yet to come.

When calculating pay due to employees, must overtime hours be included?

Yes. The Emergency Family and Medical Leave Expansion Act requires you to pay an employee for hours the employee would have been normally scheduled to work even if that is more than 40 hours in a week.

However, the Emergency Paid Sick Leave Act requires that paid sick leave be paid only up to 80 hours over a two-week period. For example, an employee who is scheduled to work 50 hours a week may take 50 hours of paid sick leave in the first week and 30 hours of paid sick leave in the second week. In any event, the total number of hours paid under the Emergency Paid Sick Leave Act is capped at 80.

Can we ask an employee to stay home or leave work if they exhibit symptoms of the COVID-19 coronavirus or the flu?

Yes, you are permitted to ask them to seek medical attention and get tested for COVID-19. The CDC states that employees who exhibit symptoms of influenza-like illness at work during a pandemic should leave the workplace. The Equal Employment Opportunity Commission (EEOC) confirmed that advising workers to go home is permissible and not considered disability-related if the symptoms present are akin to the COVID-19 coronavirus or the flu.

An employee of ours has tested positive for COVID-19. What should we do?

You should send home all employees who worked closely with that employee for a 14-day period of time to ensure the infection does not spread. Before the employee departs, ask them to identify all individuals who worked in close proximity (three to six feet) with them in the previous 14 days to ensure you have a full list of those who should be sent home. When sending the employees home, do not identify by name the infected employee or you could risk a violation of confidentiality laws.

One of our employees self-reported that they came into contact with someone who had a presumptive positive case of COVID-19. What should we do?

Take precautions. Treat the situation as if the suspected case is a confirmed case for purposes of sending home potentially infected employees. Communicate with your affected workers to let them know that the employee is asymptomatic for the virus but you are acting out of an abundance of caution.

Can we require an employee to notify the company if they have been exposed, have symptoms, and/or have tested positive for the COVID-19 coronavirus?

Yes, you should require any employee who becomes ill at work with COVID-19 coronavirus symptoms to notify their supervisor. Employees who are suffering from symptoms should be directed to remain at home until they are symptom-free for at least 24 hours.

Can we deny an employee's request for paid sick leave if we gave the employee paid leave for a reason identified in the Emergency Paid Sick Leave Act prior to the Act going into effect?

No. The Emergency Paid Sick Leave Act imposes a new leave requirement on employers. The bill is clear when it says that an employer may not require an employee to use other paid leave provided by the employer before the employee uses the paid sick time. The initial 10 days are unpaid, but an employee has the choice to elect to substitute any accrued vacation, PTO, or sick leave for unpaid leave.

What actions can we take if an employee is exhibiting flu-like symptoms but refuses to leave the workplace?

You should first take a collaborate approach. Remind the employee that you are asking them to leave. Try to make them understand the reasons why their departure is necessary to maintain the health and safety of the entire workplace. If there are benefits available such as paid sick leave, use of accrued vacation, or something else that may appease them, you should explain these benefits and how the employee can utilize them.

Can employers refuse an employee's request to wear a medical mask or respirator?

Yes, under most circumstances – but you may want to consider allowing your workers to wear them if it makes them feel safe. In almost all work situations, however, there is no currently recognized health or safety hazard – even when employees work near other people and thus there is no need for a mask or respirator. The World Health Organization has stated that people only need to wear face masks if they are treating someone who is infected with the COVID-19 coronavirus, and that wearing masks may create a false sense of security among the general public. Doctors agree that the best defense against the COVID-19 coronavirus and influenza is simply washing your hands. Thus, the consensus is that there are more appropriate measures of defense than wearing a surgical mask or respirator. However, given the high degree of concern in the general public at the current time, you may consider permitting those workers who want to wear a mask to do so without necessarily encouraging them if it makes them feel safer.

On the flipside... **Can an employee refuse to work without a mask?** OSHA has addressed the common question of whether an employee can simply refuse to work in unsafe conditions – you can look at further details into OSHA's guidance on this by doing a search in Google for “Guidance on Preparing Workplaces for COVID-19”

Can an employee be changed from exempt to non-exempt status?

Yes, nothing prohibits an employer from classifying a position as nonexempt. Such a conversion should not affect an employee's previous exempt status nor preclude returning to exempt status in the future. Remember, being nonexempt from the payment of overtime is considered to be more generous by the law than being exempt. The opposite change is where employers run into trouble.

Also, if duties are going to change, the employee is no longer eligible for the exemption. Review the employee's job description and make sure the essential job duties are in line with the expectation of the work that will be performed. If the job description needs to change to fit a non-exempt status, that is okay. But be cautious of the timing of the change. If for example, you are making the change in the middle of the week, and the exempt employee worked some hours, that employee will need to be paid their full salary for that week.

If there will be no change to the duties, make sure that they receive the equivalent wage in an hourly amount, and it must never fall below the federal or state minimum wage. The employee will need to be made aware of their new standard hours, any required breaks and meal periods, if the state law requires them, and the employer will need to track the hours worked and pay overtime as appropriate. If duties change in the future, make sure to determine if exemption requirements are met to classify as exempt.

You could also reduce salaries in response to COVID-19 (given a legitimate business need). Each situation needs to be looked at on a case-by-case basis.

Can employees take FFCRA leave to care for non-family members who are quarantined?

The FFCRA states that leave may be taken to care for an “individual” who is subject to a Federal, State, or local quarantine or isolation order related to COVID-19 or an individual who has been advised by a health care provider to self-quarantine due to concerns related to COVID-19. That type of leave does not appear to be limited to a family member. However, the portion of the FFCRA that discusses the pay for this type of leave uses the language to “care for family members.” Until this issue is clarified by the DOL, it would be risky to deny leave needed to care for non-family members who are quarantined.

Can an employee use this benefit more than once this year?

No, this will be a one-time thing. Let me give you a good example we heard yesterday:

An employee tells his manager on March 31 that he cannot work because his child’s daycare is closed. He wants to take 12 weeks of emergency FMLA leave (EFMLA) starting April 1 through June 24.

He wants to get paid for the first 10 days of EFMLA (which are unpaid days) so he decides to take his 80 hours of Emergency Paid Sick Leave. He returns to work on June 25 and has by that time exhausted both his Emergency Paid Sick Leave and EFMLA.

Substituting the sick leave (or any other accrued paid leave) for the 10 unpaid days does not extend EFMLA leave. If on August 1, this employee suddenly experiences COVID-19 symptoms and needs to seek a medical diagnosis (another one of the six qualifying events for Emergency Paid Sick Leave), he would not have any Emergency Paid Sick Leave available. The time he is away from work would either be unpaid, or he would need to use accrued vacation, PTO, or other sick leave.

If an employee who has been on a protected leave has been released to return to work, do we have to allow the employee return if their position is no longer available?

It’s important to have business criteria to support why the employee wasn’t reinstated. Under the new law, if an employer has 24 or less employees, that employer is not obligated to reinstate the employee at the end of their leave if the 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. However, you must continue to make reasonable efforts to restore the employee to an equivalent position for 1 year after the date on which the qualifying need related to a public health emergency concludes;” or 12 weeks after commencement of the employee’s leave, whichever is earlier. But if you have 25 or more employees, you must allow the employee to return to the same or equivalent position after taking EFMLA leave. Same job restoration obligations as under the current FMLA law.

How to treat an employee who previously took or exhausted FMLA leave prior to the passage of the FFCRA?

The FFCRA temporarily adds new reasons for FMLA leave to be taken, but it does not appear to add an entirely new bucket of FMLA leave if prior FMLA leave was taken and/or exhausted. Thus, an employee who exhausted his/her FMLA time due to a prior FMLA leave (during the qualifying period defined by the employer) would not have any new FMLA time under the FFCRA. However, the employee would still be eligible for ten days of Emergency Paid Sick Leave for qualifying events under the FFCRA, as well as any other available leave under state and local laws or company policies. Importantly, leave taken under the expanded FMLA provision of the FFCRA cannot run concurrently with an employee's leave entitlement under the California Family Rights Act (CFRA), because leave to care for a child whose school is closed due to Covid-19 is not a covered reason for leave under the CFRA.

Are tips included in the regular rate of pay?

Tips are treated the same as the definition of regular rate of pay under the FLSA (you can read details about that by going to Google and doing a search for DOL Fact Sheet #15)

Does the EPSL have to be used consecutively (all 80 hours at once)? How does that apply to employees working a reduced schedule/less hours per day?

We are waiting on the regulations although given the form that will need to be completed for EFMLA asking if the leave is intermittent employees will most likely be able to use sick leave in increments.

We are located in California and we are required to show an employee's paid sick leave balance on the employee's pay stub. Do we now have to add a separate line item?

Nothing has been released about COVID-19 balances on CA wage statements although it is recommended that employers use a separate pay code, so that the amount and balance are separate, which will also help with the tax credit. It's not necessary at this time to revamp the wage statement.

Payroll + Benefits + Risk Management + Human Resources

