

# Answers for Employers on COVID-19

March 27, 2020

# Introduction >

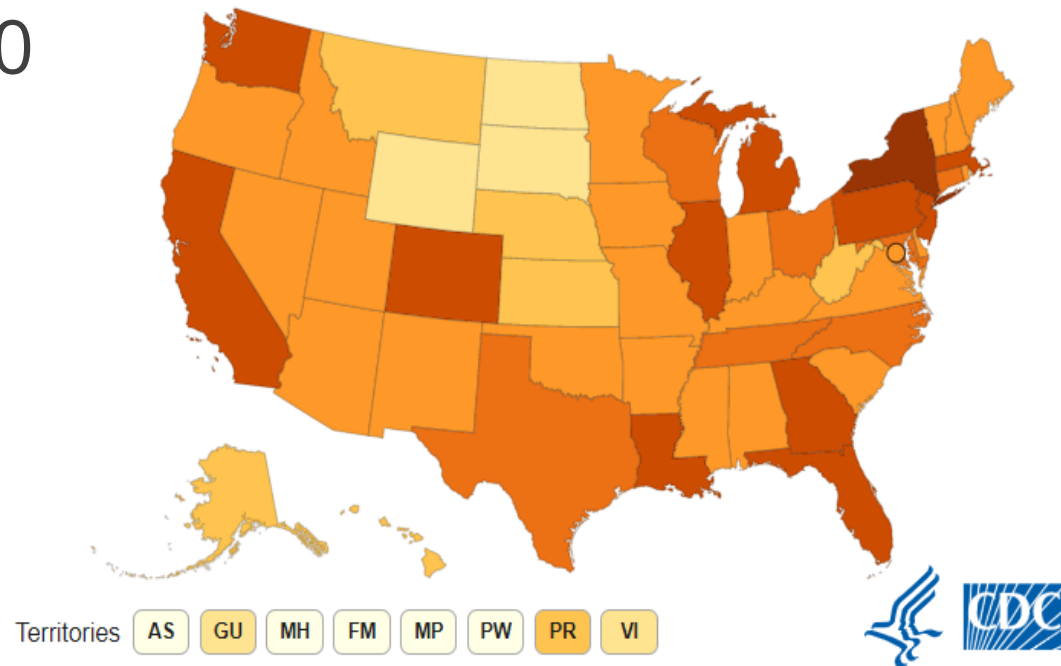
# Today's Agenda

- Situation Summary
- Latest Updates
- Common Employer Questions

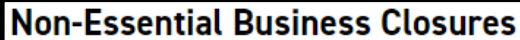
# Situation Summary >

# ➤ Situation Summary

- Total Cases: 68,440
- Total Deaths: 994
- Jurisdictions: 54
  - All 50 states, DC, Puerto Rico, Guam, US Virgin Islands
  - 27 states are reporting **community spread**



# State Orders



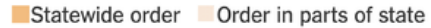
■ All non-essential business closed ■ All non-essential retail business closed ■ N/A ■ Other

Source: Kaiser Family Foundation

Kamran Rahman/POLITICO

## The definition of “non-essential” varies from state to state

“Stay-at-home” orders vary by state. Residents are typically instructed to stay at home unless going out for essential activities.



- Statewide order

### Order in parts of state

# ➤ CARES Act

- Coronavirus Aid, Relief and Economic Security Act
- Passed by Senate on March 25, expected to be voted on by House today
- Major provisions
  - Stimulus checks to households
  - Business loan programs
  - Funding for unemployment insurance
  - Increased spending on hospitals
  - Health plan coverage

Latest Updates >



# DOL Guidance on FFCRA Paid Leave

## **DOL: paid leave rules take effect on April 1**

The DOL is providing guidance on its website at <https://www.dol.gov/agencies/whd/pandemic> :

- **Fact Sheets for** employers and employees
- **Questions and Answers** on FFCRA, FLSA, FMLA, FFCRA notice
- **Posters** on employee rights under expanded FMLA And Paid Sick Leave
- **Field Assistance Bulletin** on temporary non-enforcement period

*Regulations are expected in April*



## FFCRA Temporary Non-Enforcement Policy

- **Field Assistance Bulletin No. 2020-1**
- The DOL will not bring enforcement actions against any employer for violations of the Act occurring within 30 days of the enactment of the FFCRA (March 18 - April 17, 2020)
- The employer must make reasonable, good faith efforts to comply with the Act

## ➤ Is paid leave available for business closures or furloughs?

**DOL: No, paid leave is not available in the following situations:**

- Worksite is closed due to lack of business or Federal, state or local directive (before or after April 1)
- Worksite is closed while an EE is on paid leave (after date of closure)
- EE is furloughed because there is not enough work or business
- EEs hours are reduced because there is not enough work

## FFCRA Poster Rules

- Covered employers must post a FFCRA notice in a conspicuous place on their premises
- An employer may email or direct mail the notice, or post it on an employee information internal or external website
- Not required to be posted in multiple languages

# ➤ IRS Guidance on Tax Credits

- **IR-2020-57: describes agency plan for tax credits for COVID-19 leave provided April 1- Dec. 31**
- Refundable payroll tax credits provide 100% reimbursement for the cost of providing COVID-19-related leave
  - Health insurance costs are also included in the credit – *guidance needed*
  - Employers face no payroll tax liability
  - Self-employed individuals receive an equivalent credit

# ➤ Tax Credit Details

- Eligible employers can retain payroll taxes equal to the amount of leave that they paid instead of depositing with IRS
  - Include withheld federal income taxes, the employee share of Social Security and Medicare taxes, and the employer share of Social Security and Medicare taxes with respect to all employees
- If insufficient payroll taxes to cover the cost of leave paid, employers will be able file a request for an accelerated refund payment from the IRS

# ➤ Tax Credit Examples

- ER paid \$5,000 in sick leave and would normally deposit \$8,000 in payroll taxes (including taxes withheld from EEs)
  - ER can use \$5,000 for leave payments and would only have to deposit \$3,000 on its next regular deposit date
- ER paid \$10,000 in sick leave and would normally deposit \$8,000 in taxes
  - ER could use the entire \$8,000 for leave payments and file a request for an accelerated credit for the remaining \$2,000
- Equivalent amounts are available to self-employed individuals
  - Credits will be claimed on their income tax returns and will reduce estimated tax payments

# ➤ IRS Delay on Tax Deadlines

- The filing deadline for tax returns has been extended from April 15 to July 15
- Delay applies to all taxpayers with a Federal income tax return or payment due on April 15, 2020
  - Includes individuals, trusts, estates, corporations and any type of unincorporated business entity
- State delays are up to each state



# Common Employer Questions >

## Can we require employees to stay home from work after travel?

- Yes, employers may require employees to stay away from the worksite after traveling for a period of time
- Employers should consider telework when possible
- Ensure that requirements do not discriminate based on a protected class
- This situation is not addressed in paid sick leave rules

# ➤ What do we do if an employee is diagnosed with COVID-19?

- Employees who appear to have symptoms (i.e., fever, cough, or shortness of breath) at work should be:
  - Immediately separated from other employees, customers, and visitors and
  - Sent home
- If an employee is confirmed to have COVID-19 infection:
  - Employers should inform fellow employees of their possible exposure to COVID-19 in the workplace
  - Employers must maintain confidentiality as required by the Americans with Disabilities Act (ADA)
  - The fellow employees should self-monitor for symptoms



## Which employers have to provide paid leave?

- The paid sick leave and expanded FMLA rules apply to some public employers and to private employers with fewer than 500 employees
- Health care providers and emergency responders can be exempt
- Small businesses with fewer than 50 employees may qualify for exemption from the requirement to provide paid leave due to school or child care closings

## ➤ What paid leave is required under the FFCRA?

- Two weeks (up to 80 hours) of **paid sick leave** at the employee's regular rate of pay (or minimum wage if higher)
- Where the employee is:
  - Unable to work because the employee is quarantined or isolated (pursuant to Federal, State, or local government order or advice of a health care provider) and/or
  - Experiencing COVID-19 symptoms and seeking a medical diagnosis
- *Maximum: \$511/day; \$5,110 total*

# What paid leave is required under the FFCRA?

- Two weeks (up to 80 hours) of **paid sick leave** at 2/3 the employee's regular pay rate (or minimum wage if higher)
- Because the employee is:
  - Unable to work because of a bona fide need to care for an individual subject to quarantine or isolation
  - Unable to work because of a bona fide need to care for a child (under 18 years of age) whose school or child care provider is closed or unavailable for reasons related to COVID-19, and/or
  - Experiencing similar condition specified by DOL/IRS/HHS
- *Maximum: \$200/day; \$2,000 total*

## ➤ What paid leave is required under the FFCRA?

- Up to an additional 10 weeks of **paid expanded FMLA leave** at 2/3 the employee's regular rate of pay (or minimum wage if higher)
  - The first 10 days of expanded FMLA leave are unpaid
- Where an employee:
  - Has been employed for at least 30 calendar days and
  - Is unable to work due to a bona fide need for leave to care for a child whose school/child care provider is closed/unavailable for reasons related to COVID-19
- *Maximum: \$200/day; \$10,000 total (\$12,000 when combined with paid sick leave for the same reason)*

# ➤ What if we provide paid leave before April 1 or pay more than required?

- DOL:
  - Additional paid leave must be provided beginning April 1
  - Employers can't deny paid sick leave if leave was already provided before April 1
  - Tax credits are not available for supplemental leave or pay
- IRS:
  - Eligible employers will be able to claim tax credits based on qualifying leave they provide between the effective date and December 31, 2020 (not before)





## How do you determine whether an employer has fewer than 500 EEs?

- Use employee count at the time the leave is to be taken
- Count full-time and part-time employees within the U.S. (including territories and possessions), including:
  - Employees on leave
  - Temporary employees who are jointly employed by you and another employer
  - Day laborers supplied by a temporary agency
- Do not count independent contractors

# ➤ Commonly Owned Companies

- A company with separate establishments or divisions is considered to be a single employer
- Commonly owned companies are separate employers unless they are joint employers under the FLSA with respect to certain employees
- If two entities are joint employers, all of their common employees must be counted
- Employer integration rules apply under the FMLA

# ➤ FLSA Joint Employer Test

- There are two potential scenarios where an employee may have one or more joint employers
  - Employee performs work for the employer that simultaneously benefits another individual or entity
  - Employers are sufficiently associated with respect to the employment of the employee
- Joint employment is a facts and circumstances determination

# ➤ FMLA Integrated Employer Test

- All employees of the corporation, at all locations, are counted for FMLA purposes
- Separate entities or corporations may be parts of a single employer for FMLA purposes if they meet the integrated employer test
- Factors to be considered
  - Common management
  - Interrelation between operations
  - Centralized control of labor relations
  - Degree of common ownership or financial control

## Will there be a law that helps employers with more than 500 EEs?

- There are no current plans to require paid leave for employees of larger companies
- These companies are more likely to provide paid leave already
- Other COVID-19 legislative relief efforts may apply to large employers

## ➤ How do small employers get an exemption from paid leave rules?

- Exemptions are available to businesses with fewer than 50 employees
  - If providing leave would jeopardize the viability of the business as a going concern
- Document why the business meets the criteria (will be addressed in more detail in forthcoming regulations)
- ***Do not send any materials to the DOL***

## ➤ What are exempt medical providers/emergency responders?

- This term is not defined in the statutory language or in any existing DOL guidance
- Additional information is expected in DOL regulations
- Employers should make good faith efforts to comply during the non-enforcement period

## ➤ Do paid sick leave rules apply to part-time employees?

- Yes, a part-time employee is entitled to:
  - Paid sick leave for normally scheduled work hours in a two-week period
  - Expanded FMLA leave for normal number of work hours per day up to 10 weeks
- Determining hours if no normal schedule
  - Use a six-month average to calculate the average daily hours
  - If not employed for 6 months, use the number of hours agreed to upon hiring
  - If no agreement, use average hours/day scheduled over the term of employment



## What records must an employer keep?

- Employers must maintain appropriate documentation in support of the reason for the leave:
  - Employee name
  - Qualifying reason for requesting leave
  - Statement that the employee is unable to work (including telework) for that reason
  - Dates for which leave is requested
  - Documentation of the reason for the leave

## What documentation can an employer require?

- Examples of documentation of the reason for leave
  - A copy of any quarantine or isolation order
  - Written documentation from the health care provider that has advised self-quarantine
  - A notice that has been posted on a website, published in a newspaper or sent via email regarding school or daycare closure
- Existing FMLA certification requirements apply for existing reasons for FMLA leave (such as a serious health condition)

## Is the paid leave in addition to an employer's existing leave policy?

- Yes, the paid leave requirements are new entitlements beginning April 1
- Employees must choose which leave to take, unless the employer agrees that they can be used concurrently
- Employers can allow employees to supplement paid leave with existing employer leave or can provide additional pay
  - Employers cannot require employees to use paid leave and cannot claim a tax credit for additional amounts

## How do the leave laws work together?

- Employees may be eligible for both types of paid leave but only for a total of 12 weeks
- Paid sick leave is intended to cover the unpaid first 10 days of expanded FMLA leave (if applicable)
- Paid sick leave is limited to 80 hours (or max hours for PT EEs)
  - Employees do not get multiple periods of paid sick leave for multiple reasons

## ➤ Can paid leave be taken intermittently?

- **Teleworking:** Yes, if employer agrees (in any increment agreed to)
- **Working at usual worksite:** No, if reason for leave is due to illness, quarantine/isolation or caring for a sick/quarantined/isolated person
- **Working at usual worksite** Yes if reason for leave is childcare and employer agrees (in full-day increments only for paid sick leave and possibly expanded FMLA)

*DOL encourages collaboration to achieve flexibility*

## ➤ Must health coverage be maintained during paid leave?

- **Expanded FMLA:** coverage must be maintained as if the employee had continued to work
  - Employee must make normal contribution
  - Coverage may end if employee does not return to work after FMLA leave
- **Paid sick leave:** employer must continue health coverage under HIPAA due to restrictions on actively-at-work provisions

## ➤ What if an employee has already used their FMLA leave for the year?

- The FFCRA provides additional qualifying reasons for leave under the FMLA
- It does not require additional FMLA leave beyond the aggregate 12 weeks of leave (or 26 weeks for military family leave)

## ➤ What is the age limit for caring for a child (school/daycare closure)?

- The expanded FMLA applies when employee has to care for a son or daughter under 18 years of age if the school or child care provider is closed or unavailable due to a COVID-19 public health emergency
- The emergency paid sick leave language does not specify an age but DOL guidance indicates it is also under 18



## ➤ What if an employer does not provide paid sick leave?

- Covered employers that do not provide paid sick leave will be subject to FLSA penalties and enforcement
- Employers that do not provide expanded FMLA leave are subject to the enforcement provisions of the FMLA
- The DOL is providing a temporary non-enforcement period for 30 days if the employer has acted reasonably and in good faith

# ➤ What is included in coverage for COVID-19 testing?

- Group health plans and health insurance issuers must cover COVID-19 testing
  - No cost-sharing, preauthorization or medical management may apply
- Covered items and services
  - Diagnostic products approved by FDA (and administration)
  - Items and services furnished during health care provider visits (including telehealth visits) that result in or relate to a test
- CARES Act would expand covered items and services

## ➤ How does waiving copays and cost-sharing affect HSA eligibility?

- States and carriers are providing telehealth services with no cost-sharing
- FFCRA does not address non-COVID-19 treatment or HSA eligibility
- IRS guidance only addresses COVID-19 treatment
- The CARES Act would provide flexibility for HSAs and allow other types of treatment before the deductible is met

## What happens to health coverage for laid-off employees?

- Eligibility terms of the plan will apply
  - Some states and carriers are providing flexibility for reduced hours
- If coverage is terminated, COBRA or state continuation will apply
- Some states are requiring additional open enrollment periods for individual coverage and Exchanges

## ➤ How is the look-back measurement method affected by leave or layoff?

- “Hours of service” must be counted during measurement period
  - Time an employee is paid for time working or not working
  - Special rules for periods of unpaid FMLA
- Full-time employees who are in a stability period must continue to be treated as full-time as long as they are employed

# ➤ How can employers comply with WARN Act rules?

- Employers with 100+ employees must provide **at least 60 days' notice** for layoffs/terminations of 50+ employees at single site of employment
- Exception applies for “unforeseeable circumstances”
- Some states have been easing requirements for COVID-19

## **Unforeseeable Circumstances Exemption**

- As much advance notice as possible
- Must be caused by sudden, dramatic and unexpected action or condition
- Outside of employer control
- Examples
  - Unanticipated and dramatic economic downturn
  - Government-ordered closures without notice

Questions? >

# Thank You!

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