COVID-19 Employer Frequently Asked Questions
Updated
Monday, March 30, 2020

This general guidance is based on U.S. federal employment law and the current medical assessment of COVID-19, as of March 30, 2020. State and local laws may apply, and medical assessments may change, resulting in different conclusions.

EMPLOYER RIGHTS

Question: What options are available to employers to continue operations?

Answer: An employer may utilize a variety of options to continue operations. Such options include offering voluntary layoffs, paid or unpaid leave of absence, telework, reduction in hours/workweek or rate of pay, and furlough. As these decisions are considered, employers are advised to be aware of state law possibly requiring written notice to employees of change in pay or separation of employment. Unless specifically prohibited by law or regulation, employers have free reign to operate their business as they see fit.

Question: When can an employer require an employee not come to work?

Answer: An employer can do so in three situations. First, if an employee has returned from a "Level III" country as designated by the CDC. Second, if an employee is exhibiting symptoms of COVID-19 such as a fever (100.4 F or higher) and shortness of breath/difficulty breathing. Third, if an employee has had *direct* contact with someone who has a confirmed diagnosis of COVID-19. In these situations an employer is not required to pay an employee for the time out and we recommend requiring employee being away from work for a 14-day period or providing a fitness for duty release before they return to work.

Question: Does the CDC's guidance to prohibit "gatherings" of 50 or more people for 8 weeks apply to employers?

Answer: No, not as it relates to the employer-employee relationship. The White House has issued separate guidance that recommends social gatherings (which could include funerals, conferences, etc.) be limited to 10 people – but this would not apply to the employer-employee relationship.

WAGE-HOUR

Question: Must we keep paying employees who are not working?

Answer: The answer is straightforward for nonexempt employees (i.e. employees subject to overtime pay). Nonexempt employees are paid for the actual time worked. An employer may choose to allow these employees to use vacation or other paid time off to cover the lost wages.

The answer is a little more complicated for exempt employees (i.e. employees not subject to overtime pay). An employer that remains open may lawfully deduct one full-day's absence from the salary of an exempt employee who does not report for work for the day. The Department of Labor considers this an absence due to personal reasons; therefore, a deduction of a full-day's pay will not violate the salary basis rule or otherwise affect the employee's exempt status. An employer may, as an option, require an exempt employee who fails to report for work in this situation take vacation or other paid leave to cover the full-day's absence. Deductions from an exempt employee's salary for less than a full-day's absence are not permitted**.** But an employee will not be considered paid "on a salary basis" where deductions from the predetermined compensation are made for absences occasioned by office closure during a week in which the employee performs any work. Exempt salaried employees are not required to be paid their salary in weeks in which they perform no work, however.

Employers may always change how an employee is paid, the workweek for an employee, etc. If an employer chooses to treat a currently salaried, exempt employee as nonexempt, they just have to make sure the employee is receiving at least minimum wage for hours worked and no overtime is worked.

Question: Can an employer prorate the final paycheck if they close?

Answer: For nonexempt employees, always – just pay for hours worked. For exempt employees that are terminated, laid off, or resign, employer can prorate (just pay through last day); if exempt employee remains employed (leave of absence, furlough, etc.) and worked at all in the week, full weekly salary must be paid.

Question: Can an employer electively choose to pay employees who are not working?

Answer: Yes.

Question: Can an employer temporarily suspend bonuses or commissions normally included in an employee's compensation plan?

Answer: Yes.

Question: Can an employer send home employees if business is slow? Does an employer still need to pay employees through their normal scheduled shift?

Answer: Yes. No, not for non-exempt employees.

Question: Can an employer reduce an employee's salary or hourly wages to get through a period of slow business?

Answer: Yes, but employers are advised to be aware of state law possibly requiring written notice to employees of change in pay.

INSURANCE AND OTHER FRINGE BENEFITS

Question: If I reduce an employee's hours, how long do I wait before I can terminate group health insurance coverage and offer coverage under COBRA or state-contination law**.**

Answer: An employer has 30 days after the employee's reduction of hours to notify the group health plan administrator about the reduction in hours. If employee is eligible for FMLA, they need to remain covered (and employer should not offer COBRA coverage) if employee pays his or her share of the premium.

Question: If an employer keeps an employee's coverage active when they are not working or after an employee otherwise has a qualifying event (reduction in hours, etc.), what about premiums and adjustments?

Answer: If employee is on FMLA, employer needs to provide written notice of when the employee-share of the premium is due and if payment is more than 30 days late, coverage may be terminated. Employers may offer any adjustment to employee-share of premium.

Question: What if an employee is subject to a collective bargaining agreement (CBA)?

Answer: The terms of the CBA must be strictly complied with and are in addition to any federal or state legal requirements, unless provided otherwise.

VACATION, PAID TIME OFF, PAID SICK LEAVE, PAID FAMILY AND MEDICAL LEAVE

Question: May an employer require employees with COVID-19 or employees that have had direct contact with individuals with COVID-19 to use available paid leave? (UPDATED March 25, 2020)

Answer: Yes, subject to the provisions of the employer's current paid leave policies and any federal or state state legal requirements. Effective April 1, 2020, federal law prohibits an employer from requring employees to use available employer-provided paid leave before using emergency paid sick leave or emergency paid family leave.

Question: Does federal law require certain employers to provide emergency paid sick leave and paid family and medical leave related to leave for COVID-19?

Answer: Yes, private employers with less than 500 employees and all government employers will have to provide both types of leave beginning April 1, 2020 and ending December 31, 2020. Both provisions allow an employer of an employee who is a healthcare provider or an emergency responder to elect to exclude the employee from the application of these two provisions. In addition, they both allow subsequent U.S. Department of Labor regulations to exempt small businesses with fewer than 50 employees when the provision would jeopardize the viability of the business as a going concern (employers with less than 50 employees can't just unilaterally choose to exempt themselves from the requirements); such regulations have yet to be issued.

Question: What do employers have to do to meet the emergency paid sick leave requirements? (UPDATED March 25, 2020)

Answer: Any current employees of a covered employer are entitled to some amount of emergency paid sick leave. The employee does not have to be employed for a minimum amount of time to be entitled to leave.

Full-time employees would be entitled to two weeks (i.e., 80 hours) of paid sick leave. Part-time employees, however, would be entitled to the equivalent of two weeks of paid sick leave, based on the average number of hours the part-time employee works. For example, if a part-time employee is regularly scheduled to work 20 hours per week, the employee would be entitled to 40 hours of total paid sick leave. Part-time employees are entitled to the "number of hours equal to the number of hours that such employee works, on average, over a 2-week period." For employees with variable work schedules, the determination of hours to be paid is based on the average hours the employee was scheduled per day over the six-month period ending on the date on which the employee takes such leave, including hours for which the employee took leave of any type. If the employee does not have six-months of work history with the employer, hours are based on "the reasonable expectation of the employee at the time of hiring of the average number of hours per day that the employee would normally be scheduled to work."

Pay is based on the employee's regular rate as averaged over the previous six (6) month period.

An employee may use emergency paid sick leave under the bill for any of the following purposes:

1. Quarantine: to comply with a federal, state or local quarantine or isolation order related to COVID-19.

2. Self-Quarantine: to self-quarantine, if the employee has been advised to do so by a local healthcare provider.

3. Diagnosis or Treatment: to obtain a medical diagnosis or treatment if the employee is experiencing symptoms of COVID-19.

4. Care for a Quarantined Individual: to care for an individual required to be quarantined or advised to be quarantined.

5. Child Care: to care for an employee's child if the child's school or child care provider has been closed or is unavailable due to COVID-19-related issues.

6. Substantially Similar Care – to care for an employee's substantially similar condition, as specified by the Secretary of Health and Human Services.

Total paid leave is capped at $511 per day and $5,110 in the aggregate (per employee) for leave due to the first three items above, and employers must pay employees the regular rate of pay. For the last three items above, total paid leave is capped at $200 per day and $2,000 in the aggregate (per employee), and employers must pay employees not less than two-thirds of the employee's regular rate of pay.

Question: What do employers have to do to meet the emergency paid family leave requirements? (UPDATED March 25, 2020)

Answer: All employees who have been employed for at least 30 calendar days are covered by the emergency paid family leave requirements .

Employers are be required to provide up to 12 weeks of job-protected paid leave under the Family and Medical Leave Act (FMLA). The first 10 days of such leave may be unpaid. Employees may use accrued paid leave during the first 10 days, but may not be required to do so. After the first 10 days, the employer must compensate the employee in an amount not less than two-thirds of the employee's regular rate of pay. However, total paid leave may not exceed $200 per day and $10,000 in the aggregate (for each employee).

Employees may take paid family and medical leave only if the employee is unable to work (or telework) due to a need for leave to care for a child under age 18 if the child's school or place of care has been closed, or if the child care provider is unavailable due to COVID-19. This is significantly more limited than the initial draft of the bill, which provided paid FMLA leave for employees who are quarantining or exhibiting symptoms of COVID-19, or caring for others who are quarantining or exhibiting symptoms.

Employees taking leave under this provision of the bill are entitled to job protection, similar to regular FMLA leave. An exception from the job protection requirement applies to employers with fewer than 25 employees if the employee's position no longer exists due to economic conditions or other changes in the employer's operations that affect employment and are caused by the public health crisis during the period of leave. The employer must make reasonable efforts to restore the employee to the same or an equivalent position, and if the reasonable efforts fail, the employer must make efforts to contact the employee and reinstate the employee if an equivalent position becomes available within a one-year period beginning on the earlier of (a) the date on which the qualifying need related to a public health emergency concludes, or (b) the date that is 12 weeks after the date the employee's leave started.

Question: Who is a "health care provider" for purposes of determining individuals whose advice to self-quarantine due to concerns related to COVID-19 can be relied on as a qualifying reason for paid sick leave? (UPDATED March 30, 2020)

Answer: The term "health care provider," as used to determine individuals whose advice to self-quarantine due to concerns related to COVID-19 can be relied on as a qualifying reason for paid sick leave, means a licensed doctor of medicine, nurse practitioner, or other health care provider permitted to issue a certification for purposes of the FMLA.

Question: Who is a "health care provider" who may be excluded by their employer from paid sick leave and/or expanded family and medical leave? (UPDATED March 30, 2020)

Answer: 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 health care provider is **anyone employed at any doctor's office, hospital, health care center, clinic, post-secondary educational institution offering health care instruction, medical school, local health department or agency, nursing facility, retirement facility, nursing home,**

home health care 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 similar to such institutions.

This definition includes any individual employed by an entity that contracts with any of the above institutions, employers, or entities institutions to provide services or to maintain 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. This also includes any individual that the highest official of a state or territory, including the District of Columbia, determines is a health care provider necessary for that state's or territory's or the District of Columbia's response to COVID-19.

Question: When does the small business exemption apply to exclude a small business from the provisions of the Emergency Paid Sick Leave Act and Emergency Family and Medical Leave Expansion Act? (UPDATED March 30, 2020)

Answer: An employer, including a religious or nonprofit organization, with fewer than 50 employees (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. A small business may claim this exemption if an authorized officer of the business has determined that:

1. 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;

2. 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

3. There are not sufficient workers who are able, willing, and qualified, and who will be available at t 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.

Question: If I close/shutdown my business BEFORE April 1, 2020 (the effective date of the FFCRA), but before the employee goes out on leave, do I still need to pay the employee(s) the sick leave and/or expanded family and medical leave? (UPDATED March 30, 2020)

Answer: No. If you close the business after the FFCRA's effective date (even if the employee requested leave prior to the closure), the employee will not get paid sick leave or expanded family and medical leave but they may be eligible for unemployment insurance benefits.

This is true whether the owner of the business closes the worksite for lack of business or because it was required to close pursuant to a Federal, State or local directive.

Question: If I close/shutdown my business ON or AFTER April 1, 2020 (the effective date of the FFCRA), but BEFORE an employee goes out on leave, do I still have to pay the sick leave and/or expanded family and medical leave to employee(s)? (UPDATED March 30, 2020)

Answer: No. The emplyoee may be eligible for unemployment insurance benefits and should contact their specific state unemployment office for further information.

Question: If I shutdown/close my business while an employee is currently out on paid sick leave or expanded family and medical leave, what happens? (UPDATED March 30, 2020)

Answer: If you close the business while an employee is out on paid sick leave or expanded family and medical leave, you are responsible to pay for any paid sick leave or expanded family and medical leave used before the date in which the business closed. The employee may be eligible for unemployment insurance benefits as well.

Question: If my business remains open, but we furlough employee(s) ON or AFTER April 1, 2020 (the effective date of the FFCRA), is that furloughed employee(s) eligible to receive paid sick leave or expanded family and medical leave? (UPDATED March 30, 2020)

Answer: No. Employees who are furloughed because the business does not have enough work or business, are not entitled to then take paid sick leave or expanded family and medical leave. However, they may be eligible for unemployment insurance benefits.

Question: What liability do employers face if they violate the emergency paid sick leave and paid family leave requirements?

Answer: The legislation provides immunity from employee ***civil*** lawsuits stemming from COVID-19 leave for small employers who fall under the COVID-19 leave provisions, but who would not meet the standard, 50-employee threshold for FMLA coverage. However, immunity is not extended to agency action by DOL.

Question: How does paid sick leave required by state law interact with emergency federal paid sick leave and paid family and medical leave?

Answer: Unless otherwise provided, any paid sick leave required by state law is still required and is in addition to the new emergency paid leave.

Question: Is the paid sick leave in addition to current leave provided by the employer?

Answer: Congress removed a provision in the original bill that would have prevented employers from changing their current policies and benefits. But an employer may not require an employee to use other paid leave provided by the employer before the employee uses the paid sick leave available under the Act.

Question: What notice must an employee provide for leave?

Answer: The FMLA provisions require employees to provide the employer with "notice of leave as is practicable."

The paid sick leave provisions state that after the first workday (or portion thereof) that an employee receives paid sick leave, an employer may require the employee to follow reasonable notice procedures in order to continue receiving the paid sick leave.

Question: Does the less than 500-employee requirement refer to a location or company-wide? (UPDATED March 25, 2020)

Answer: The company (not just the location) must have fewer than 500 employees.

Whether separate entities will be deemed a single employer to determine employer coverage will be determined by the "joint employer" or "integrated employer" tests described in the Fair Labor Standards Act (FLSA) and/or Family and Medical Leave Act (FMLA).

Question: Are there posting requirements related to emergency paid sick leave and emergency paid family leave? (UPDATED March 25, 2020)

Answer: Each covered employer must post a notice of the Families First Coronavirus Response Act (FFCRA) requirements in a conspicuous place on its premises. An employer may satisfy this requirement by emailing or direct mailing this notice to employees, or posting this notice on an employee information internal or external website. The notice cane be accessed by clicking ***HERE***

Question: Must an employer pay out unused emergency paid sick leave or paid family and medical leave if the employee separates from its employment?

Answer: An employer is not required to pay unused emergency paid sick leave or paid family and medical leave if an employee separates from employment.

Question: If an employee has previoulsy exhausted FMLA leave for the employer's relevant 12-month period, does the emergency paid family leave provide more FMLA protected leave?

Answer: No. While subsequently-issued DOL regulations may definitively answer this question, currently our recommendation is that traditional FMLA exhaustion principles apply.

Question: Does an employer have to grant an employee's request for intermittent paid family leave?

Answer: No. While subsequently-issued DOL regulations may definitively answer this question, currently our recommendation is that traditional FMLA principles apply: an employer is required to grant an employee's request for intermittent FMLA leave is medical certification provides for such.

Question: Can an emplyoee request to take paid sick leave intermittently while working at the usual worksite (as opposed to teleworking)? (Updated March 30, 2020)

Answer: It depends on why the emplyoee is taking paid sick leave and whether the employer agrees. Unless teleworking, paid sick leave for qualifying reasons related to COVID-19 must be taken in full-day increments.

Unless the employee is teleworking, once they begin taking paid sick leave for one or more of these qualifying reasons, they must continue to take paid sick leave each day until the employee either (1) use the full amount of paid sick leave or (2) no longer have a qualifying reason for taking paid sick leave.

In contrast, the employer may agree to allow the employee to take paid sick leave intermittently if employee is taking paid sick leave to care for your child whose school or place of care is closed, or whose child care provider is unavailable, because of COVID-19 related reasons.

WORKPLACE SAFETY ISSUES

Question: Can an employee refuse to come to work because of fear of infection?

Answer: Generally, no. Employees are only entitled to refuse to work if they believe they are in imminent danger. The threat must be immediate or imminent, which means that an employee must believe that death or serious physical harm could occur within a short time.

TRAVEL ISSUES

Question: Can we prohibit an employee from traveling on their personal time?

Answer: No, you generally cannot prohibit otherwise legal activity, such as travel abroad by an employee. This includes pregnant employees or those with medical conditions. However, you should educate your employees before they engage in travel to risky environments, and you can – and should – monitor those employees returning from such travel for signs of illness.

Question: What should I do if an employee has recently traveled to an affected area or otherwise may have been exposed to the COVID-19 coronavirus?

Answer: The Americans with Disabilities Act Amendments Act (ADAAA) places restrictions on the inquiries that an employer can make into an employee's medical status. The ADAAA prohibits employers from making disability-related inquiries and requiring medical examinations, unless (1) the employer can show that the inquiry or exam is job-related and consistent with business necessity, or (2) where the employer has a reasonable belief that the employee poses a direct threat to the health or safety of the individual or others that cannot otherwise be eliminated or reduced by reasonable accommodation.

According to the Equal Employment Opportunity Commission (EEOC), whether a particular outbreak rises to the level of a "direct threat" depends on the severity of the illness. The EEOC instructs employers that the assessment by the CDC or public health authorities provides the objective evidence needed for a disability-related inquiry or medical examination.

OTHER EMPLOYEE PROTECTED LEAVE

Question: Does contraction of COVID-19 coronavirus implicate the ADAAA?

Answer: Generally, no, because in most cases COVID-19 is a transitory condition. However, some employees could make an argument that the ADAAA is implicated if the virus substantially limited a major life activity, such as breathing. Moreover, if an employer "regards" an employee with COVID-19 as being disabled, that could trigger ADAAA coverage.

Question: May an employer encourage employees to telework as an infection-control strategy?

Answer: Yes. The EEOC has opined that telework is an effective infection-control strategy. The EEOC has also stated that employees with disabilities that put them at high risk for complications of pandemic influenza may request telework as a reasonable accommodation to reduce their chances of infection during a pandemic.

CONFIDENTIALITY

Question: Is an employer's knowledge that an employee has COVID-19 subject to the privacy restrictions of the Health Insurance Portability and Accountability Act (HIPAA)?

Answer: Not usually, unless the employer acquired the information in its role as the administrator of the health insurance plan. Because most employers will learn of a COVID-19 diagnosis from the employee or his or her family, HIPAA usually will not be implicated.

Question: May an employer disclose an employee's COVID-19 diagnosis to others?

Answer: Yes, according to the CDC, employers should inform fellow employees of their potential workplace exposure, but only to the extent necessary to adequately inform them of their potential workplace exposure, while maintaining confidentiality under the ADAAA (i.e., without revealing the infected individual's name unless otherwise directed by the CDC or applicable public health authority). Employers may communicate to non-exposed employees generally that there has been a potential COVID-19 exposure, without sharing additional identifying information. Employers also may be able to communicate to appropriate non-employees (e.g., customers, vendors, and others with whom the employee may have come in contact while working) that there was a potential COVID-19 exposure, again without sharing identifying information. In all cases, time and circumstances permitting, employers may find it helpful to coordinate with state or local health authorities for guidance and direction regarding the scope and content of disclosures.

WORKERS' COMPENSATION AND UNEMPLOYMENT BENEFITS

Question: Can COVID-19 be covered by workers' compensation?

Answer: Workers' compensation claims and procedures are based on state laws and carrier-specific requirements. Generally, however, state workers' compensation laws require an employee to prove that he or she contracted the illness in the course and scope of employment and

that the illness is caused by a hazard recognized as peculiar to a particular employment. Some states specifically exclude from coverage contagious diseases resulting from exposure to fellow employees or from a hazard to which the ill employee would have been equally exposed outside of his or her employment.

Question: When may an employee become eligible for unemployment during a furlough or unpaid leave of absence?

Answer: Eligibility for unemployment benefits is based on state laws and agency-specific requirements. While working 15 hours or less generally results in potential eligibility, the benefit determination will be based primarily on compensation and hours worked.

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