
Employer FAQs During COVID-19

Families First Act

Are employers with less than 50 employees exempt from the paid sick leave requirements under the Families First Act?

Yes, if the paid leave is related to school closings or childcare unavailability. The Department of Labor has provided guidance that small businesses with fewer than 50 employees may qualify for exemption from the requirement to provide the 12 weeks of FMLA expansion leave or the 80 hours of paid sick leave due to school closings or child care unavailability if the leave requirements would jeopardize the viability of the business as a going concern. NOTE that the guidance does not state that employers would be exempt from providing 80 hours of sick leave for the other 5 listed reasons. The Department of Labor has stated that additional guidance on this and other exceptions will be available in April.

What sort of paid leave is required of employers that are covered by the Families First Act?

If an employee is eligible for FMLA COVID-19 leave, they are eligible for up to 12 weeks of job-protected leave. The first 10 days of such FMLA COVID-19 leave may be unpaid. For the remaining 10 weeks, the leave must be paid at 2/3 of the employee's regular rate. The amount of paid leave is capped at \$200/day and \$10,000 in the aggregate.

If an employee is eligible for Paid Sick Leave, full-time employees can receive a maximum of 80 hours (two workweeks) of leave. Generally, if the leave is taken because of the employee's condition or situation, the greater of the employee's regular rate, or the applicable federal, state, or local minimum wage. If the leave is taken because of the employee's quarantine or isolation ordered by a government authority or health care provider, or the employee's COVID-19 symptoms (and the employee is seeking a medical diagnosis), then the paid leave is capped at \$511 a day, or \$5,110 aggregated. Generally, if the leave is taken so that the employee can care for another person, or pursuant to the "catchall" provision quoted above, the greater of two-thirds of the employee's regular rate or applicable minimum wage. Paid leave under these circumstances is capped at \$200 a day, or \$2,000 aggregated.

When is an employee eligible to take up to 12 weeks of leave for FMLA emergency leave?

The only "qualifying need" in the final version of the legislation is that the employee is unable to work or telework because the employee's son or daughter under age 18 is home due to a school or child care center closure, or due to unavailability of a child care provider, because of a COVID-19 emergency

It should be noted that if an employee is ill with coronavirus, or is caring for a spouse, parent, or child with coronavirus, the employee would qualify for "traditional" FMLA leave, assuming the employee was otherwise eligible (and that the employer has 50 or more employees).

However, the new legislation does not address employees who are self-isolating, or who are out of work only because of exposure to COVID-19.

When is an employee eligible to take up to 80 hours of paid sick leave?

Paid sick leave is required when an employee is unable to work or telework for any of the following reasons:

1. The employee is under a federal, state, or local quarantine or isolation order because of COVID-19,
2. The employee is advised by a health care provider to self-quarantine because of COVID-19,
3. The employee has symptoms of COVID-19 and is seeking a medical diagnosis,
4. The employee is caring for an individual who meets one of the first two conditions, above,
5. The employee is caring for a son or daughter whose school or child care center is closed because of COVID-19 precautions, or whose child care provider is unavailable for the same reason, OR
6. The employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services in consultation with the Secretary of the Treasury and the Secretary of Labor.

When are employers required to fully comply with the Families First Act?

The final version of the FMLA and paid leave provisions will take effect 15 days after enactment, which is be April 1. Both provisions will expire after December 31, 2020.

Are Healthcare Providers and Emergency Responders excluded from the sick leave provisions and FMLA expansion outlined in the Families First Act?

Yes, employers can exclude health care providers and emergency responders from these provisions.

What is the definition of a healthcare provider?

The law specifically provides that the definition of “health care provider” is the same as those in the FMLA. This regulatory definition includes doctors of medicine who are authorized to practice medicine and any medical provider providing health care services that is authorized to diagnose and/or treat physical or mental health conditions.

Furlough / Layoff Issues

What is the difference between a furlough and a layoff?

A furlough is considered to be an alternative to layoff. When an employer furloughs its employees, it requires them to work fewer hours or to take a certain amount of unpaid time off. An employer may require all employees to go on furlough, or it may exclude some employees who provide essential services. Generally, the theory is to have the majority of employees share some hardship as opposed to a few employees losing their jobs completely.

A layoff is a temporary separation from payroll. An employee is laid off because there is not enough work for him or her to perform. Generally, an employer believes that circumstances may change in the future and, if so, intends to recall the person when work again becomes available.

What happens to health insurance coverage for employees during a furlough or layoff?

Many third-party insurers require that employees work at least once every 30 days to maintain “eligibility”. However, many insurers have been relaxing these eligibility standards and allowing coverage to continue beyond these periods. Reach out to your insurance broker or

insurance company to confirm these extensions. If there is a longer-term layoff that goes beyond any allowed extensions, employees may have to use COBRA continuation benefits to maintain healthcare coverage.

Unemployment Insurance and Office Closure Issues

What options do employers have if they decide to close?

Employers can place the practice employees on a paid leave and receive tax credits, temporarily lay off employees of the practice so that they can seek unemployment benefits, reduce employee hours, or permanently terminate employees.

If the office is closed, does the employer have to pay the employees?

This depends on whether the employee is exempt or non-exempt. An employer is required to pay an exempt employee their entire salary for a workweek during which the employee performs any work during the week, including work completed remotely, or if the employee only works a partial week. However, if you conduct layoffs, there may be appropriate deductions for the final week of employment.

An employer is only required to pay non-exempt employees for hours actually worked.

If a shutdown initially starts as unpaid, then can the employer change later and furlough or lay off employees?

Yes.

If an employee is terminated, can an employer choose to pay a severance?

Yes. But be cautious and make sure that the amount of severance paid is not (or will not be interpreted) as discriminatory. For example, employers could calculate severance amounts based on tenure. We can also assist with drafting separation and release agreements to accompany any severance amounts.

If you pay an employee a severance, will that disqualify them from unemployment benefits?

Generally no, but it may affect the amounts that an employee receives during the time period in which the severance is received.

What does the unemployment process look like in Arkansas now?

In Arkansas, there is generally a one week waiting period before employees are eligible to receive unemployment benefits; however, this has been temporarily waived. There may still be some additional delays as the system is weighed down with requests. However, there are provisions in the new proposed Act that gives additional grant funds to state unemployment offices and there are incentives if the state offices increase access to unemployment and waive waiting periods.

Ongoing Employee Issues Related to COVID-19

Can you take an employee's temperature before they report to the worksite?

Yes. The EEOC confirms that "employers may ask employees who report feeling ill at work, or who call in sick, questions about their symptoms to determine if they have or may have COVID-19" and "may measure employees' body temperature." Employers choosing to take their employees' temperatures should make clear that the temperature test is being used solely to

determine whether the employee may have a symptom of COVID-19, as opposed to determining whether the employee has some other medical impairment or disability.

What should employer do if an employee exhibits symptoms?

During a pandemic, ADA-covered employers may ask such employees if they are experiencing symptoms of the pandemic virus. For COVID-19, these include symptoms such as fever, chills, cough, shortness of breath, or sore throat. Employers must maintain all information about employee illness as a confidential medical record in compliance with the ADA.

Does the ADA allow employers to require employees to stay home if they have symptoms of the COVID-19?

Yes. The CDC states that employees who become ill with symptoms of COVID-19 should leave the workplace. The ADA does not interfere with employers following this advice.

When employees return to work, does the ADA allow employers to require doctors' notes certifying their fitness for duty?

Yes. Such inquiries are permitted under the ADA either because they would not be disability-related or, if the pandemic influenza were truly severe, they would be justified under the ADA standards for disability-related inquiries of employees. As a practical matter, however, doctors and other health care professionals may be too busy during and immediately after a pandemic outbreak to provide fitness-for-duty documentation. Therefore, new approaches may be necessary, such as reliance on local clinics to provide a form, a stamp, or an e-mail to certify that an individual does not have the pandemic virus.

Where is there more information about COVID-19 federally?

U.S. SBA Disaster Assistance in Response to the Coronavirus [here](#).

U.S. Department of Labor Wage and Hour Division – FLSA and FLMA Guidance [here](#).

U.S. EEOC Guidance [here](#).

Coronavirus in the Workplace: Health, Safety and Insurance Considerations [here](#).

An Employer's Guide: Ten Considerations to Support Your Workforce [here](#).

COVID-19 and Paid Leave: Three Scenarios to Plan For [here](#).

The Workers Compensation Impacts of 2019 Coronavirus [here](#).

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