

GILL RAGON OWEN

ATTORNEYS

425 W. Capitol Ave, Suite 3800, Little Rock, AR 72201
www.gill-law.com • (501) 376-3800

Employer FAQs During COVID-19

FINANCIAL

Is my business office eligible for the loan that Governor Hutchinson announced?

Yes. Your office should qualify for the Quick Action Closing Fund loan, which was activated by the governor's office on March 18. The program makes available \$7 million available to assist midsize companies and non-profits. Click [here](#) for more information.

Are there any Arkansas business assistance programs?

Yes, the Arkansas Economic Development Commission has allocated a portion of the Quick Action Loan Program to provide smaller loans with faster approval. The AEDC is offering forgivable loans up to \$25,000.

Eligibility:

- For small businesses in Arkansas with two - 50 (direct W-2) employees, excluding owners
- Companies must currently be in operation at the time of application and sign a loan agreement that includes a commitment to retaining jobs
- Loans may only be used for working capital (e.g., payroll, rent, utilities, supplies, etc.)
- Only one AEDC sponsored assistance program will be allowed per company (per Employer Identification Number)

The objective of this loan program is to assist companies in Arkansas with job retention as they navigate the challenges brought about by the COVID-19 pandemic. To that end, AEDC will offer the following terms for qualifying businesses:

- A forgivable loan of up to \$25,000 to be used for working capital
- 0% interest
- Deferred payments for 12 months, upon which time the balance is due
- If the company retains at least 75% of its current payroll over the next **12 months, the loan balance will be forgiven**

To Apply: Please follow the instructions at <https://formstack.io/4E619>. Upon completing the form on this link, you'll be sent a verification email from AEDC Quick Action Loan Program (acapel@arkansasedc.com). This email will include login information to our system, where you'll be asked to upload the following documents in order to complete the application:

- Most recent state and federal tax returns for owner(s) and business
- Signed W-9 form (<https://www.irs.gov/pub/irs-pdf/fw9.pdf>)
- Certificate of good standing from the Arkansas Secretary of State (https://www.ark.org/sos/good_standing/index.php)
- Copy of valid Driver's License or state issued identification card

What about Small Business Administration (SBA) loans?

Arkansas is now an included state for the SBA Disaster Assistance Loans for Small Businesses Impacted by Coronavirus. Gov. Asa Hutchinson made the announcement on Friday, March 20. Suzanne Terrazas of the SBA recommends that businesses complete the [application process](#).

[Economic Injury Disaster Loan Program](#) - The SBA will work directly with state Governors to provide targeted, low-interest loans to small businesses and non-profits that have been severely impacted by the Coronavirus (COVID-19). The SBA's Economic Injury Disaster Loan program provides small businesses with working capital loans of up to \$2 million that can provide vital economic support to small businesses to help overcome the temporary loss of revenue they are experiencing. Click [here](#) for more information.

SBA provides a number of loan resources for small businesses to utilize when operating their business. For more information on loans or how to connect with a lender, visit [here](#).

What is the CARES Act?

The CARES Act expands existing unemployment benefits in two material ways: (1) providing for an extra \$600 weekly payment, in addition to the weekly benefit amount an eligible employee otherwise receives under state law; and (2) increases the maximum number of weeks an individual may receive benefits. These new benefits are funded at the federal level, but will be administered by the states. Arkansas Commerce Secretary, **Mike Preston, said the first wave of CARES Act unemployment checks went out on April 7, 2020.**

What is the [Paycheck Protection Program](#) Loan?

- The Act creates a new loan product within SBA's 7(a) Loan Program and both existing SBA lenders and new lenders will be eligible to offer loans eligible to small businesses.

- These new loans will be 100% guaranteed by the SBA for loans through December 31, 2020; and the loans will have a 4% interest rate. The loan will cover payroll costs, including related to continuation of group health insurance, salaries, commissions, payments on mortgage obligations, rent, utilities, and interest on certain other debt obligations.

- Businesses and 501(c)(3)s with less than 500 employees are eligible, along with sole proprietors, independent contractors, and self-employed individuals. Other eligible businesses include those in the hospitality and food industries that have less than \$500 million in gross receipts with more than one location, if the individual store employs less than 500 people – meaning each store location could be eligible.

- The maximum loan amount will be the lesser of \$10 million or 2.5 the average monthly payroll based on the prior year's payroll. On April 3, the SBA issued additional guidance that payments to independent contractors are NOT included in payroll costs for the loan amount calculation.

- For loan eligibility purposes, instead of determining repayment ability, which is not possible during this crisis, lenders will determine whether a business was operational on February 15, 2020, and had employees for whom it paid salaries and

payroll taxes, or a paid independent contractor.

- All lenders will have delegated authority to process, service, and close the loans without SBA review. All borrower and lender fees will be waived, along with the Credit Elsewhere Test and requirements for collateral and personal guarantees.
- The loans will be built with automatic deferrals of principal and interest and fees for six months.
- Provides a limitation on a borrower from receiving this loan and an economic injury disaster loan for the same purpose. However, it allows a borrower who has an EIDL loan unrelated to COVID-19 to apply for a PPP loan, with an option to refinance that loan into the PPP loan. The emergency EIDL grant award of up to \$10,000 would be subtracted from the amount forgiven under the Paycheck Protection Program.

What is the Loan Forgiveness Program?

- The Proposal also establishes a loan forgiveness tool that allows businesses that maintain payroll continuity from Feb. 15, 2020 through June 30, 2020 as defined by headcount, to request forgiveness on a Paycheck Protection loan used on payroll costs; mortgage interest; rent; and utility pay over an 8-week period.
- The amount forgiven will be reduced proportionally by any reduction in employees retained compared to the prior year and reduced by the reduction in pay of any employee beyond 25 percent of their prior year compensation.
- The loan forgiveness program provides flexibility for businesses that re-hire workers that were previously laid off.
- To receive loan forgiveness, a business will have to work with a lender to justify their payroll was maintained through documentation.
- Lenders will be held harmless on decisions of eligibility and SBA will purchase the loan after the lender grants approval.
- The forgiveness amount cannot exceed the principal amount of the loan. The eligible payroll costs do not include compensation about \$100,000 in wages. Forgiveness on a covered loan is equal to the sum of the following payroll costs incurred during the covered 8-week period compared to the previous year or time period, proportionate to maintaining employees and wages:
 - Payroll costs **plus** any payment of interest on any covered mortgage obligation (which shall not include any prepayment of or payment of principal on a covered mortgage obligation) **plus** any payment on any covered rent obligation **+** and any covered utility payment.
 - Only up to 25% of loan proceeds can be used for non-payroll costs to be forgivable. The SBA plans to issue additional guidance on forgiveness.
- Upon a lender's report of an expected loan forgiveness amount for a loan or pool of loans, the SBA will purchase such amount of the loan from the lender.
- Canceled indebtedness resulting from this section will not be included in the borrower's taxable income.
- Any loan amounts not forgiven at the end of one year is carried forward as an ongoing loan with terms of a max of 10 years, at max 4% interest. The 100% loan

guarantee remains intact.

When should I apply for the PPP Loan?

Starting April 3rd, small businesses and sole proprietorships can apply. Starting April 10th, independent contractors and self-employed individuals can apply. The outside filing date is currently June 30, 2020. New guidance is coming out from the SBA daily to Lenders on how to document and fund the PPP loans. Therefore, it is possible that your PPP loan funding may be delayed after you submit your initial application. We recommend talking to your Lender about anticipated loan funding timing as Lenders are required to begin disbursements within 5 days of loan approval. Guidance has stated that the Treasury Department is extending that deadline to within 10 days of loan approval, but the guidance from the SBA has not yet reflected this. The loan funding date is also important as it starts the clock for the 8-week period for forgiveness calculations.

While you have until June 30th to apply, there have been many applications submitted since the April 3rd opening and there is no guarantee that the federal government will provide additional rounds of funding when the initial funds are depleted.

What is the Emergency Economic Injury Disaster Loan?

- The Senate Proposal expands eligibility for access to Economic Injury Disaster Loans (EIDL) to include Tribal businesses, cooperatives, and ESOPs with fewer than 500 employees or any individual operating as a sole proprietor or an independent contractor during the covered period (January 31, 2020 to December 31, 2020). Private non-profits are also eligible for both grants and EIDLs.

- It also requires that for any SBA EIDL loans made in response to COVID-19 before December 31, 2020, the SBA shall waive any personal guarantee on advances and loans below \$200,000, the requirement that an applicant needs to have been in business for the 1-year period before the disaster, and the credit elsewhere requirement.

- During the covered period, the proposal allows SBA to approve and offer EIDL loans based solely on an applicant's credit score, or use an alternative appropriate alternative method for determining applicant's ability to repay.

- The Proposal establishes an Emergency Grant to allow an eligible entity who has applied for an EIDL loan due to COVID-19 to request an advance on that loan, of not more than \$10,000, which the SBA must distribute within 3 days. And outlines that advance payment may be used for providing paid sick leave to employees, maintaining payroll, meeting increased costs to obtain materials, making rent or mortgage payments, and repaying obligations that cannot be met due to revenue losses.

- Terminates the authority to carry out Emergency EIDL Grants on December 30, 2020

- Subsidy for Certain Loan Payments: requires the SBA to pay the principal, interest, and any associated fees that are owed on the covered loans for a six month period starting on the next payment due. Loans that are already on deferment will receive six months of payment by the SBA beginning with the first payment after the deferral period. Loans made up until six months after enactment will also receive a full 6 months of loan payments by the SBA.

- Defines a covered loan as an existing 7(a) (including Community Advantage), 504, or microloan product
- Paycheck Protection Program (PPP) loans are not covered.

How can I get access to lending partners?

SBA has developed Lender Match, a free online referral tool that connects small businesses with participating SBA-approved lenders within 48 hours.

- 7(a) program offers loan amounts up to \$5,000,000 and is an all-inclusive loan program deployed by lending partners for eligible small businesses within the U.S. States and its territories. The uses of proceeds include: working capital; expansion/renovation; new construction; purchase of land or buildings; purchase of equipment, fixtures; lease-hold improvements; refinancing debt for compelling reasons; seasonal line of credit; inventory; or starting a business.

- Express loan program provides loans up to \$350,000 for no more than 7 years with an option to revolve. There is a turnaround time of 36 hours for approval or denial of a completed application. The uses of proceeds are the same as the standard 7(a) loan.

- Community Advantage loan pilot program allows mission-based lenders to assist small businesses in underserved markets with a maximum loan size of \$250,000. The uses of proceeds are the same as the standard 7(a) loan.

- 504 loan program is designed to foster economic development and job creation and/or retention. The eligible use of proceeds is limited to the acquisition or eligible refinance of fixed assets.

- Microloan program involves making loans through nonprofit lending organizations to underserved markets. Authorized use of loan proceeds includes working capital, supplies, machinery & equipment, and fixtures (does not include real estate). The maximum loan amount is \$50,000 with the average loan size of \$14,000.

Would another option be to get a loan from my financial institution?

Yes, working with a banking partner with whom you already have an established relationship is an excellent option to consider. Often, this may be a more efficient option that allows relative quick access o needed capital. Some financial institutions are waiving penalties and fees for things like emergency CD withdrawals, so it's best to reach out and inquire about what would be vest for your situation.

Because interest rates are low, would a credit card be something to consider?

Low-interest or even zero-interest credit cards may be available and could be a good choice during this unpredictable season. You also may want to consider making minimum payments or even restructuring existing lines of credit to take advantage of the lower interest rate environment.

Are there options if my business needs to skip payments?

The best recommendation is for you to contact vendors and financial partners directly — and proactively — to make requests. Since skipping a payment without making prior

arrangements can have a negative impact on your credit, it's encouraged that you reach out in advance of missing any payments. You could potentially negotiate terms that include requesting a pause on payments, making interest-only payments or pausing automatic payments.

Do you have suggestions for other ways my business can access funds during this time of uncertainty?

We suggest continuing to manage your receivables and collect them from clients even during the pandemic to bring in payments for services that have been rendered.

HUMAN RESOURCES:

What options do employers have if they decide to close?

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

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.

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.

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.

What happens to an employee's 401(k) plan if he or she is furloughed due to COVID-19?

Generally, when an employee has been terminated or leaves a job, the employee can do one of three things with the funds in a 401(k) plan:

- Leave the money in the existing plan if the account balance is more than \$5,000
- Cash out – this is ordinarily subject to 20% withholding and subject to penalties, but if it is a “coronavirus related distribution” (definition below), the penalty is waived for up to \$100,000. This distribution may be repaid within 3 years to an eligible retirement plan. If the distribution is repaid to an eligible plan within 3 years, it will be treated the same as a rollover distribution within 60 days.

- Roll Over to another plan or IRA under traditional rules:
 - Here, the funds can be rolled over directly, or distributed to the employee
 - If the funds are distributed directly, the funds must be redeposited in the qualified plan within 60 days.

The CARES Act relaxed the time period for rolling over a 401(k) plan under certain circumstances. Essentially, the employee can take a “coronavirus-related distribution” of up to \$100,000, and can repay that amount within 3 years and have the repayment treated the same as an ordinary rollover within the 60-day period.

A “coronavirus related distribution” is made on or after January 1, 2020 and before December 31, 2020, to an individual—

(I) who is diagnosed with the virus SARS–CoV–2 or with coronavirus disease 2019 (COVID– 19) by a test approved by the Centers for Disease Control and Prevention,

(II) whose spouse or dependent (as defined in section 152 of the Internal Revenue Code of 1986) is diagnosed with such virus or disease by such a test, or

(III) who experiences adverse financial consequences as a result of being quarantined, being furloughed or laid off or having work hours reduced due to such virus or disease, being unable to work due to lack of child care due to such virus or disease, closing or reducing hours of a business owned or operated by the individual due to such virus or disease, or other factors as determined by the Secretary of the Treasury (or the Secretary’s delegate).

What should an 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 screening employees entering the workplace during this time, may an employer only ask employees about the COVID-19 symptoms EEOC has identified as examples, or may it ask about any symptoms identified by public health authorities as associated with COVID-19?

Employers should rely on the CDC, other public health authorities, and reputable medical sources for guidance on emerging symptoms associated with the disease. For example, additional symptoms beyond fever or cough may include new loss of smell or taste as well as gastrointestinal problems, such as nausea, diarrhea, and vomiting.

May an employer store in existing medical files information it obtains related to COVID-19, including the results of taking an employee's temperature or the employee's self-identification as having this disease, or must the employer create a new medical file system solely for this information?

The ADA requires that all medical information about a particular employee be stored separately from the employee's personnel file, thus limiting access to this confidential information. An employer may store all medical information related to COVID-19 in existing medical files. This includes an employee's statement that he has the disease or suspects he has the disease, or the employer's notes or other documentation from questioning an employee about symptoms.

If an employer requires all employees to have a daily temperature check before entering the workplace, may the employer maintain a log of the results?

Yes. The employer needs to maintain the confidentiality of this information.

May an employer disclose the name of an employee to a public health agency when it learns that the employee has COVID-19?

Yes.

May a temporary staffing agency or a contractor that places an employee in an employer's workplace notify the employer if it learns the employee has COVID-19?

Yes. The staffing agency or contractor may notify the employer and disclose the name of the employee, because the employer may need to determine if this employee had contact with anyone in the workplace.

May an employer postpone the start date or withdraw a job offer because the individual is 65 years old or pregnant, both of which place them at higher risk from COVID-19?

No. The fact that the CDC has identified those who are 65 or older, or pregnant women, as being at greater risk does not justify unilaterally postponing the start date or withdrawing a job offer. However, an employer may choose to allow telework or to discuss with these individuals if they would like to postpone the start date.

If a job may only be performed at the workplace, are there reasonable accommodations for individuals with disabilities absent undue hardship that could offer protection to an employee who, due to a preexisting disability, is at higher risk from COVID-19?

There may be reasonable accommodations that could offer protection to an individual whose disability puts him at greater risk from COVID-19 and who therefore requests such actions to eliminate possible exposure. Even with the constraints imposed by a pandemic, some accommodations may meet an employee's needs on a temporary basis without causing undue hardship on the employer.

Low-cost solutions achieved with materials already on hand or easily obtained may be effective. If not already implemented for all employees, accommodations for those who request reduced contact with others due to a disability may include changes to the work

environment such as designating one-way aisles; using plexiglass, tables, or other barriers to ensure minimum distances between customers and coworkers whenever feasible per CDC guidance or other accommodations that reduce chances of exposure.

Flexibility by employers and employees is important in determining if some accommodation is possible in the circumstances. Temporary job restructuring of marginal job duties, temporary transfers to a different position, or modifying a work schedule or shift assignment may also permit an individual with a disability to perform safely the essential functions of the job while reducing exposure to others in the workplace or while commuting.

If an employee has a preexisting mental illness or disorder that has been exacerbated by the COVID-19 pandemic, may he now be entitled to a reasonable accommodation (absent undue hardship)?

Although many people feel significant stress due to the COVID-19 pandemic, employees with certain preexisting mental health conditions, for example, anxiety disorder, obsessive-compulsive disorder, or post-traumatic stress disorder, may have more difficulty handling the disruption to daily life that has accompanied the COVID-19 pandemic.

As with any accommodation request, employers may: ask questions to determine whether the condition is a disability; discuss with the employee how the requested accommodation would assist him and enable him to keep working; explore alternative accommodations that may effectively meet his needs; and request medical documentation if needed.

In a workplace where all employees are required to telework during this time, should an employer postpone discussing a request from an employee with a disability for an accommodation that will not be needed until he returns to the workplace when mandatory telework ends?

Not necessarily. An employer may give higher priority to discussing requests for reasonable accommodations that are needed while teleworking, but the employer may begin discussing this request now. The employer may be able to acquire all the information it needs to make a decision. If a reasonable accommodation is granted, the employer also may be able to make some arrangements for the accommodation in advance.

What if an employee was already receiving a reasonable accommodation prior to the COVID-19 pandemic and now requests an additional or altered accommodation?

An employee who was already receiving a reasonable accommodation prior to the COVID-19 pandemic may be entitled to an additional or altered accommodation, absent undue hardship. For example, an employee who is teleworking because of the pandemic may need a different type of accommodation than what he uses in the workplace. The employer may discuss with the employee whether the same or a different disability is the basis for this new request and why an additional or altered accommodation is needed.

What practical tools are available to employers to reduce and address workplace harassment that may arise as a result of the COVID-19 pandemic?

Employers can help reduce the chance of harassment by explicitly communicating to the workforce that fear of the COVID-19 pandemic should not be misdirected against individuals because of a protected characteristic, including their national origin, race, or other prohibited bases.

Practical anti-harassment tools provided by the EEOC for small businesses can be found here:

- Anti-harassment policy tips for small businesses
- Select Task Force on the Study of Harassment in the Workplace (includes detailed recommendations and tools to aid in designing effective anti-harassment policies; developing training curricula; implementing complaint, reporting, and investigation procedures; creating an organizational culture in which harassment is not tolerated):
 - report;
 - checklists for employers who want to reduce and address harassment in the workplace; and,
 - chart of risk factors that lead to harassment and appropriate responses.

Under the EEOC's laws, what waiver responsibilities apply when an employer is conducting layoffs?

Special rules apply when an employer is offering employees severance packages in exchange for a general release of all discrimination claims against the employer.

ARKANSAS UNEMPLOYMENT

I own my business. Am I eligible for unemployment?

Possibly so. Many of the restrictions have been relaxed during the pandemic. You and your employees can begin the application process at <https://www.ezarc.adws.arkansas.gov/>. The website has been known to crash so you may want to call the AR Division of Workforce Services at 855-225-4440 or 501-682-2121.

On April 8, 2020, Commerce Secretary Mike Preston provided an update on unemployment for **self-employed individuals** and **independent contractors**. The state received its guidance from the federal government and said the state will need to build an entire new system to process and handle this type of claim because the current system is not compatible with gathering the information needed. He estimated a three week time frame to build that system, but said the state can backdate those claims and payments. Independent contractors, freelancers, and self-employed individuals are encouraged to wait for updates from the department.

What does the unemployment process look like in Arkansas?

There are multiple ways to apply for unemployment benefits:

- File online [here](#). “We appreciate your patience and understanding as we are experiencing delays in the EZARC online application system. Currently the hub is being saturated from all States due to the COVID-19. Claimants are asked to only enter a Social once, not several times. The State has authorized additional funds to be used for upgrades to the system to hopefully assist in the process.”
- Call the nearest Workforce Center directly, or call 1-855-225-4440. While it is not recommended, you may visit your nearest workforce center.
- Effective Monday, March 23, 2020, a Temporary Claims Processing Hotline will be available for affected workers who require assistance in filing their unemployment claims. The Temporary Claims Processing Hotline can be reached at 1-844-908-2178 or 501-534-6304 from 8:00 a.m. to 3:30 p.m.

Has Arkansas made any changes to the unemployment process in response to the FFCRA?

Effective March 18, 2020, Governor Hutchinson authorized the following unemployment insurance waivers for 30 days:

- Waived one-week waiting period, allowing ADWS to pay claims more quickly.
- Waived work-search requirement, allowing unemployed to receive benefits without seeking employment.
- Waived requirement for in-person follow-up after a claim has been filed, allowing the unemployed to apply for benefits online or by telephone, thus furthering the effort to minimize the risk of spreading COVID-19.

I need to temporarily close my business due to the COVID-19 Pandemic. Can my employees file for unemployment insurance benefit?

Yes! The unemployment insurance program is designed to assist workers who are laid off through no fault of their own, regardless of whether their separation from employment is the result of COVID-19 or some other factor impacting a business. Affected workers should be encouraged by employers to file their unemployment insurance claims with the Arkansas Division of Workforce Services.

Will my affected workers be eligible for unemployment insurance benefits?

Generally, most individuals who are filing unemployment insurance claims arising from businesses impacted by COVID-19 will be eligible for benefits provided they meet the momentary and other eligibility requirements.

How much will my affected workers receive in unemployment insurance benefits?

How much an affected worker will receive in unemployment insurance benefits is determined by the amount of wages earned in their base period. The base period is the first four of the last five completed quarters of employment. Arkansas' weekly benefit amounts range from \$81 to \$451 per week.

My business is closing for a short period of time due to the COVID-19 Pandemic, will my workers be required to seek work while receiving benefits?

If a business has a temporary reduction in its workforce for a period of 10 weeks or less, its workers will not be required to seek new employment. It is recommended that the business provide a letter to their workers with a specific return work date that is within 10 weeks of their last day of work. This letter will expedite the process. Affected workers should provide this letter to DWS.

Will employers impacted by the COVID-19 Pandemic accounts be charged for unemployment insurance benefits paid to their workers?

It depends. DWS will continue to examine the reason for the separation from employment and, where appropriate, non-charge benefits within federal and state guidelines. In most cases, benefits paid as a result of a lay-off, regardless of the reason, are charged to an employer's DWS account.

What happens to a small business' account when it lays off workers due to COVID-19?

An employer's account is charged for all benefits paid to workers who were laid off. There is no provision to non-charge employer accounts for a lay off regardless of the reason.

How can an employer check their reserve balance with ADWS?

In December 2019, all employers were sent their annual Rate Notice for CY2020. This notice informs them of their contribution rate, the taxable wage base, and their account reserve. Employers may also log into their DWS Tax21 account to view this information.

Where can I find the Tax 21 system?

The Tax 21 system is available [here](#).

Will pending federal legislation provide economic assistance or reimbursement to employers impacted by the COVID-19 Pandemic?

The provisions of HR 6201 do not contain language to assist employers in addressing the impact of COVID-19 related to unemployment insurance claims and accounts. DWS will continue to monitor federal legislation impacting the unemployment insurance program.

FEDERAL UNEMPLOYMENT

What will the unemployment expansion look like?

The Act creates the Pandemic Unemployment Assistance. This provision would create a new program modeled on Disaster Unemployment Assistance that would provide unemployment benefits to individuals who do not qualify for regular unemployment compensation and are unable to work because of the COVID-19 public health emergency. Pandemic Unemployment Assistance will cover self-employed workers (including gig workers and independent contractors), part-time workers, and those with limited work histories. The changes made in sections 2104 and 2107 to increase the size of regular unemployment benefits and make them available for additional weeks will also apply to

benefits received through the Pandemic Unemployment Assistance program. Pandemic Unemployment Assistance will be state-administered but fully federally funded. Except as otherwise provided in this section, federal regulations for Disaster Unemployment Assistance will apply to Pandemic Unemployment Assistance. The program is effective through December 31, 2020.

This provision would add an additional \$600 in Federal Pandemic Unemployment Compensation to every weekly unemployment benefit, effective until July 31, 2020. This \$600 benefit will be taxable (like regular unemployment benefits), but it will be disregarded in determining Medicaid or CHIP eligibility.

This provision would make an additional 13 weeks of federally-funded unemployment compensation for individuals who have exhausted their state unemployment benefits available immediately through December 31, 2020.

FURLOUGH/LAYOFF

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.

FEDERAL GUIDANCE

What is the Families First Coronavirus Response Act?

Under the Act, there are three provisions relating to employees being forced to miss work because of the COVID-9 outbreak: (1) an emergency expansion of the FMLA, (2) a new federal paid sick leave law; and (3) expanded unemployment insurance benefits.

What are the paid leave and tax credit proposals in the Families First Coronavirus Response Act?

The Emergency Paid Sick Leave Act requires employers with fewer than 500 employees to provide employees with 80 hours of paid sick leave at the employee's regular rate. If the employee is using the paid sick leave to care for a child whose school or daycare has closed due to coronavirus or to care for a family member who is self-isolating, then the employee is entitled to 2/3 of the employee's regular rate.

Employers are entitled to a refundable tax credit equal to 100% of the qualified sick leave wages paid by employers for each calendar quarter in accordance with the Emergency Paid Sick Leave Act. The qualified sick leave wages are capped at \$511 per day for each individual (\$200 per day if the leave is to care for a family member or child) for up to 10 days per employee in each calendar quarter. An allowance has been added for credit for certain health plan expenses.

The Act also includes a provision giving the Secretary of Labor the power to exempt employers with fewer than 50 employees. The DOL has stated that if an employer with less than 50 employees can prove that offering this leave to employees could affect the business as a going concern, they may be exempted from providing this paid sick leave.

The DOL, IRS and Treasury Department have put out joint guidance on this Act. Read the story here: <https://www.dol.gov/newsroom/releases/osec/osec20200320>

What are Federal agencies saying about FFCRA compliance?

The U.S. Department of the Treasury, the Internal Revenue Service, and the U.S. Department of Labor previously issued a joint communication about the Families First Coronavirus Response Act.

The announcement included an overview of the Act and noted that small and midsize employers can begin taking advantage of two new refundable payroll tax credits, designed to immediately and fully reimburse them, dollar-for-dollar, for the cost of providing Coronavirus-related leave to their employees.

Eligible employers who pay qualifying sick or child-care leave will be able to retain an amount of the payroll taxes equal to the amount of qualifying sick and child-care leave that they paid, rather than deposit them with the IRS. The publication gave examples, which have been included below.

The DOL provided important enforcement guidance and stated that the DOL will not bring an enforcement action against any employer for violations of the Act, for 30 days from the date of enactment, so long as the employer has acted reasonably and in good faith to comply with the Act. The Department of Labor will instead focus on compliance assistance during the period.

Key Takeaways

- Paid Sick Leave for Workers: For COVID-19 related reasons, employees receive up to 80 hours of paid sick leave and expanded paid child care leave when employees' children's schools are closed or child care providers are unavailable.
- Complete Coverage: Employers receive 100% reimbursement for paid

leave pursuant to the Act.

- o Health insurance costs are also included in the credit.
- o Employers face no payroll tax liability.
- o Self-employed individuals receive an equivalent credit.
- **Fast Funds:** Reimbursement will be quick and easy to obtain.
 - o An immediate dollar-for-dollar tax offset against payroll taxes will be provided
 - o Where a refund is owed, the IRS will send the refund as quickly as possible
- **Small Business Protection:** Employers with fewer than 50 employees are eligible for an exemption from the requirements to provide leave to care for a child whose school is closed or child care is unavailable in cases where the viability of the business is threatened.

Has the Department of Labor issued any further guidance related to the FFCRA?

On April 1, 2020, the U.S. Department of Labor provided new guidance on how American workers and employers will benefit from the protections and relief offered by the Emergency Paid Sick Leave Act and Emergency Family and Medical Leave Expansion Act, both part of the [Families First Coronavirus Response Act \(FFCRA\)](#).

Excerpts from the rule are outlined below.

In this temporary rule, the Department provides guidance, as outlined below:

- There is further direction to employers on how to make paid leave determinations based on any of the qualifying reasons listed the FFCRA, including the reasons listed below.
 - o the employee or someone the employee is caring for is subject to a government quarantine order or has been advised by a health care provider to self-quarantine;
 - o the employee is experiencing COVID-19 symptoms and is seeking medical attention; or,
 - o the employee is caring for his or her son or daughter whose school or place of care is closed or whose child care provider is unavailable for reasons related to COVID-19.
- Paid leave calculations. The guidelines include certain calculations of paid leave requirements for part-time employees.
- Use of accrued leave. Employers may require an employee to use accrued leave under the employer's policies concurrently with the expanded FMLA to allow employees to receive full pay during the period for which they have preexisting accrued vacation or personal leave or paid time off, and allow employers to require employees to take such leave and minimize employee absences.

- **Consistency Clarification.** There is inconsistency between the two Acts with respect to the second employee because he or she would have more hours of leave than needed for that purpose. Accordingly, pursuant to the Secretary’s authority to issue regulations “to ensure consistency” between the two types of paid leave under the FFCRA, § 826.24 states that the unpaid period for expanded family and medical leave lasts for two weeks rather than ten days. As a practical matter, the unpaid period for employees who work regular Monday through Friday schedules would still be ten days because that is the number of days they would work in two weeks.

- **Eligible employees.** For an employee to be eligible to take leave under the expanded FMLA on April 1, 2020, the employee must have been on the employer’s payroll as of March 2, 2020.

- **Healthcare provider.** The term “health care provider” as used in sections 3105 and 5102(a) of the FFCRA, however, is not limited to diagnosing medical professionals. Rather, such health care providers include any individual who is capable of providing health care services necessary to combat the COVID-19 public health emergency. Such individuals include not only medical professionals, but also other workers who are needed to keep hospitals and similar health care facilities well supplied and operational. They further include, for example, workers who are involved in research, development, and production of equipment, drugs, vaccines, and other items needed to combat the COVID-19 public health emergency.

- The narrower definition of healthcare provider still applies for other purposes of the FFCRA, such as those who may advise an employee to self-quarantine.

- **Businesses with less than 50 employees.** A small employer is exempt from the requirement to provide such paid leave when: (1) such leave would cause the small employer’s expenses and financial obligations to exceed available business revenue and cause the small employer to cease operating at a minimal capacity; (2) the absence of the employee or employees requesting such leave would pose a substantial risk to the financial health or operational capacity of the small employer because of their specialized skills, knowledge of the business, or responsibilities; or (3) the small employer cannot find enough other workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services the employee or employees requesting leave provide, and these labor or services are needed for the small employer to operate at a minimal capacity. For reasons (1), (2), and (3), the employer may deny paid sick leave or expanded family and medical leave only to those otherwise eligible employees whose absence would cause the small employer’s expenses and financial obligations to exceed available business revenue, pose a substantial risk, or prevent the small employer from operating at minimum capacity, respectively. Section 826.40(b)(2) explains that if a small employer decides to deny paid sick leave or expanded family and medical leave to an employee or employees whose child’s school or place of care is closed, or whose child care provider is unavailable, the small employer must document the facts and circumstances that meet the criteria set forth in § 826.40(b)(1) to justify such denial. The employer should not send such material or documentation to the Department, but rather should retain such records for its own files.

- Intermittent use of paid leave. One basic condition applies to all employees who seek to take their paid sick leave or expanded family and medical leave intermittently—they and their employer must agree. Absent agreement, no leave under the FFCRA may be taken intermittently. Subsection (a) does not require an employer and employee to reduce to writing or similarly memorialize their agreement. But, in the absence of a written agreement, there must be a clear and mutual understanding between the parties that the employee may take intermittent paid sick leave or intermittent expanded family and medical leave, or both. Additionally, where an employer and employee agree that the latter may take paid sick leave or expanded family and medical leave intermittently, they also must agree on the increments of time in which leave may be taken, as explained.

- Interaction between paid sick leave and FMLA expansion. Specifies that, generally, when an employee qualifies for leave under both Acts, an employee may first use the two weeks of paid leave provided by the Paid Sick Leave. This use runs concurrent with the first two weeks of unpaid leave under the expanded FMLA. Any remaining leave taken for this purpose is paid under the expanded FMLA.

- Prior use of paid sick leave. An employee's prior use of emergency paid sick leave, which does not prevent the employee from taking expanded family and medical leave. For example, if the employee takes two weeks of paid sick leave for a qualifying reason under EPSLA section 5102(a)(1)–(4) and (6), the employee has exhausted the paid sick leave available to the employee under the EPSLA and may not take additional paid sick leave for any qualifying reason. If the employee then needs to take leave under the EFMLEA, the employee may do so, but the first ten days of expanded family and medical leave may be unpaid. The employee may, however, choose to substitute earned or accrued paid leave, as provided by the employer's established policies.

- Notices.

- Employers must post or distribute the required notice.

- An employer may require employees to follow reasonable notice procedures as soon as practicable after the first workday or portion of a workday for which an employee receives paid sick leave in order to continue to receive such leave. The employer may not require the notice to include documentation beyond what is allowed by § 826.100.

- DOCUMENTATION FOR REQUEST: Such documentation must include a signed statement containing the following information: (1) the employee's name; (2) the date(s) for which leave is requested; (3) the COVID-19 qualifying reason for leave; and (4) a statement representing that the employee is unable to work or telework because of the COVID-19 qualifying reason.

- Recordkeeping. Section 826.140 explains that an employer is required to retain all documentation provided pursuant to § 826.100 for four years, regardless of whether leave was granted or denied. If an Employee provided oral statements to support his or her request for paid sick leave or expanded family and medical leave, the employer is required to document and retain such information for four years. If an employer denies an employee's request for leave pursuant to the small business exemption under §

826.40(b), the employer must document its authorized officer's determination that the prerequisite criteria for that exemption are satisfied and retain such documentation for four years. Section 826.140 also explains what documents the employer should create and retain to support its claim for tax credits from the Internal Revenue Service (IRS). A more detailed explanation of how Employers may claim tax credits can be found at <https://www.irs.gov/forms-pubs/about-form-7200> and <https://www.irs.gov/pub/irs-drop/n-20-21.pdf>.

FEDERAL TAX CREDITS

The IRS published some guidance on the Families First Coronavirus Response Act ("FFCRA") tax credit provisions. The FFCRA was effective as of April 1, 2020. The IRS also announced the Employee Retention Credit and provided some related information.

Some of the FAQs are excerpted here, along with general information. The full list of FAQs can be found [here](#) and we recommend employers read through all the guidance.

What tax credits does the FFCRA provide?

The FFCRA provides businesses with tax credits to cover certain costs of providing employees with required paid sick leave and expanded family and medical leave for reasons related to COVID-19, from April 1, 2020, through December 31, 2020.

May an Eligible Employer receive both the tax credits for qualified leave wages under the FFCRA and the Employee Retention Credit under the Coronavirus Aid, Relief, and Economic Security Act (CARES Act)?

Yes, if an Eligible Employer also meets the requirements for the employee retention credit, it may receive both credits, but not for the same wage payments.

Section 2301 of the CARES Act allows certain employers subject to a full or partial closure order due to COVID-19 or experiencing a significant decline in gross receipts a tax credit for retaining their employees. This employee retention credit is equal to 50% of qualified wages (including allocable qualified health plan expenses) paid to employees after March 12, 2020, and before January 1, 2021, up to \$10,000 in qualified wages for each employee for all calendar quarters. However, the qualified wages for the employee retention credit do not include the amount of qualified leave wages for which the employer received tax credits under the FFCRA.

Note: The IRS expects to issue Frequently Asked Questions on the employee retention credit under the CARES Act during April 2020.

May an Eligible Employer receive both the tax credits for qualified leave wages under the FFCRA and a Small Business Interruption Loan under the CARES Act?

Yes. However, if an Eligible Employer receives tax credits for qualified leave wages, those wages are not eligible as "payroll costs" for purposes of receiving loan forgiveness under section 1106 of the CARES Act.

May an Eligible Employer reduce its federal employment tax deposit by the qualified leave wages it has paid without incurring a failure to deposit penalty?

Yes. An Eligible Employer will not be subject to a penalty under section 6656 of the Internal Revenue Code for failing to deposit federal employment taxes relating to qualified leave wages (and allocable qualified health plan expenses and the Eligible Employer's share of Medicare tax on the qualified leave wages) in a calendar quarter if:

- the Eligible Employer paid qualified leave wages to its employees in the calendar quarter before the required deposit,
- the amount of federal employment taxes that the Eligible Employer does not timely deposit is less than or equal to the amount of the Eligible Employer's anticipated tax credits for these qualified leave wages (and allocable qualified health plan expenses and the Eligible Employer's share of Medicare tax on the qualified leave wages) for the calendar quarter as of the time of the required deposit, and
- the Eligible Employer did not seek payment of an advance credit by filing [Form 7200, Advance Payment of Employer Credits Due to COVID-19](#), with respect to any portion of the anticipated credits it relied upon to reduce its deposits.

For more information about the relief from the penalty for failure to deposit federal employment taxes on account of qualified leave wages, see [Notice 2020-22 \(PDF\)](#).

Does the amount of qualified health plan expenses include both the portion of the cost paid by the Eligible Employer and the portion of the cost paid by the Employee?

The amount of qualified health plan expenses taken into account in determining the credits generally includes both the portion of the cost paid by the Eligible Employer and the portion of the cost paid by the employee with pre-tax salary reduction contributions. However, the qualified health plan expenses should not include amounts that the employee paid for with after-tax contributions.

What information should an Eligible Employer receive from an employee and maintain to substantiate eligibility for the sick leave or family leave credits?

An Eligible Employer will substantiate eligibility for the sick leave or family leave credits if the employer receives a written request for such leave from the employee in which the employee provides:

- The employee's name;
- The date or dates for which leave is requested;
- A statement of the COVID-19 related reason the employee is requesting leave and written support for such reason; and
- A statement that the employee is unable to work, including by means of telework, for such reason.

In the case of a leave request based on a quarantine order or self-quarantine advice, the statement from the employee should include the name of the governmental entity ordering quarantine or the name of the health care professional advising self-quarantine, and, if the person subject to quarantine or advised to self-quarantine is not the employee, that person's name and relation to the employee.

In the case of a leave request based on a school closing or child care provider unavailability, the statement from the employee should include the name and age of the child (or children) to be cared for, the name of the school that has closed or place of care that is unavailable, and a representation that no other person will be providing care for the child during the period for which the employee is receiving family medical leave and, with respect to the employee's inability to work or telework because of a need to provide care for a child older than fourteen during daylight hours, a statement that special circumstances exist requiring the employee to provide care.

What additional records should an Eligible Employer maintain to substantiate eligibility for the sick leave or family leave credit?

An Eligible Employer will substantiate eligibility for the sick leave or family leave credits if, in addition to the information set forth in FAQ 44 ("What information should an Eligible Employer receive from an employee and maintain to substantiate eligibility for the sick leave or family leave credits?"), the employer creates and maintains records that include the following information:

- Documentation to show how the employer determined the amount of qualified sick and family leave wages paid to employees that are eligible for the credit, including records of work, telework and qualified sick leave and qualified family leave.
- Documentation to show how the employer determined the amount of qualified health plan expenses that the employer allocated to wages. See FAQ 31 ("[Determining the Amount of Allocable Qualified Health Plan Expenses](#)") for methods to compute this allocation.
- Copies of any completed Forms 7200, Advance of Employer Credits Due To COVID-19, that the employer submitted to the IRS.
- Copies of the completed Forms 941, Employer's Quarterly Federal Tax Return, that the employer submitted to the IRS (or, for employers that use third party payers to meet their employment tax obligations, records of information provided to the third party payer regarding the employer's entitlement to the credit claimed on Form 941).

How long should an Eligible Employer maintain records to substantiate eligibility for the sick leave or family leave credit?

An Eligible Employer should keep all records of employment taxes for at least 4 years after the date the tax becomes due or is paid, whichever comes later. These should be available for IRS review.

May an Eligible Employer receive both the tax credits for qualified leave wages under the FFCRA and the Employee Retention Credit under the Coronavirus Aid, Relief, and Economic Security Act (CARES Act)?

Yes, if an Eligible Employer also meets the requirements for the employee retention credit, it may receive both credits, but not for the same wage payments.

Section 2301 of the CARES Act allows certain employers subject to a full or partial closure order due to COVID-19 or experiencing a significant decline in gross receipts a tax credit for retaining their employees. This employee retention credit is equal to 50% of qualified wages (including allocable qualified health plan expenses) paid to employees after March

12, 2020, and before January 1, 2021, up to \$10,000 in qualified wages for each employee for all calendar quarters. However, the qualified wages for the employee retention credit do not include the amount of qualified leave wages for which the employer received tax credits under the FFCRA.

May an Eligible Employer receive both the tax credits for qualified leave wages under the FFCRA and a Small Business Interruption Loan under the CARES Act?

Yes. However, if an Eligible Employer receives tax credits for qualified leave wages, those wages are not eligible as “payroll costs” for purposes of receiving loan forgiveness under section 1106 of the CARES Act.

Employee Retention Credit

The IRS announced a tax credit will be available to employers who retain employees during the coronavirus crisis. The credit is available to employers of any size, provided that they are not recipients of small business loans. Qualifying employers can receive a maximum credit of 50 percent of \$10,000 in qualifying wages. An employer will qualify if (a) the employer's business is fully or partially suspended by government order due to COVID-19 during the calendar quarter, or (b) the employer's gross receipts are below 50 percent of the comparable quarter in 2019. Once the employer's gross receipts go above 80 percent of a comparable quarter in 2019, they no longer qualify after the end of that quarter.

The definition of qualified wages depends on the employer's number of employees. If an employer averaged more than 100 full-time employees during 2019, qualified wages are generally those wages, including certain health care costs, (up to \$10,000 per employee) paid to employees that are not providing services because operations were suspended or due to the decline in gross receipts. These employers can only count wages up to the amount that the employee would have been paid for working an equivalent duration during the 30 days immediately preceding the period of economic hardship.

If an employer averaged 100 or fewer full-time employees during 2019, qualified wages are those wages, including health care costs, (up to \$10,000 per employee) paid to any employee during the period operations were suspended or the period of the decline in gross receipts, regardless of whether or not its employees are providing services.

Employers who believe they may qualify for the Employee Retention Credit are advised to read the entire IRS publication on this subject:

<https://www.irs.gov/newsroom/employee-retention-credit>

Please contact one of the following attorneys for more information regarding COVID-19:

Employment Law: [Jenny Holt Teeter](#)

Finance Law: [Heartsill Ragon](#), [Christopher L. Travis](#), [Chad L. Cumming](#)

Tax Law: [Adam D. Reid](#)