FREQUENTLY ASKED QUESTIONS

1. What if we shut down our business or furlough employees? Do we still owe the expanded FMLA and sick paid leave?

The Families First Coronavirus Response Act ("FFCRA") Emergency Paid Sick Leave Act ("EPSLA") entitles an employee to paid leave if "[t]he employee is subject to a Federal, State, or local quarantine or isolation order related to COVID-19" that makes "the employee . . . unable to work (or telework)" and "need . . . leave." Section 5102(a)(1), https://www.congress.gov/bill/116th-congress/house-bill/6201/text

In the next week or so, the Department of Labor ("DOL") will issue guidance regarding this law. We expect the DOL to express an opinion about whether shelter in place or business closure orders are "quarantine or isolation" orders within the meaning of the FFCRA. Watch for updates here. https://www.dol.gov/agencies/whd/pandemic

In the meantime, our take on the language of the FFCRA is that it does not require paid leave due to a shelter in place or business closure order that requires employees to be furloughed or laid off based on the following analysis.

a. If the government order is for businesses to close due to COVID-19, that does not mean that the employee "need[s] . . . leave." It means the employee has no place to work.

b. If a business furloughs non-essential employees (whether or not in response to a shelter-in-place order), that does not make the employee "need . . . leave." It means the employee has no job.

Section 5102(a)(1) makes sense as applied to a situation in which the government orders an employee to stay home ("quarantine or isolation order"), which makes the employee "need . . . leave." But the employee who is out of a job due to a business-closure order or furlough does not "need leave." They need a job.

The EPSLA provides an anti-discrimination provision, Section 5104. But it applies only if the employee is furloughed or terminated because the employee "takes leave in accordance with this Act" or "has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act (including a proceeding that seeks enforcement of this Act), or has testified or is about to testify in any such proceeding)." Section 5104(1)-(2).

It does not prohibit an employer from furloughing workers before the Act becomes effective on April 1. Nor does it prohibit an employer from furloughing workers who do not engage in Section 5104 protected conduct or for other reasons.

The Minneapolis and Saint Paul Sick and Safe Time Ordinances require that accrued paid sick leave benefits be paid to an employee when the employer's business is ordered to be closed by a public official due to Coronavirus.

Employers and employees should review their paid sick, PTO, and vacation policies to determine whether employees may use accrued paid leave benefits under the circumstances.

The federal WARN Act generally requires 60 days' advance notice before layoffs or closures by private and quasi-public employers with more than 100 employees. The WARN Act has an unforeseeable business circumstances exception. But an employer governed by the WARN Act must still "give as much notice as is practicable," even if that notice comes "after the fact." And the notice must "provide a brief statement of the reason for reducing the notice period," in addition to the other required elements of notice. For more information, see https://www.dol.gov/sites/dolgov/files/ETA/Layoff/pdfs/_EmployerWARN2003.pdf

Minnesota employers who are required to give notice under WARN must also provide notice to the Minnesota Commissioner of Employment and Economic Development of the names, addresses, and occupations of the employees who will be or have been terminated.

If you lay employees off, encourage them to apply for unemployment. They will not be subject to the ordinary waiting week and work search requirements have been relaxed. In addition, under the Minnesota governor's Executive Order 20-05, unemployment benefits paid as a result of the COVID-19 pandemic cannot be used to compute the employer's future tax rate.

2. How can we ensure that employees aren't abusing the expanded FMLA paid leave? For example, if schools are closed and both spouses are eligible for the leave through their employer? Can we request documentation to verify an employee's need for the leave?

If an employee is not caring for a child due to school or daycare closure, the employee is not eligible for the expanded FMLA paid leave. There is no specific provision in the new law that discusses how to verify this in order to prevent abuse, but the FMLA can offer some guidance. As with the FMLA, employers can require that employees notify them "as soon as practicable" in order to receive the paid leave. If necessary, as under the FMLA, an employer has a right to inquire further into the need for the leave and the employee is obligated to respond to those inquiries in order to determine whether the leave is qualifying. If the employee does not respond, it could result in denial or delay of the leave. As far as documentation, if an employer has reasonable suspicion that an employee is abusing the paid leave, it may be reasonable to request verification from the school or daycare that it is closed and that their spouse or other household family member is not available to care for the child(ren). Employers should work together with affected employees to find a situation that is workable, providing the paid leave required under the law, with the least impact on business operations. We will learn more about how to manage this leave in the next few weeks.

3. An employee's spouse runs a home daycare for children of nurses who fall into the high risk category. Should we allow him to take paid leave? Should we take any precautions with this employee?

For all employees, your business should strictly follow CDC and OSHA COVID-19 guidelines; assess the risk, maintain social distance and ensure the work area and tools are clean, and the employee is practicing good hygiene (frequent handwashing, etc). Currently there is no law that prevents the employee from working under these circumstances, unless the employee meets any of the criteria under the new paid FMLA or sick leave laws, and so long as the work is considered an essential service under a shelter in place order. But if the employee exhibits Coronavirus symptoms, he may be sent home.

4. Our business employs essential critical infrastructure workers. Are we still obligated to provide expanded paid FMLA and sick leave?

Yes. With the exception of healthcare providers, the FFCRA does not exempt critical infrastructure industries from providing paid leave to qualifying employees.

5. My business has less than 50 employees, but is wholly-owned subsidiary of a larger corporation of over 500 employees. Is my business exempt from providing the expanded FMLA leave?

If a company is a separate legal entity from a larger corporation, then it is generally considered a separate employer under the FMLA. There is an exception under the "integrated employer" tests, which requires assessing the following factors:

- Common management (e.g. common directors, common boards)
- Interrelation between operations (e.g., common offices, common record keeping, shared bank accounts and equipment)
- Centralized control of labor relations; (e.g., company controls of personnel of the other, such as hiring and firing decisions)
- Degree of common ownership/financial control

6. Can we require the employee to provide notice of a need for COVID-19 leave?

Yes. Employers may require employees to follow reasonable notice protocols regarding their need for leave if employees know leave will be required in advance. With respect to sick leave, after the employee initially takes sick leave, the employer may require reasonable notice regarding the need and timing of continued leave as a condition of providing ongoing paid leave.

7. Should we update our handbook?

The DOL has provided guidance regarding compliance with duties to provide FFCRA sick leave. https://www.dol.gov/agencies/whd/pandemic. It includes form notices that employers must conspicuously post where the employer posts other notices for its employees. Based on this guidance, update your policies accordingly. While the FMLA extension in the FFCRA does not require separate notice, FMLA generally requires employers to post notice of FMLA rights in the workplace and to provide FMLA rights notice in an employee handbook if there is one.

8. Can we require employees to use sick or vacation time to fulfill a full day if they are out caring for a family member to get them to whole pay vs. the cap of $200?

No. The Act specifically prohibits this: "An employer may not require an employee to use other paid leave provided by the employer to the employee before the employee uses the paid sick time" allowed under the Act.

9. Is the FMLA 10 weeks paid leave in addition to the 80 hours of sick leave we must offer? Or can we require they be used concurrently?

The 10 weeks paid FMLA is in addition to the 80 hours sick leave. A qualified employee could claim up to 12 weeks of paid leave under the new laws.

10. How does the 80 hours paid sick leave to care for children out of school/day care interact with the expanded FMLA leave of 10 weeks paid leave that can also be used for that purpose?

Employees must be allowed to take FFCRA sick pay before other sick or PTO leave available. If an employee is healthy and not subject to quarantine but needed to be out of work to care for a child out of school for 12 weeks the whole 12 weeks would be paid at 2/3: First two weeks FFCRA sick leave; then 10 weeks extended FMLA.

11. How does our business comply with the CDC's requirement to communicate information to employees about potential exposure to COVID-19 in the workplace, while maintaining confidentiality?

Alert employees if you confirm or suspect they may have been exposed to an employee with COVID-19. Do *not* disclose to employees *the identity* of the employees with confirmed or suspected COVID-19. Do *not* disclose the *symptoms* of the employee with confirmed or suspected COVID-19. Disclose the *minimum* information *necessary* to alert employees to their contact with the person with confirmed or suspected COVID-19. Be especially cautious when disclosing information in a small employment setting or community in which the existing employees could connect the dots to identify the employee at issue.

There is risk in this area because, currently (3/25/2020), there is no specific guidance on what information employers may disclose, and no specific guidance on what small employers may disclose. The EEOC's ADA guidance to employers is to defer to the CDC on matters of COVID-19 safety, not disclose employee symptoms, and to maintain ADA confidentiality. https://www.eeoc.gov/facts/pandemic_flu.html. The CDC's interim guidance to employers includes:

> **Separate sick employees:**
>
> > Employees who appear to have symptoms (i.e., fever, cough, or shortness of breath) upon arrival at work or who become sick during the day should immediately be separated from other employees, customers, and visitors and sent home.
> >
> > If an employee is confirmed to have COVID-19 infection, employers should inform fellow employees of their possible exposure to COVID-19 in the workplace but maintain confidentiality as required by the Americans with Disabilities Act (ADA). The fellow employees should then self-monitor for symptoms (i.e., fever, cough, or shortness of breath).

https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html

12. Can a client that provides residential care services tell an employee who also works a customer service job that the employee needs to quit the customer service job due to the potential exposure?

This is a multi-layered question, which requires case-specific analysis but, generally, it would be unwise to do this for an employee who is not experiencing symptoms.

13. My business was not subject to FMLA, having fewer than 50 employees. Is my business required to provide the FFCRA FMLA paid leave?"

Technically, yes, all businesses under 500 employees must provide the paid sick and child care leaves. But, DOL will be issuing guidance that exempts employers with fewer than 50 employees who cannot meet the requirements and maintain business as a going concern **and** the leaves that are required to be paid under FFCRA will be fully reimbursable via tax credit. The agencies have put out a press release stating that employers will be able to retain payroll taxes equal to the amount of qualifying leave they paid rather than paying those amounts to IRS. More guidance on both points expected next week. https://www.irs.gov/newsroom/treasury-irs-and-labor-announce-plan-to-implement-coronavirus-related-paid-leave-for-workers-and-tax-credits-for-small-and-midsize-businesses-to-swiftly-recover-the-cost-of-providing-coronavirus ("Under guidance that will be released next week, 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.")

14. Our employee count varies by season. How do we know if we are FMLA exempt?

Generally, if you have 50 or more employees during any twenty or more weeks in the current or prior calendar year, you must provide FMLA leaves. An employee worked for you during the week if (s)he did any work during that week. To be eligible, among other things, an employee must work at a site where the employer employs at least 50 employees within 75 miles of that worksite as of the date when the employee gives notice of the need for leave. Below are a couple of quick references.
https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/fmlaen.pdf
https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/employerguide.pdf

For the expanded COVID-19 FMLA leave under the FFCRA, which provides partially paid leaves for employees who must be off work to care for children whose school or day care is closed due to the pandemic, all employers with fewer than 500 employees are covered but small employers with fewer than 50 employees who cannot pay the leaves without jeopardizing the ability to continue business as a going concern will likely be exempted by forthcoming guidance from the Department of Labor. I believe this guidance is expected in early April. Watch for that information here.

15. Does the FMLA exemption only apply to child care? Or is the leave provided in the Families First Coronavirus Response Act also exempt if we are under 50 employees?

If you did not have 50 employees during twenty weeks this year or last, then you are not governed by FMLA generally but will still have to provide the FFCRA partially paid child care leaves **and** paid sick leaves unless you meet the test the Department of Labor will provide for small businesses that cannot maintain as a going concern. The federal agencies have put out a press release indicating that 100% of paid leave will be reimbursable via refundable tax credits and have also stated that employers will be able to take an immediate dollar-for-dollar tax offset against payroll taxes for the amounts given in paid leaves. More guidance is coming on this as well, but for now, see https://www.irs.gov/newsroom/treasury-irs-and-labor-announce-plan-to-implement-coronavirus-

related-paid-leave-for-workers-and-tax-credits-for-small-and-midsize-businesses-to-swiftly-recover-the-cost-of-providing-coronavirus ("Under guidance that will be released next week, 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.")

16. How does an employer handle an employee that wants to wear PPE like a mask or gloves? Are they required to allow it?

There is not any explicit OSHA standard requiring an employer to allow employees to wear PPE where it is not required. It is generally left to the employer's discretion. But, in this climate, we would caution that the employer should have a good reason for denying the employee's request. The common goal right now is slowing or stopping the spread of the disease. If an employee is denied the opportunity to contribute to that goal and the workplace has an outbreak, the employer could face some scrutiny from OSHA on their duties under the General Duty Clause.

Note also that if an employer does allow the employee to wear a respirator mask, they need to provide the information from Appendix D to Standard Number 1910.134, and may have some other obligations depending on the type of mask and other factors. Below is a link to an OSHA standard interpretation letter from 2018 relating to these issues. We think we may see another standard interpretation in the near future on this.

https://www.osha.gov/laws-regs/standardinterpretations/2018-04-26