

COVID-19 Webinar Series



COVID-19 Issues: Employment & Benefits FAQs

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Topics

- Families First Coronavirus Response Act
- Layoffs
- Furlough
- Hours reductions
- Salary reductions
- Benefit plan changes
- CARES Act
- Tax extensions
- Shelter-in-place orders



FFCRA: Overview

Q: What if I have reduced hours or laid off employees?

- Eligibility vs. Usability
- If an employee is completely laid off (i.e. not performing any work), you have no obligation to provide paid leave under the FFCRA (they are not eligible). This is true regardless of whether the layoff is due to a federal, state, or local directive related to COVID-19
- If an employee is still working on reduced schedule, you are required to provide such an employee with paid leave under the FFCRA (they are eligible if they qualify).
 - However, FFCRA leave cannot be used for the hours that they are no longer scheduled to work (leave is only usable for time you otherwise need them to work).
 - The amount of leave to which an employee is entitled is computed based on their average work schedule before it was reduced.
- Poster requirements
 - All covered employers (fewer than 500 employees)
 - Email to remote workers



FFCRA: Overview

Example - a full-time, eligible employee unable to work (or telework) due to the closure of school or place of child care will be entitled to up to 80 hours (10 days) of paid sick leave and up to 12 weeks of job-protected E-FMLA leave. The first 10 days will be covered as Federal Paid Sick Leave at the full rate (but not more than \$200 per day, and \$2,000 in the aggregate per employee, though the employee can elect to use other sick pay, vacation, or PTO instead). The remaining 10 weeks will be paid by the employer at 2/3 of the regular rate of pay up to a maximum entitlement of \$200 per day and \$10,000 in the aggregate.



FFCRA: Intermittent Leave

Q: Can employees take intermittent leave under the FFCRA?

A: Yes, but only if the employer and employee come to an agreement on a suitable arrangement. However, employees who continue to report to an employer's worksite may only take FFCRA leave intermittently in circumstances where there is a minimal risk that the employee will spread COVID-19 to other employees at an employer's worksite.



FFCRA: Exemptions

Q: How do the exemptions operate?

A: Under the FFCRA, there are two possible exemptions: (1) the small business exemption and (2) exemption of health care providers and emergency responders. The Department of Labor (DOL) has provided guidance on how each of these exemptions operate and has emphasized that employers should be judicious when using these exemptions.



Exemptions

Small Business Exemption

- An employer with fewer than 50 employees is exempt from providing FFCRA 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.
- The employer does not have to “apply” for the exemption, rather it should internally decide whether the criteria are met and simply “claim” the exemption.



Exemptions

Small Business Exemption

A small business may claim this exemption if an authorized officer of the business has determined that:

1. Providing leave would result in 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(s) requesting 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 available who are able, willing, and qualified to perform the services provided by the employee(s) requesting leave, and these labor or services are needed for the small business to operate at a minimal capacity.

Exemptions

Health Care Provider

- A health care provider is anyone who works 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, medical testing laboratory, or pharmacy.
- This also includes anyone who works for an entity who:
 - Contracts with any of the above institutions to provide services or to maintain the operation of the facility
 - Provides medical services or produces medical products



Exemptions

Emergency Responder

- An emergency responder is anyone necessary for the provision of transport, care, healthcare, comfort and nutrition of such patients, or others needed for the response to COVID-19, including:
 - Military or National Guard
 - Law Enforcement Officers
 - Correctional Institution Personnel
 - Fire Fighters
 - Emergency Medical Services
 - Physicians and Nurses
 - Public Health Personnel
 - Paramedics
 - Emergency Management Personnel
 - 911 Operators
 - Child Welfare Workers
 - Public Works Personnel
 - Etc.



FFCRA: Documentation

Q: What documentation is required for an employee to take leave?

- An employee must provide a signed statement containing: (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. Additional documentation is required depending on the COVID-19 qualifying reason for leave. Further, employers **must** keep all FFCRA documentation for **4 years**.



FFCRA: Costs & Credits

Q: What's this going to cost my company?

- Potential Max Cost per employee: \$15,110 (this would mean taking leave for personal reasons under the law AND an additional 10 weeks of child care-related Emergency FMLA (“E-FMLA”) leave).
 - This does not include any additional sick leave the employer might be required to provide under any state or local law that affords greater benefits.



FFCRA: Costs & Credits

Q: How do employers claim the tax credits?

- Tax credits available against employer payroll taxes
- Can withhold from current payroll tax withholdings and remit less to IRS in current quarter
- If more credit due than current payroll tax withholdings, can withhold from current federal income tax withholdings and remit less to IRS in current quarter
- Employers can request additional payment faster if needed
- Forms now available from the IRS to report



Layoffs: General Considerations

Q: We're considering laying off employees. What should we know?

- **WARN Notifications**

- Layoffs may trigger federal WARN notice requirements and/or applicable state Mini-WARN requirements.
- There may be applicable exceptions to the advance notice requirements of federal WARN or a state Mini-WARN; however, notice is still required.
- WARN notice requirements under federal and state WARN laws generally inapplicable for temporary layoffs (< 6 mos. / “good faith” standard).



Layoffs: General Considerations

Q: We're considering laying off employees. What should we know (continued)?

- **Wage and Hour**

- The employment relationship is severed with both permanent and temporary layoffs.
- Employers should consider offering severance in exchange for a release any time there is a layoff.

- **Unemployment**

- Triggered by both permanent and temporary layoffs.
- Be mindful of state-specific quirks.



Layoffs: General Considerations

Q: We're considering laying off employees. What should we know (continued)?

- **Employee Benefits**
 - Treated as a termination for benefit plans
 - Terms of benefit plan will govern
 - Potential severance obligations
 - COBRA notification requirements
 - Partial plan termination
- **PPP SBA loan forgiveness impacted**
 - Layoffs can affect amount of loan forgiveness



Layoffs: Costs

Q: What do layoffs cost?

- **WARN**

- Federal WARN Act:
 - *Liability to each affected employee = back pay and benefits (only ERISA and actual medical costs) for the period of violation up to 60 days.*
 - *Civil penalty \leq \$500 for each day of violation. Can be avoided if employer satisfies the liability to each affected employee within three weeks after the triggering event for the WARN violation.*
- In any suit, the court may allow the prevailing party reasonable attorneys' fees as part of the costs. These are the only remedies that WARN provides.
- A state's Mini-WARN Act may add additional costs.

- **Wage and Hour**

- Final paycheck is owed (sometimes very soon), and possibly all accrued PTO.
- Potential cost of severance in exchange for release.

- **Unemployment**

- State agencies may *not* allocate charges to employers' unemployment insurance accounts for individuals who are paid benefits for reasons related to COVID-19.
- But, employers may be subject to liability for failing to fulfill state-specific obligations related to COVID-19 unemployment benefits.



Furloughs: General Considerations

Q: Furloughs and temporary layoffs are the same, right?

- **In short, no...**
- **Temporary layoffs terminate the employment relationship...**
... even if the employer plans to bring the employee back later
- **Furloughs generally do not terminate the employment relationship**
 - Rare exception: if the employees are off work > 30 days in CA → presumptive termination
 - Likewise, WARN *generally* not triggered
 - Exception: the furlough turns into a furlough lasting > 6 mos. or becomes indefinite
 - *Now we have an employment loss under WARN*
 - But employees on furlough may be eligible for UI; depends on state law and furlough structure
- **Employee benefits issues**
 - Plan document controls, but benefits likely to terminate if employee is not “actively at work”
 - Carriers are providing exceptions upon request
 - If benefits do terminate, then COBRA would be required
 - If benefits continue, how will employees pay for it? (check plan document first)
 - Contrast - reduction in hours (plan document eligibility issue)



Furloughs: General Considerations (cont'd)

Q: What are some other considerations to keep in mind with furloughs?

- **Furloughs may offer flexible options for the workplace**
 - E.g., not working at all for X # of months, or working 2 weeks on and 2 weeks off, etc.
- **Note wage and hour issues can arise**
 - Are employees working off the clock (especially when remote)?
 - There may be other wage and hour issues implicated for both exempt and non-exempt employees.
 - Keys = appropriate structuring of the furlough schedule; policy implementation.
 - ***... and not letting employees do any work when they're on furlough...***



Furloughs: Costs

Q: What sorts of costs am I looking at with furloughs?

- **Termination of the employment relationship**
 - As noted, furloughs can implicate WARN if > 6 mos.
 - Employees also may be eligible for unemployment benefits, *whether or not the employment relationship is deemed terminated*
 - Additional costs of employment termination (e.g., final pay, PTO, severance)
- **Wage and Hour**
 - Potential for hefty wage and hour claims
 - *Examples of potential claims by non-exempt employees:* Claims by employees that they were asked to work during furlough days, miscalculation of hours worked, especially if shifts are split across a pay period, general OTC issues
 - *Examples of potential claims by exempt employees:* Failure by employer to pay employee 100% compensation in a week if the employee is furloughed for some days in a week by essentially “tying” salary to hours worked



Reduction of Hours, Furloughs, Layoffs: Retirement Plans

Q: How will a reduction of hours, furlough or layoff impact our retirement plans?

- **Compensation definition**
 - Personal time off is generally plan compensation; severance is not
- **Eligibility and vesting**
 - Generally, participants will continue to accrue vesting service while on furlough or unpaid leave
 - Consider loss of eligibility and break in service rules
 - Pay from governmental safety net programs do not count as hours of service
- **Testing**
 - Reduction in hours or reduced or eliminated employee deferrals may impact nondiscrimination testing
- **Possibility of a partial termination**
 - If 20% of workforce terminates service involuntarily within the plan year, a partial termination may be deemed to have occurred—full vesting of account balances for impacted participants



Hours Reductions: General Considerations

Q: What are the traps in reducing employees' hours?

- **First, is it even permitted?**
 - May be addressed by CBAs, offer letters, employment contracts
- **Could impact employees' benefits eligibility**
 - Consult applicable plans
- **Beware of WARN**
 - An employee counts toward the WARN threshold if his/her hours go below 50% in each month of any six-month period
- **Beware of Wage & Hour issues**
 - Exempt employees will still be entitled to their full compensation
 - State specific requirements may require advance notice of reduction
- **Potential unemployment eligibility (partial claim)**
 - Unless employee exceeds fixed \$\$ weekly max benefit, but claim still may be filed (and in some states, must be filed by employer)



Hours Reductions: Costs

Q: What will a reduction in hours cost?

- **WARN**
 - Federal WARN (back pay and benefits to each affected employee up to 60 days and up to \$500 per day up to 60 days)
 - Potential attorneys' fees in court
 - Potential additional costs under a state's Mini-WARN Act
- **Wage & Hour**
 - Potential for expensive wage and hour violation claims for underpayment of full salaries to exempt employees
- **Potential unemployment eligibility (partial claim)**
 - Unless employee exceeds fixed \$\$ weekly max benefit, but claim still may be filed (and in some states, must be filed by employer)



Cost Savings: Suspending, Reducing, or Delaying Compensation

Q: We are considering suspending, reducing, or delaying salary for certain employees. What tax issues do we need to consider?

- **What will happen to the reduced, suspended or delayed salary? If the amount will “accrue” and be paid at a later date, the arrangement may violate Code Section 409A**
- **Potential ways to pay “foregone” salary at a later date without violating 409A:**
 - Defer through formal nonqualified deferred compensation plan
 - Pay at a later point in 2020 or before March 15, 2021
 - Delay until payment can be made without jeopardizing company’s ability to continue as a going concern
 - Pay as a transaction bonus
- **If the “accrued” unpaid salary remains subject to a substantial risk of forfeiture until paid, then there is generally not a 409A issue and payment can be delayed beyond 2020:**
 - Continued employment through payment date; or
 - Employer retains complete discretion about whether to pay amount or not
- **Avoid:**
 - Employee or employer discretion as to timing of payment of accrued amount
 - Accruing the foregone amount on the employer’s financials without papering the obligation (with legal review)
 - Failing to update existing documentation (e.g., employment agreement, offer letters, etc.)



Cost Savings: Suspending or Eliminating Employer Contributions to Retirement Plans

Q: We want to suspend or eliminate our employer contribution to our retirement plan. How do we go about making a mid-year change?

- Participants entitled to contributions earned prior to amendment regardless of type of plan
- **Non-safe harbor plans**
 - Corporate action necessary; may require plan amendment if terms are specified
- **Safe harbor plans**
 - Look to safe harbor notice– was ability to amend reserved? If not, the employer must be operating at an economic loss
 - 30 day advance notice to participants
 - ACP, ADP and top-heavy testing must be performed for entire plan year



Workforce Modification Chart

Workforce modification	FFCRA – sick leave		EE Benefits		WARN Act		Unemployment		Wage/Hour	
	+	-	+	-	+	-	+	-	+	-
Furlough	> No leave required			> Employees likely lose benefits (unless exception is arranged)		> May trigger notice obligations		> May trigger UI obligations		> May trigger final pay and separation notice obligations at start of furlough (rare)
Reduction in hours	(if EE qualifies) > Tax credits			> May impact benefits eligibility > May be impermissible under CBAs or employment contracts		> May trigger notice obligations		> May trigger UI obligations > May prevent UI eligibility (if EE exceeds fixed \$ threshold)		> Potential FLSA issues for exempt workers
Reduction in comp	(if EE qualifies) > Tax credits > May reduce cost of leave			> May be impermissible under CBAs or employment contracts				> Likely prevents UI eligibility		> FLSA issues for exempt and non-exempt workers
Layoffs (temporary and permanent)	> No leave required			> Potential severance obligations	> If less than 6 months, WARN not in play	> May trigger notice obligations	> EEs are generally eligible for UI benefits			> Triggers final pay and separation notice obligations



CARES Act: Retirement Plan Provisions

Q: How does the CARES Act impact our retirement plans?

- Impacts “qualified individuals”
 - Participant (or spouse or dependent) diagnosed with COVID-19 by a CDC approved test; or
 - As a result of COVID-19, participant experiences adverse financial consequences due to any of the following:
 - Being quarantined, furloughed or laid off;
 - Having hours reduced;
 - Being unable to work due to lack of child care; or
 - Closing or reducing hours of operation of a business owned or operated by the participant.
- Important: Employers may rely on self-certification of qualified status. But keep records of certification with plan files!



CARES Act: Retirement Plan Provisions

Q: How does the CARES Act impact our retirement plans?

- Coronavirus-Related Distributions (CRDs)
 - Special withdrawal right of up to \$100,000 (no early withdrawal penalty)
 - Participants can elect to recognize income over 3 year period and can repay distributions to plan over that period
- Coronavirus-Related Loans (CRLs)
 - Limit increased to lesser of \$100,000 or 100% of vested account balance
 - Can defer loan repayments due in 2020
- Waiver of Required Minimum Distributions for 2020 calendar year (for all participants, not just qualified individuals)



CARES Act: Retirement Plan Provisions

Q: Are the changes mandatory? Are your other clients adopting the changes?

- Employers are not required to offer them, but many are doing so to the maximum extent allowed under the act
 - Argument that RMD suspension is mandatory, but vendors are allowing participants to opt out of suspension

Q: Any reason why shouldn't offer them?

- Plan leakage
- Administrative burden

Q: Can we wait to implement these provisions?

- Yes— although the changes can be made immediately effective
- Plan amendments can be delayed until 2022 (2024 for governmental plans)



Delayed IRS Deadlines

Q: I have heard IRS filing deadlines are delayed. How does this apply to employer sponsored benefit plans?

- IRS extensions (Notices 2020-17, 18) for 2019 tax return from April 15, 2020 to July 15, 2020
- Delay to July 15th applies to:
 - Deadline for reporting and paying early withdrawal (before 59.5) on 2019 distributions
 - Employer contribution deadlines for 2019 plan year contributions
 - HSA contribution deadline for 2019
- Extension DOES NOT apply to April 15th deadline to distribute excess elective deferrals for 2019 over \$19,000 limit
 - Penalties and double taxation for correction after 4/15



Am I an Essential Business?

Q: I am currently under a shelter-in-place or stay-at-home order. Does this mean my business have to shut down?

- It depends.
- Whether you're considered an "essential" business is determined at the state and local level, but many states are using the essential critical infrastructure guidelines that are issued by the United States Department of Homeland Security.



What if I Should Be “Essential”?

Q: Can I do anything if I think I should be considered an essential business but am not on the list?

- There’s not a lot of information on this yet, but additional guidance is expected. However, some states (Pennsylvania, New York and Connecticut) allow businesses to apply for relief online.



Non-Essential Businesses: What are the Next Steps?

Q: I am a non-essential business. What do I need to do?

- There are several things you need to do: (1) set your workforce up to work remotely; (2) determine how you will secure your facilities, protect your business's confidential information, and maintain your property; and (3) consider whether you need an emergency telecommuting policy.



What About Violations?

Q: Can I be penalized if I violate a shelter-in-place or stay-at-home order for my area?

- Yes. The penalties vary from state to state, but could include citations, fines, suspension of licenses, and even criminal penalties.



What About Paid Sick Leave?

Q: My employees are subject to a shelter-in-place or stay-at-home order. Does that mean they qualify for leave under the Emergency Paid Sick Leave Act?

- It depends.
- According to the Department of Labor, the key question is whether the employee would be able to work or telework “but for” being required to comply with a quarantine, isolation, containment, shelter-in-place, or stay-at-home order.



What About Layoffs?

Q: If I am subject to a shelter-in-place or stay-at-home order, can I lay off employees (either temporarily or permanently)?

- Generally, yes. But, you still have to consider whether the actions will trigger the WARN Act protections and equivalent state acts.



What About Wage & Hour Rules?

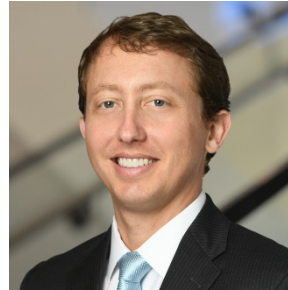
Q: Does the “continuous workday” rule apply during this time?

- No, the Department of Labor has suspended this rule for employees who are working from home as a result of COVID-19. This means employers who allow non-exempt employees to work from home and break their day into chunks of working time, with personal business in between, do not need to treat the entire day as compensable under the Fair Labor Standards Act.

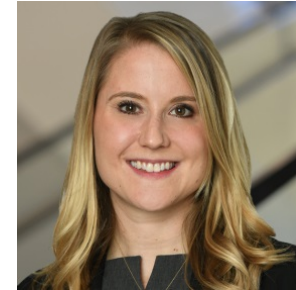
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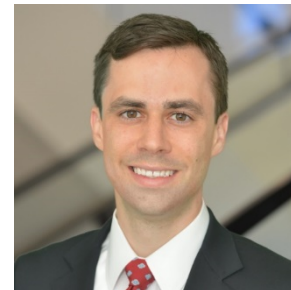
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COVID-19 Resources

- MMM COVID-19 Task Force
- More information: <https://www.mmmlaw.com/practice-areas/coronavirus-covid-19/>
- Upcoming COVID-19 webinar topics:
 - Paycheck Protection Program
 - Real Estate and Construction