



Rick Bailey &

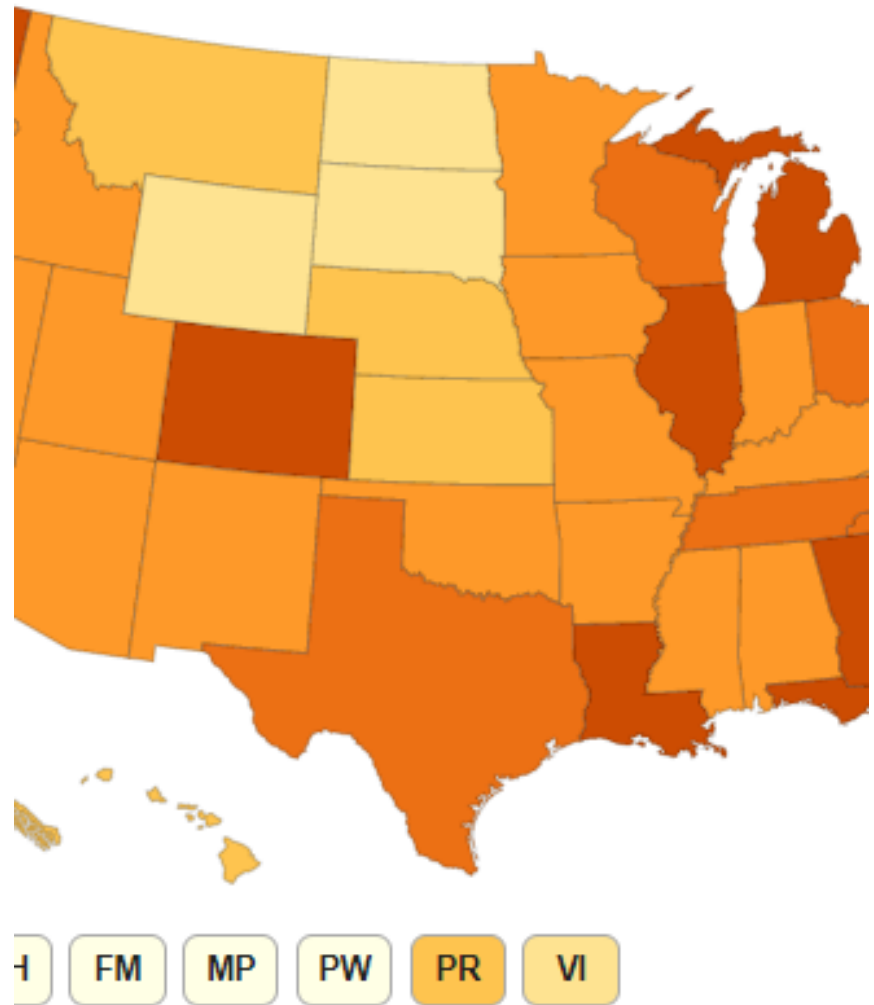
C O M P A N Y

Answers for Employers on COVID-19
March 27, 2020

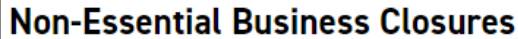
Situation Summary

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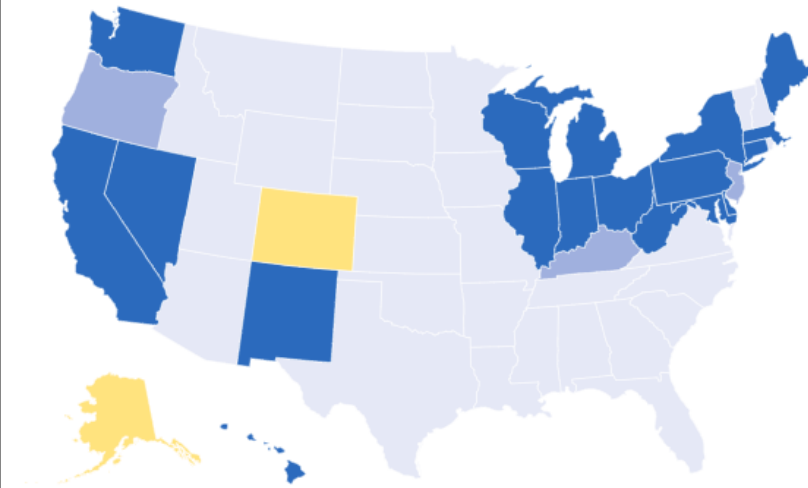
- Total Cases: 68,440
- Total Deaths: 994
- Jurisdictions: 54
 - All 50 states, DC, Puerto Rico, Guam, US Virgin Islands
 - 27 states are reporting **community spread**



State Orders



■ All non-essential business closed ■ All non-essential retail business closed ■ N/A ■ Other



Source: Kaiser Family Foundation

Kamran Rahman/POLITICO



The definition of “non-essential” varies from state to state

CARES Act

- Coronavirus Aid, Relief and Economic Security Act
- Passed by Senate on March 25, expected to be voted on by House today
- Major provisions
 - Stimulus checks to households
 - Business loan programs
 - Funding for unemployment insurance
 - Increased spending on hospitals
 - Health plan coverage

Latest Updates

DOL Guidance on FFCRA Paid Leave

DOL: paid leave rules take effect on April 1

The DOL is providing guidance on its website at <https://www.dol.gov/agencies/whd/pandemic>:

- **Fact Sheets for** employers and employees
- **Questions and Answers** on FFCRA, FLSA, FMLA, FFCRA notice
- **Posters** on employee rights under expanded FMLA And Paid Sick Leave
- **Field Assistance Bulletin** on temporary non-enforcement period

Regulations are expected in April

FFCRA Temporary Non-Enforcement Policy

- **Field Assistance Bulletin No. 2020-1**
- The DOL will not bring enforcement actions against any employer for violations of the Act occurring within 30 days of the enactment of the FFCRA (March 18 - April 17, 2020)
- The employer must make reasonable, good faith efforts to comply with the Act



Is paid leave available for business closures or furloughs?

DOL: No, paid leave is not available in the following situations:

- Worksite is closed due to lack of business or Federal, state or local directive (before or after April 1)
- Worksite is closed while an EE is on paid leave (after date of closure)
- EE is furloughed because there is not enough work or business
- EEs hours are reduced because there is not enough work

FFCRA Poster Rules

- Covered employers must post a FFCRA notice in a conspicuous place on their premises
- An employer may email or direct mail the notice, or post it on an employee information internal or external website
- Not required to be posted in multiple languages

IRS Guidance on Tax Credits

- **IR-2020-57: describes agency plan for tax credits for COVID-19 leave provided April 1- Dec. 31**
- Refundable payroll tax credits provide 100% reimbursement for the cost of providing COVID-19-related leave
 - Health insurance costs are also included in the credit – *guidance needed*
 - Employers face no payroll tax liability
 - Self-employed individuals receive an equivalent credit



Tax Credit Details

- Eligible employers can retain payroll taxes equal to the amount of leave that they paid instead of depositing with IRS
 - Include withheld federal income taxes, the employee share of Social Security and Medicare taxes, and the employer share of Social Security and Medicare taxes with respect to all employees
- If insufficient payroll taxes to cover the cost of leave paid, employers will be able file a request for an accelerated refund payment from the IRS

Tax Credit Examples

- ER paid \$5,000 in sick leave and would normally deposit \$8,000 in payroll taxes (including taxes withheld from EEs)
 - ER can use \$5,000 for leave payments and would only have to deposit \$3,000 on its next regular deposit date
- ER paid \$10,000 in sick leave and would normally deposit \$8,000 in taxes
 - ER could use the entire \$8,000 for leave payments and file a request for an accelerated credit for the remaining \$2,000
- Equivalent amounts are available to self-employed individuals
 - Credits will be claimed on their income tax returns and will reduce estimated tax payments



IRS Delay on Tax Deadlines

- The filing deadline for tax returns has been extended from April 15 to July 15
- Delay applies to all taxpayers with a Federal income tax return or payment due on April 15, 2020
 - Includes individuals, trusts, estates, corporations and any type of unincorporated business entity
- State delays are up to each state

Common Employer Questions

Can we require employees to stay home from work after travel?

- Yes, employers may require employees to stay away from the worksite after traveling for a period of time
- Employers should consider telework when possible
- Ensure that requirements do not discriminate based on a protected class
- This situation is not addressed in paid sick leave rules

What do we do if an employee is diagnosed with COVID-19?

- Employees who appear to have symptoms (i.e., fever, cough, or shortness of breath) at work should be:
 - Immediately 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
 - Employers must maintain confidentiality as required by the Americans with Disabilities Act (ADA)
 - The fellow employees should self-monitor for symptoms

Which employers have to provide paid leave?

- The paid sick leave and expanded FMLA rules apply to some public employers and to private employers with fewer than 500 employees
- Health care providers and emergency responders can be exempt
- Small businesses with fewer than 50 employees may qualify for exemption from the requirement to provide paid leave due to school or child care closings

What paid leave is required under the FFCRA?

- Two weeks (up to 80 hours) of **paid sick leave** at the employee's regular rate of pay (or minimum wage if higher)
- Where the employee is:
 - Unable to work because the employee is quarantined or isolated (pursuant to Federal, State, or local government order or advice of a health care provider) and/or
 - Experiencing COVID-19 symptoms and seeking a medical diagnosis
- *Maximum: \$511/day; \$5,110 total*

What paid leave is required under the FFCRA?

- Two weeks (up to 80 hours) of **paid sick leave** at 2/3 the employee's regular pay rate (or minimum wage if higher)
- Because the employee is:
 - Unable to work because of a bona fide need to care for an individual subject to quarantine or isolation
 - Unable to work because of a bona fide need to care for a child (under 18 years of age) whose school or child care provider is closed or unavailable for reasons related to COVID-19, and/or
 - Experiencing similar condition specified by DOL/IRS/HHS
- *Maximum: \$200/day; \$2,000 total*

What paid leave is required under the FFCRA?

- Up to an additional 10 weeks of **paid expanded FMLA leave** at 2/3 the employee's regular rate of pay (or minimum wage if higher)
 - The first 10 days of expanded FMLA leave are unpaid
- Where an employee:
 - Has been employed for at least 30 calendar days and
 - Is unable to work due to a bona fide need for leave to care for a child whose school/child care provider is closed/unavailable for reasons related to COVID-19
- *Maximum: \$200/day; \$10,000 total (\$12,000 when combined with paid sick leave for the same reason)*

What if we provide paid leave before April 1 or pay more than required?

DOL:

- Additional paid leave must be provided beginning April 1
- Employers can't deny paid sick leave if leave was already provided before April 1
- Tax credits are not available for supplemental leave or pay

IRS:

- Eligible employers will be able to claim tax credits based on qualifying leave they provide between the effective date and December 31, 2020 (not before)

How do you determine whether an employer has fewer than 500 EEs?

- Use employee count at the time the leave is to be taken
- Count full-time and part-time employees within the U.S. (including territories and possessions), including:
 - Employees on leave
 - Temporary employees who are jointly employed by you and another employer
 - Day laborers supplied by a temporary agency
- Do not count independent contractors

Commonly Owned Companies

- A company with separate establishments or divisions is considered to be a single employer
- Commonly owned companies are separate employers unless they are joint employers under the FLSA with respect to certain employees
- If two entities are joint employers, all of their common employees must be counted
- Employer integration rules apply under the FMLA

FLSA Joint Employer Test

- There are two potential scenarios where an employee may have one or more joint employers
 - Employee performs work for the employer that simultaneously benefits another individual or entity
 - Employers are sufficiently associated with respect to the employment of the employee
- Joint employment is a facts and circumstances determination

FMLA Integrated Employer Test

- All employees of the corporation, at all locations, are counted for FMLA purposes
- Separate entities or corporations may be parts of a single employer for FMLA purposes if they meet the integrated employer test
- Factors to be considered
 - Common management
 - Interrelation between operations
 - Centralized control of labor relations
 - Degree of common ownership or financial control

Will there be a law that helps employers with more than 500 EEs?

- There are no current plans to require paid leave for employees of larger companies
- These companies are more likely to provide paid leave already
- Other COVID-19 legislative relief efforts may apply to large employers

How do small employers get an exemption from paid leave rules?

- Exemptions are available to businesses with fewer than 50 employees
 - If providing leave would jeopardize the viability of the business as a going concern
- Document why the business meets the criteria (will be addressed in more detail in forthcoming regulations)
- ***Do not send any materials to the DOL***

What are exempt medical providers/emergency responders?

- This term is not defined in the statutory language or in any existing DOL guidance
- Additional information is expected in DOL regulations
- Employers should make good faith efforts to comply during the non-enforcement period

Do paid sick leave rules apply to part-time employees?

- Yes, a part-time employee is entitled to:
 - Paid sick leave for normally scheduled work hours in a two-week period
 - Expanded FMLA leave for normal number of work hours per day up to 10 weeks
- Determining hours if no normal schedule
 - Use a six-month average to calculate the average daily hours
 - If not employed for 6 months, use the number of hours agreed to upon hiring
 - If no agreement, use average hours/day scheduled over the term of employment

What records must an employer keep?

- Employers must maintain appropriate documentation in support of the reason for the leave:
 - Employee name
 - Qualifying reason for requesting leave
 - Statement that the employee is unable to work (including telework) for that reason
 - Dates for which leave is requested
 - Documentation of the reason for the leave

What documentation can an employer require?

- Examples of documentation of the reason for leave
 - A copy of any quarantine or isolation order
 - Written documentation from the health care provider that has advised self-quarantine
 - A notice that has been posted on a website, published in a newspaper or sent via email regarding school or daycare closure
- Existing FMLA certification requirements apply for existing reasons for FMLA leave (such as a serious health condition)

Is the paid leave in addition to an employer's existing leave policy?

- Yes, the paid leave requirements are new entitlements beginning April 1
- Employees must choose which leave to take, unless the employer agrees that they can be used concurrently
- Employers can allow employees to supplement paid leave with existing employer leave or can provide additional pay
 - Employers cannot require employees to use paid leave and cannot claim a tax credit for additional amounts

How do the leave laws work together?

- Employees may be eligible for both types of paid leave but only for a total of 12 weeks
- Paid sick leave is intended to cover the unpaid first 10 days of expanded FMLA leave (if applicable)
- Paid sick leave is limited to 80 hours (or max hours for PT EEs)
 - Employees do not get multiple periods of paid sick leave for multiple reasons

Can paid leave be taken intermittently?

- **Teleworking:** Yes, if employer agrees (in any increment agreed to)
- **Working at usual worksite:** No, if reason for leave is due to illness, quarantine/isolation or caring for a sick/quarantined/isolated person
- **Working at usual worksite:** Yes if reason for leave is childcare and employer agrees (in full-day increments only for paid sick leave and possibly expanded FMLA)

DOL encourages collaboration to achieve flexibility

Must health coverage be maintained during paid leave?

- **Expanded FMLA:** coverage must be maintained as if the employee had continued to work
 - Employee must make normal contribution
 - Coverage may end if employee does not return to work after FMLA leave
- **Paid sick leave:** employer must continue health coverage under HIPAA due to restrictions on actively-at-work provisions

What if an employee has already used their FMLA leave for the year?

- The FFCRA provides additional qualifying reasons for leave under the FMLA
- It does not require additional FMLA leave beyond the aggregate 12 weeks of leave (or 26 weeks for military family leave)

What is the age limit for caring for a child (school/daycare closure)?

- The expanded FMLA applies when employee has to care for a son or daughter under 18 years of age if the school or child care provider is closed or unavailable due to a COVID-19 public health emergency
- The emergency paid sick leave language does not specify an age but DOL guidance indicates it is also under 18

What if an employer does not provide paid sick leave?

- Covered employers that do not provide paid sick leave will be subject to FLSA penalties and enforcement
- Employers that do not provide expanded FMLA leave are subject to the enforcement provisions of the FMLA
- The DOL is providing a temporary non-enforcement period for 30 days if the employer has acted reasonably and in good faith

What is included in coverage for COVID-19 testing?

- Group health plans and health insurance issuers must cover COVID-19 testing
 - No cost-sharing, preauthorization or medical management may apply
- Covered items and services
 - Diagnostic products approved by FDA (and administration)
 - Items and services furnished during health care provider visits (including telehealth visits) that result in or relate to a test
- CARES Act would expand covered items and services

How does waiving copays and cost-sharing affect HSA eligibility?

- States and carriers are providing telehealth services with no cost-sharing
- FFCRA does not address non-COVID-19 treatment or HSA eligibility
- IRS guidance only addresses COVID-19 treatment
- The CARES Act would provide flexibility for HSAs and allow other types of treatment before the deductible is met

What happens to health coverage for laid-off employees?

- Eligibility terms of the plan will apply
 - Some states and carriers are providing flexibility for reduced hours
- If coverage is terminated, COBRA or state continuation will apply
- Some states are requiring additional open enrollment periods for individual coverage and Exchanges

How is the look-back measurement method affected by leave or layoff?

- “Hours of service” must be counted during measurement period
 - Time an employee is paid for time working or not working
 - Special rules for periods of unpaid FMLA
- Full-time employees who are in a stability period must continue to be treated as full-time as long as they are employed

➤ How can employers comply with WARN Act rules?

- Employers with 100+ employees must provide **at least 60 days' notice** for layoffs/terminations of 50+ employees at single site of employment
- Exception applies for “unforeseeable circumstances”
- Some states have been easing requirements for COVID-19

Unforeseeable Circumstances Exemption

- As much advance notice as possible
- Must be caused by sudden, dramatic and unexpected action or condition
- Outside of employer control
- Examples
 - Unanticipated and dramatic economic downturn
 - Government-ordered closures without notice



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Thank You

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