

# Pandemic Flu/Influenza/Coronavirus (COVID-19): Key Employment Law Issues, Prevention, and Response

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This practice note provides practical guidance to employers for preparing and responding to pandemic diseases, whether the coronavirus (COVID-19) or other widespread illnesses. While COVID-19 is the latest pandemic disrupting businesses and families across the nation and the world, prior pandemics, including the H1N1 (or swine) flu, provide employers with baseline information related to workplace concerns during a pandemic. To prepare for these events, employers should consider adopting a customized pandemic preparedness and response policy to lessen the risk of potential exposure to disease in the workplace.

For purposes of this practice note, a pandemic is an outbreak of disease over a widespread geographic area. When the World Health Organization (WHO) declares a pandemic, as it did in March 2020 with regard to COVID-19, the outbreak generally has spread worldwide. In the United States, the COVID-19 outbreak disrupted normal business operations with the issuance of state and local stay-home/stay-in-place orders (SIP orders) requiring or recommending that constituents refrain from nonessential activities, including nonessential work.

Specifically, this practice note provides guidance on the following issues:

- Occupational Safety and Health Administration Best Practices for Preventing and Responding to Flu/Coronavirus Outbreaks in the Workplace
- Key Health and Safety-Related Employer Questions and Answers regarding COVID-19 and Pandemics
- Coronavirus Aid, Relief, and Economic Security Act (CARES Act): Brief Overview of Key Employment-Related Provisions
- Families First Coronavirus Response Act (FFCRA) (Emergency Paid Sick and Family and Medical Leave): Brief Overview and Summary
- FFCRA: Detailed Analysis
- Americans with Disabilities Act Issues
- Wage and Hour Issues
- Telecommuting Employees
- Traveling Employees
- Labor-Management Relations
- WARN Act Obligations / Business Closings

For more guidance on a wide variety of COVID-19 legal issues, see [Coronavirus \(COVID-19\) Resource Kit](#). For tracking of key federal, state, and local Labor & Employment legal developments, see [Labor & Employment Key Legal Development Tracker](#).

## Occupational Safety and Health Administration Best Practices for Preventing and Responding to Flu/ Coronavirus Outbreaks in the Workplace

Although the Occupational Safety and Health Administration (OSHA) has not adopted a standard addressing employers' obligations to safeguard employees during a pandemic, OSHA has issued general guidance for employers as a direct result of the COVID-19 outbreak in the United States. See [COVID-19 \(OSHA\), Prevent Worker Exposure to Coronavirus \(COVID-19\)](#), and [Guidance on Preparing Workplaces for COVID-19](#). For more guidance on key OSH Act legal issues, see [COVID-19 and OSHA and OSH Act Requirements, Inspections, Citations, and Defenses](#). Below we summarize key OSHA pandemic and coronavirus recommendations and provide guidance on handling health and safety issues during pandemics and COVID-19.

### Assessment of Risk

Employers should determine the exposure their employees may have to a pandemic disease. The exposure risk per employee will vary based on the nature of the disease, as well as the responsibilities of the employee. Even if employers determine that risk of infection during the course of employment is low, all employers should consider implementing a policy, customized to their work environment, with the goal of protecting employees (as well as visitors to the employers' facilities) from contracting and spreading a pandemic disease.

The best way to lessen the risk of exposure is to follow the latest guidance from federal, state, and local governmental health authorities (Health Authorities), including, but not limited to, the Centers for Disease Control and Prevention (CDC). Conflicting guidance provided by Health Authorities should supersede guidance that employers issue.

### Prevention and Flexible Work Arrangements

In most pandemic situations, good hygiene and infection control habits can help minimize the risk of exposure.

Based on the latest guidance from the CDC for COVID-19, employers should consider observing the following practices:

- **Wash hands.** Require employees to wash hands frequently and thoroughly.
  - Employers should, to the extent possible, make soap and hand sanitizer available to all employees.
- **Employees who display symptoms.** Require employees who feel ill or display symptoms associated with a pandemic disease to stay home or, if at work when symptoms arise, notify their manager and leave work immediately.
- **Coughs and sneezes.** Require employees to cover their mouths when coughing and their noses when sneezing.
- **Clean office equipment.** Prohibit the use of phones, desks, offices, or work tools and equipment used by other employees without appropriate cleaning measures.
- **Enforce good housekeeping practices.** Emphasize and require good housekeeping practices in all work areas, including cleaning and disinfecting surfaces, equipment, and other elements of the work environment (as recommended by Health Authorities).
- **Enforce travel restrictions.** Require employees to follow the recommendations issued by Health Authorities regarding travel, such as limiting personal travel or avoiding certain geographic areas. See [Coronavirus \(COVID-19\) Considerations for Traveling Employees](#).
- **Implement social distancing.** Require social distancing recommended by Health Authorities.

Based upon guidance provided by Health Authorities, employers also should consider allowing employees to work from home as feasible, provide flexible schedules, and/or reduce work hours.

If an employee cannot work from home and cannot attend work due to being quarantined (whether required by law or as a best practice), employers may allow employees to use paid time off (PTO) benefits to reduce the financial impact. For state law on paid vacation and PTO, see [Paid Vacation and PTO State Law Survey](#).

### Identification and Isolation of Infected Individuals

Another priority during a pandemic is to identify employees, customers, visitors, or others at the employer's facilities who may have contracted a pandemic disease. Employers may address this issue by observing the following CDC recommendations:

- **Employee self-monitoring of symptoms.** Employers should require employees to self-monitor for signs and symptoms of the disease (flu, COVID-19, etc.) if the employees suspect possible exposure or infection.
- **Report exposure to Human Resources (HR).** Employers should require employees who suspect exposure or infection to report their symptoms to a designated management or HR representative. However, employers also should consider and address the following issues:
  - o **Keep medical information confidential.** Information that the employee provides should remain confidential; the employer should only disclose or share it with the employee's written consent or as applicable law permits.
  - o **Determine the need to isolate the employee.** The employer should immediately determine whether to isolate the employee and move him or her to a location distant from other employees, customers, and visitors.
    - **Designate an isolation space.** When isolating an employee, the employer should designate a room or other space where it can potentially isolate an infected employee.
    - **Ensure privacy in an isolation space.** To protect the employee's confidentiality, a designated isolation space should, if feasible, have closeable doors and be as far away as possible from areas where other employees, customers, and visitors may congregate.
    - **Train management personnel on pandemic issues.** Employers also should train management personnel designated to address pandemic issues so that they understand precautions to take, both to ensure their own safety and to account for confidentiality concerns.
  - o **Consider the need for face masks.** The employer should determine whether to provide and require employees to wear face masks (if available). See [Employers Providing Face Masks Should Review Their Health and Safety Obligations](#).
  - o **Assess the need to restrict access to isolation areas.** The employer should think about whether to restrict access to isolation areas and require authorized individuals to maintain at least six feet of space (or follow more stringent social distancing recommendations made by Health Authorities) between themselves and the isolated employee.
- **Identify those exposed to the isolated employee.** An employer's designated management or HR representative should identify other employees, customers, or visitors

who may have come into close contact (within six feet or less stringently than as recommended by Health Authorities) of the isolated employee and take steps to inform those individuals of potential exposure.

- o **Maintain privacy of an isolated employee.** Employers should avoid revealing the isolated employee's identity.
- o **Determine the need for more employees to isolate.** Depending on the circumstances, employers may require additional employees to isolate until further notice or they obtain appropriate documentation indicating they are able to return to work.

## Controlling the Work Environment

No two pandemic diseases are identical or call for the same protective measures. As such, employers should consider the Health Authorities' guidelines and periodically update their policies consistent with those guidelines. For example, if a Health Authority recommends increasing airflow in an indoor facility or the use of personal protective equipment (PPE) (e.g., gloves, face masks, or goggles) in certain industries, then employers should consider implementing those measures.

Employers should communicate to employees any additional or revised and implemented environmental controls, requirements, or recommendations.

## Compliance with Existing OSHA Standards

Employers should continue to comply with all applicable OSHA standards. For example, healthcare employers should continue to enforce policies addressing blood-borne pathogens and required PPE, just as manufacturing employers should continue to observe lockout/tagout and guarding requirements. All employers should also consider implementing additional measures to maintain a clean and sanitary workplace and should continue to comply with OSHA's recordkeeping requirements (e.g., OSHA 300 log), especially now for workplace exposures to COVID-19. For information on OSHA 300 logs and OSHA recordkeeping requirements, see [OSH Act Requirements, Inspections, Citations, and Defenses](#).

For a detailed summary of existing OSHA standards that may be directly relevant to COVID-19, visit [OSHA's COVID-19 Standards website](#). See also [COVID-19 and OSHA](#), [OSHA Guidance on Preparing Workplaces for COVID-19](#), and [Prevent Worker Exposure to Coronavirus \(COVID-19\)](#).

OSHA also provides posters stating how employers can reduce the risk of exposure to coronavirus. See [Ten Steps All Workplaces Can Take to Reduce Risk of Exposure to](#)

[Coronavirus \(English Version\)](#) and [Ten Steps All Workplaces Can Take to Reduce Risk of Exposure to Coronavirus \(Spanish Version\)](#).

## **COVID-19 Exposure Issues and Temporary Suspension of Recording Requirements for Most Employers**

A COVID-19 exposure may be a recordable illness if the employee contracted the infection as a result of performing his or her work-related duties. Employers should analyze each exposure in light of the impacted employees' job duties and the resulting effects of the infection (e.g., medical treatment received, days away from work, and restrictions posed by the infection). In many cases, it will not be possible to determine where an employee contracted COVID-19.

Recognizing that it will be difficult for employers to determine whether an employee's exposure to COVID-19 occurred at work and is thus recordable, OSHA has suspended enforcement of its recordkeeping requirements for COVID-19 cases for most employers. See [Enforcement Guidance for Recording Cases of Coronavirus Disease 2019 \(COVID-19\), Occ. Safety & Health Admin. \(Apr. 10, 2020\)](#). However, employers must still record COVID-19 cases if (1) they have objective evidence that a COVID-19 case may be work-related and (2) the evidence was reasonably available to the employer.

This temporary suspension of recording requirements will not apply to (1) healthcare employers; (2) emergency response organizations (e.g., emergency medical, firefighting, and law enforcement services); and (3) correctional institutions. Employers in these industries must continue to make work-relatedness determinations pursuant to 29 C.F.R. pt. 1904.

OSHA states that "this enforcement policy will provide certainty to the regulated community and help employers focus their response efforts on implementing good hygiene practices in their workplaces and otherwise mitigating COVID-19's effects." See [Enforcement Guidance for Recording Cases of Coronavirus Disease 2019 \(COVID-19\), Occ. Safety & Health Admin. \(Apr. 10, 2020\)](#).

### **Retaliation Prohibition**

Employers should bear in mind that Section 11(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 660(c), prohibits employers from retaliating against workers for raising concerns about safety and health conditions. OSHA's Whistleblower Protection Program protects employees from retaliation for raising or reporting concerns about violations of certain industry specific

federal laws, including those relating to airlines, commercial motor carriers, consumer products, environmental hazards, financial reforms, food safety, health insurance reforms, motor vehicle safety, nuclear facilities, pipeline companies, public transportation agencies, railroads, maritime businesses, securities, and tax laws. For information on OSHA retaliation issues, see the section entitled "Requirement 4: Anti-retaliation Provisions" in [OSH Act Requirements, Inspections, Citations, and Defenses](#).

On April 8, 2020, the Department of Labor (DOL) issued a news release reminding employers that "[e]mployees have the right to safe and healthy workplaces," and encouraging employees to contact OSHA if they "believe[] that their employer is retaliating against them for reporting unsafe working conditions[.]" See DOL, [U.S. Dep't of Lab. Reminds Employers that they Cannot Retaliate Against Workers Reporting Unsafe Conditions During Coronavirus Pandemic](#) (Apr. 8, 2020). Employers should carefully consider the risks of an adverse employment action against an employee who has raised health and safety concerns related to coronavirus, including concerns over work-related travel requirements. See [Coronavirus \(COVID-19\) Considerations for Traveling Employees](#).

## **Key Health and Safety-Related Employer Questions and Answers regarding COVID-19 and Pandemics**

This section addresses additional health and safety-related questions that employers may have.

### **What If Employees Are Hesitant to Come to Work during COVID-19 or Another Pandemic?**

Employers should anticipate that, under certain circumstances, employees may refuse to work based on concerns over COVID-19 or other pandemic conditions. As explained above in the subsection entitled "Retaliation Prohibition," if the employee's concern for his or her safety or well-being is reasonable and raised in good faith, the Occupational Health and Safety Act protects the employee from retaliatory actions. Also see the section entitled "Requirement 4: Anti-retaliation Provisions" in [OSH Act Requirements, Inspections, Citations, and Defenses](#). Determining whether the employee's concern is reasonable will require careful consideration of the circumstances of his or her job requirements. For example, if the employee will need to travel by airplane or other mass transit for work or if the work would require working in large groups, then

his or her fear of contracting the virus might be reasonable based on the latest CDC guidance. Employers should consider alternatives and any administrative or engineering controls that may reduce or eliminate the risk altogether.

### **What Questions Should Employers Ask Employees Suspected of Being Sick with COVID-19 or Another Type of Flu?**

Just as employees may have concerns about returning or continuing to work during a pandemic, employers also may have concerns about employees at work who may be sick with a pandemic disease. When addressing these situations, employers should balance the need to take measures that keep employees safe with employment laws their actions may implicate. Employers should review the latest guidance provided by OSHA, the Equal Employment Opportunity Commission (EEOC), the CDC, and any other government agencies addressing a pandemic or a local or regional health concern. For COVID-19 guidance from these agencies, see [COVID-19 \(OSHA\)](#), [Coronavirus and COVID-19 \(EEOC\)](#), and [Interim Guidance for Businesses and Employers \(CDC\)](#).

For purposes of combatting COVID-19, the EEOC has given employers leeway to make medical inquiries that the Americans with Disabilities Act (ADA) otherwise might prohibit. See [What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws](#).

Below is a list of questions employers should consider asking employees suspected of having COVID-19:

- Are you experiencing symptoms associated with COVID-19, including fever (over 100.4°F), chills, cough, shortness of breath, sore throat, loss of smell or taste, or gastrointestinal problems, such as nausea, diarrhea, or vomiting?
- Have you tested positive for or been diagnosed with COVID-19?
- Have you been in close contact (i.e., within six feet or a recommended distance as updated by the CDC) with any person who has tested positive for, or been diagnosed with, COVID-19 within the past 14 days?
- Has your doctor, other medical professional, or health official asked you to self-quarantine within the past 14 days?
- Have you recently traveled to or been in any location for which the CDC has issued a Level 3 travel health notice? See [CDC's Coronavirus Disease 2019 Travel Health Notices](#). See also [Coronavirus \(COVID-19\) Considerations for Traveling Employees](#).

- Do you require an accommodation due to an existing condition that may put you at “high-risk” for COVID-19, as per the CDC’s guidance? See [CDC's Coronavirus Disease 2019 People Who are at Higher Risk](#).

### **Can Employers Prevent Employees from Coming to Work during COVID-19 or Another Pandemic?**

Absent an agreement with an employee or a collective bargaining agreement that restricts the employer’s authority to dictate hours of work, levels of production, or similar issues, an employer is typically free to send employees home from work. To the extent that employees can work remotely, OSHA encourages employers to allow telecommuting, working from home, alternating schedules, reducing work hours, or similar measures to reduce the risk of spreading COVID-19 or a flu.

If an employee is diagnosed with COVID-19, an employer should prohibit that employee from coming into the workplace, consistent with the latest guidelines from public health authorities like the CDC. If the employee can work remotely, the employer should allow the employee to do so. See [Telecommuting Employees](#) below. See also [Telecommuting Employees: Best Practices Checklist](#). Moreover, for employees who may display symptoms of COVID-19, employers should consider taking similar actions, provided that they account for other employment laws, including the American with Disabilities Act. See [Americans with Disabilities Act Issues](#) below. See also [Americans with Disabilities Act: Guidance for Employers](#). To the extent an employee who is confirmed or presumptively diagnosed with COVID-19 has been in close contact with coworkers, the employer may inform those coworkers of their potential exposure, but the employer must not disclose the employee’s identity without his or her written consent.

### **What Steps Should Employers Take before Bringing a Previously Infected Employee Back to Work?**

Before allowing employees who test positive for COVID-19 or another pandemic disease or who displayed symptoms associated with a pandemic disease to return to work, employers may require employees to:

- Provide a doctor’s note clearing the employee to return to the workplace
- Submit to a medical examination –and/or–
- Remain symptom-free for a specific period of time (as recommended by Health Authorities) before returning to work

## Coronavirus Aid, Relief, and Economic Security Act (CARES Act): Brief Overview of Key Employment-Related Provisions

While a full analysis of the CARES Act is beyond the scope of this practice note, employers must know that the CARES Act covers the following key issues affecting employers:

- **Eligible employers and self-employment individuals can receive small business loans under the Paycheck Protection Program (PPP).** For more information on the Paycheck Protection Program, see [Paycheck Protection Program Fact Sheet](#), [First Analysis: CARES Act Paycheck Protection Program Summary](#), and [CARES Act's Forgivable Paycheck Protection Loans to Small Businesses](#).
- **Eligible unemployed individuals will receive enhanced unemployment insurance benefits and employers will receive benefits for retaining certain employees.** For more information on the CARES Act, including details on its unemployment provisions, see [An Employer's Cheat Sheet For The 854-Page Virus Relief Bill](#) and [DOL Guidance Tackles Coronavirus Unemployment Programs](#). See also [U.S. Department of Labor Publishes Latest Guidance Regarding Pandemic Emergency Unemployment Compensation Program \(April 10, 2020\)](#).
- **The CARES Act amended the Families First Coronavirus Response Act (FFCRA) to address advanced tax credits employers can take in providing emergency sick and family and medical leave to employees.** For more detail, see [Coronavirus Aid, Relief, and Economic Security Act or the "CARES Act" \(H.R. 748\) – Miscellaneous Provisions](#) and [Coronavirus Tax Relief – Families First Coronavirus Response Act \(H.R. 6201\)](#). See also IRS, [COVID-19 Related Tax Credits for Required Paid Leave Provided by Small and Midsize Businesses FAQs](#).
- **The CARES Act provides for loans to certain distressed businesses and restricts compensation for executives working for business receiving these loans.** For more information, see [Addressing the Coronavirus Impact on Executive Compensation](#).
- **Employers can provide tax-free payments to employees affected by COVID-19 as "qualified disaster relief payments" under 26 U.S.C. § 139.** For more detail, see [Coronavirus Tax Relief – Utilizing IRC Section 139](#).

## Families First Coronavirus Response Act (FFCRA) (Emergency Paid Sick and Family and Medical Leave): Brief Overview and Summary

This section provides a brief overview of key issues regarding the Families First Coronavirus Response Act (FFCRA). For a more comprehensive analysis of the FFCRA, see FFCRA: Detailed Analysis below.

In response to the COVID-19 outbreak, the federal government enacted the FFCRA. The FFCRA applies to private employers with fewer than 500 employees and all public employers. It creates new leave benefits, including paid sick leave and expanded protections under the Family and Medical Leave Act of 1992 (FMLA), 29 U.S.C. § 2601 et seq. Both leave programs run from April 1, 2020 through December 31, 2020.

Whether a particular employee qualifies for benefits under the FFCRA will depend on why the employee is unable to work. In general, the FFCRA does not provide benefits to employees who choose to stay home out of fear of exposure to COVID-19. Thus, employers may discipline employees who choose not to work, so long as that discipline is consistent with their normal policies and/or contractual obligations. On the other hand, employers should not discipline employees who have a qualifying reason to stay home under the FFCRA simply because the employees are taking leave; those employees are entitled to the benefits that the FFCRA provides.

For FMLA information related to COVID-19, see [COVID-19 or Other Public Health Emergencies and the Family and Medical Leave Act Questions and Answers](#) and [FMLA Leave: Guidance for Employers and Employees](#). For additional information on the FMLA, see the Family and Medical Leave practice note page and the Family and Medical Leave forms page.

For more information on paid sick leave, see [Paid Sick Leave State and Local Law Survey \(Private Employers\)](#) and [Paid Sick Leave Policies Checklist \(Best Drafting Practices for Employers\)](#). For information on state family and medical leave laws, see the Family, Medical, Sick, Pregnancy, and Military Leave column of [Attendance, Leaves, and Disabilities State Practice Notes Chart](#).

## Emergency Paid Sick Leave under FFCRA

Employees are immediately eligible to take emergency paid sick leave for a qualifying need. Full-time employees are entitled to 80 hours of paid sick leave. Part-time employees are entitled to sick leave equivalent to those hours the employee works, on average, over a two-week period. To establish a qualifying need for paid sick leave, an employee must be unable to work (or telework) due to one or more of the following seven reasons:

- 1 The employee is subject to a federal, state, or local quarantine or isolation order related to COVID-19.
- 2 The employee has been advised by a healthcare provider (i.e., a licensed doctor of medicine, nurse practitioner, or other healthcare provider permitted to issue a certification for purposes of the FMLA) to self-quarantine due to concerns related to COVID-19.
- 3 The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis.
- 4 The employee is caring for an individual subject to a federal, state, or local quarantine or isolation order related to COVID-19.
- 5 The employee is caring for an individual who has been advised by a healthcare provider to self-quarantine due to concerns related to COVID-19.
- 6 The employee is caring for his or her child for one of the following reasons: the child's school or place of care has been closed, or the child's care provider is unavailable, due to COVID-19 precautions.
- 7 The employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services in consultation with the Secretary of Treasury and the Secretary of Labor.

See DOL, [Families First Coronavirus Response Act: Questions and Answers](#). As of April 16, 2020, there are no substantially similar conditions that the U.S. Department of Health and Human Services has identified. Id.

Where an employee takes emergency paid sick leave for his or her own self-isolation, medical diagnosis, or treatment (i.e., reasons (1), (2), or (3) in the qualifying events list above), that employee will receive 100% of his or her regular rate of pay for the duration, subject to a \$511 daily and \$5,110 aggregate cap over the two-week period.

Where an employee takes emergency paid sick leave to care for another individual, to care for the employee's child, or due to a substantially similar condition to COVID-19 (i.e., reasons (4), (5), (6), or (7) in the qualifying events list

above), that employee will receive two-thirds (2/3) of his or her regular rate of pay or two-thirds (2/3) the applicable minimum wage, whichever is higher, for the duration, subject to a \$200 daily and \$2,000 aggregate cap over the two-week period.

For more guidance on available paid sick pay hours and pay requirements for emergency paid sick leave, see the subsection entitled "Pay Requirements and Number of Sick Leave Hours Provided" in FFCRA: Detailed Analysis below.

## Expanded Family and Medical Leave under the FFCRA

All employees who have been employed by the same employer for at least 30 days are eligible for Public Health Emergency Leave under the expanded FMLA when they have a qualifying need. Additionally, an employee with a qualifying need who was laid off after March 1, 2020, but who has subsequently been rehired is eligible for Public Health Emergency Leave if he or she worked for that employer for at least 30 of the 60 calendar days that preceded his or her layoff.

To establish a qualifying need, an employee must be unable to work (or telework) because he or she needs to care for his or her minor child for one of the following reasons:

- The child's elementary or secondary school or place of care has been closed because of an emergency declared by a federal, state, or local authority regarding COVID-19.
- The child's regular paid care provider is unavailable because of an emergency declared by a federal, state, or local authority regarding COVID-19.

Employees who take Public Health Emergency Leave are eligible to take up to 12 weeks of job-protected leave due to a qualifying need. The first 10 days of this leave are unpaid, though employees may opt to use (substitute) any accrued paid time off, vacation time, sick leave, or other paid leave during this initial period, including emergency paid sick leave.

## Pay Requirements

After the first 10 days of Public Health Emergency Leave, an eligible employee will be paid at a rate of two-thirds (2/3) of his or her regular rate of pay for the hours he or she would normally have been scheduled to work, subject to a \$200 daily and \$10,000 aggregate cap over the full course of Public Health Emergency Leave.

## Tax Credit

Covered employers are eligible for tax credit reimbursements for FFCRA paid leave expenses. For more information on the FFCRA tax credit, see IRS, [COVID-19](#)

[Related Tax Credits for Required Paid Leave Provided by Small and Midsize Businesses FAQs; Coronavirus Tax Relief – Families First Coronavirus Response Act \(H.R. 6201\); and Coronavirus Aid, Relief, and Economic Security Act or the “CARES Act” \(H.R. 748\) – Miscellaneous Provisions.](#) Also see the subsection entitled “Tax Credit” in the “Emergency Family and Medical Leave Expansion Act” section of FFCRA: Detailed Analysis below.

## FFCRA: Detailed Analysis

This section provides a more detailed analysis of the FFCRA along with key DOL guidance concerning the FFCRA. For a brief outline of key issues regarding the FFCRA, see Families First Coronavirus Response Act (FFCRA) (Emergency Paid Sick and Family and Medical Leave): Brief Overview and Summary above.

President Trump signed the FFCRA into law on March 18, 2020. It includes two major overhauls to leave programs for employers: (1) an expansion to the FMLA via the Emergency Family and Medical Leave Expansion Act (also known as the EFMLEA), which includes paid Public Health Emergency Leave and (2) the Emergency Paid Sick Leave Act (also known as the EPSLA).

According to U.S. DOL [guidance](#), both laws went into effect on April 1, 2020, and run through December 31, 2020. That guidance further confirms that neither of the new leave programs are retroactive (i.e., they apply to leave taken between April 1, 2020 and December 31, 2020). The DOL has consistently amended/supplemented its [guidance](#), and the U.S. Internal Revenue Service (IRS) has issued [guidance](#) related to tax credits for the paid leave.

On April 1, 2020, the DOL issued a temporary rule (and later, a correction) at 29 C.F.R. pt. 826. That same day, the Ranking Member of the U.S. Senate Committee on Health, Education, Labor, and Pensions, Senator Patty Murray, and the Chair of the U.S. House Appropriations Subcommittee on Labor, Health and Human Services, Education, and Related Agencies, Representative Rosa L. DeLauro, issued a request to the DOL to revise its materials in accord with the text and congressional intent of the FFCRA. Although the letter was issued prior to the release of the DOL’s regulations, the positions contained in the letter signal that Congress disagrees with material aspects of the DOL’s regulations and interpretations of the FFCRA to that point.

Additionally, the DOL has issued a model poster in [English](#), [Spanish](#), and multiple other languages that covered nonfederal government employers must post, as well as an [FAQ](#) related to the poster. Federal government

employers have separate model posters in [English](#) and [Spanish](#).

On March 27, 2020, President Trump signed the CARES Act into law. Among other things, the CARES Act amends portions of the FFCRA. For more information, see Coronavirus Aid, Relief, and Economic Security Act (CARES Act): Brief Overview of Key Employment-Related Provisions above.

For more information on the FMLA, see [COVID-19 or Other Public Health Emergencies and the Family and Medical Leave Act Questions and Answers](#) and [FMLA Leave: Guidance for Employers and Employees](#).

For more information on paid sick leave, see [Paid Sick Leave State and Local Law Survey \(Private Employers\)](#) and [Paid Sick Leave Policies Checklist \(Best Drafting Practices for Employers\)](#).

### Emergency Family and Medical Leave Expansion Act

The main component of the Emergency Family and Medical Leave Expansion Act portion of the FFCRA is the addition of Public Health Emergency Leave, with certain job protection requirements and paid and unpaid leave for certain eligible employees.

#### Employer Coverage

Public Health Emergency Leave applies to all private employers with fewer than 500 employees, and it applies to all public employers. 29 C.F.R. § 826.40(a), (c). This criteria is different from the FMLA’s usual coverage threshold (i.e., a 50-employee minimum). Employees on leave, temporary employees jointly employed by one or more companies (regardless of where the jointly employed employees are housed for payroll purposes), and day laborers supplied by a temporary agency are also counted toward the leave coverage limit. 29 C.F.R. § 826.40(a)(1)(ii).

A corporation, including its separate establishments or divisions, is considered to be a single employer and its employees should be each counted toward the 500-employee threshold. 29 C.F.R. § 826.40(a)(2). Where a corporation has an ownership interest in another corporation, the two corporations are separate employers unless they are joint employers as defined in the Fair Labor Standards Act (FLSA). If two entities are deemed joint employers, all of their common employees must be counted in determining whether Public Health Emergency Leave or emergency paid sick leave applies. For more information on joint employment, see [Joint Employment Relationships:](#)

[Best Practices and Risks](#). In addition, two or more entities are separate employers unless they satisfy the integrated employer test under the FMLA (see 29 C.F.R. § 825.104(c) (2)). In that case, the employees of all entities making up the integrated employer are counted in determining employer coverage for Public Health Emergency Leave or emergency paid sick leave. See [DOL Guidance: Families First Coronavirus Response Act: Questions and Answers](#), Question 2.

Employers that are signatories to multiemployer collective bargaining agreements may find some relief from this amendment if they make contributions to a multiemployer fund, plan, or program based on the paid leave entitlements to which employees would otherwise be entitled.

The amended FMLA, as it relates to Public Health Emergency Leave, allows the Secretary of Labor to issue good-cause regulations to exclude certain healthcare providers and emergency responders from eligibility. DOL [guidance](#) indicates that employers of “healthcare providers” and “emergency responders” are not required to provide those employees with Public Health Emergency Leave.

### Healthcare Provider

According to the DOL, a healthcare provider is anyone employed at any doctor’s office, hospital, healthcare center, clinic, postsecondary educational institution offering healthcare instruction, medical school, local health department or agency, nursing facility, retirement facility, nursing home, home healthcare provider, any facility that performs laboratory or medical testing, pharmacy, or any similar institution, employer, or entity. This includes any permanent or temporary institution, facility, location, or site where medical services are provided that are similar to such institutions. This definition also includes any individual employed by an entity that contracts with any of the above institutions, employers, or entities institutions to provide services or to maintain the operation of the facility. This also includes anyone employed by any entity that provides medical services; produces medical products; or is otherwise involved in the making of COVID-19 related medical equipment, tests, drugs, vaccines, diagnostic vehicles, or treatments. This also includes any individual that the highest official of a state or territory, including the District of Columbia, determines is a healthcare provider necessary for that state’s or territory’s or the District of Columbia’s response to COVID-19. See [DOL Guidance: Families First Coronavirus Response Act: Questions and Answers](#), Question 56.

In the April 1, 2020, letter from Congress to the DOL, Congress disagreed with the DOL’s interpretation of the term healthcare provider. Congress stated that the DOL’s

definition improperly deviates from the narrow definition provided by Congress in the FMLA. Instead, Congress states, the employee cannot merely be an employee of a healthcare provider but must, in fact, be a healthcare provider as defined by the FMLA, 29 U.S.C. § 2611.

### Emergency Responder

The DOL interprets the term emergency responder to mean an employee who is necessary for the provision of transport, care, healthcare, comfort, and nutrition of such patients, or whose services are otherwise needed to limit the spread of COVID-19. This includes but is not limited to military or national guard, law enforcement officers, correctional institution personnel, fire fighters, emergency medical services personnel, physicians, nurses, public health personnel, emergency medical technicians, paramedics, emergency management personnel, 911 operators, public works personnel, and persons with skills or training in operating specialized equipment or other skills needed to provide aid in a declared emergency as well as individuals who work for such facilities employing these individuals and whose work is necessary to maintain the operation of the facility. This also includes any individual that the highest official of a state or territory, including the District of Columbia, determines is a healthcare provider necessary for that state’s or territory’s or the District of Columbia’s response to COVID-19. See [DOL Guidance: Families First Coronavirus Response Act: Questions and Answers](#), Question 57.

### Limited Exemption for Small Businesses

The amended FMLA also allows the Secretary of Labor to issue regulations that exempt small businesses with fewer than 50 employees if the obligations would jeopardize the viability of the business as a going concern. 29 C.F.R. § 826.40(b). DOL [guidance](#) provides that an employer, including a religious or nonprofit organization, with fewer than 50 employees is exempt from providing Public Health Emergency Leave due to school or place of care closures or childcare provider unavailability for COVID-19 related reasons if an authorized officer of the business has made one of the following determinations:

- The provision of Public Health Emergency Leave would result in the small business’s expenses and financial obligations exceeding available business revenues and cause the small business to cease operating at a minimal capacity.
- The absence of the employee or employees requesting Public Health Emergency 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.

- There are not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services provided by the employee or employees requesting Public Health Emergency Leave, and these labor or services are needed for the small business to operate at a minimal capacity.

See [DOL Guidance: Families First Coronavirus Response Act: Questions and Answers](#), Question 58.

Employers should note, however, that this small business exemption does not eliminate an otherwise-covered employer from providing FFCRA leave to an employee for any of the other qualifying reasons.

### **Immunity from FMLA Litigation for Certain Employers**

Notably, the Emergency Family and Medical Leave Expansion Act contains a “Special Rule for Certain Employers.” It provides that an employer, as defined by the Emergency Family and Medical Leave Expansion Act (i.e., fewer than 500 employees), will not be subject to Section 107(a) of the FMLA (29 U.S.C. § 2617) (i.e., its section that allows employees to bring an enforcement action) for a violation based on the Emergency Family and Medical Leave Expansion Act unless that employer also meets the traditional definition of employer under the FMLA (i.e., 50 or more employees). See 29 C.F.R. § 826.151(b). See also Annotations to 29 U.S.C. § 2620—Special Rule for Certain Employers. P.L. 116-127, Div C, § 3104, 134 Stat. 192, which provides: “An employer under 110(a)(B) shall not be subject to section 107(a) for a violation of section 102(a)(1)(F) if the employer does not meet the definition of employer set forth in Section 101(4)(A)(i).”

### **DOL Enforcement**

The DOL has clarified that its 30-day moratorium from enforcing the FFCRA ran from March 18 through April 17, 2020. After April 17, 2020, the DOL lifted the stay of enforcement and the DOL is now fully enforcing violations of the FFCRA. The DOL will retroactively enforce violations back to April 1, 2020, if employers have not remedied any violations after April 17, 2020. See [DOL Guidance: Families First Coronavirus Response Act: Questions and Answers](#), Questions 78–79.

### **Relaxed Eligibility Requirements for Employees and Qualifying Needs for Public Health Emergency Leave**

Ordinarily, employees must work at least 1,250 hours and at least 12 consecutive months to be eligible for FMLA leave. Public Health Emergency Leave coverage is more expansive. Employees who have been employed for at least

30 days are eligible for this leave from that employer. 29 C.F.R. 826.30(b). The CARES Act further relaxes the 30-day requirement, providing that employees who were laidoff after March 1, 2020, but later rehired would be eligible for Public Health Emergency Leave if the employee worked for the employer for at least 30 of the last 60 calendar days prior to their layoff. H.R. 748, 116 P.L. 136, Section 3605(A)(ii).

To qualify for Public Health Emergency Leave, an employee must have a qualifying need related to an emergency declared by a federal, state, or local authority regarding COVID-19. To establish a qualifying need, the employee must be unable to work (or telework) because:

- He or she needs to care for his or her minor child if the child’s elementary or secondary school or place of care has been closed –or–
- The child’s regular paid care provider is unavailable, because of an emergency declared by a federal, state, or local authority regarding the coronavirus

29 C.F.R. § 826.20(b).

DOL [guidance](#) also indicates that this leave would also extend to an employee’s adult son or daughter who (1) has a mental or physical disability and (2) is incapable of self-care because of that disability. See [DOL Guidance: Families First Coronavirus Response Act: Questions and Answers](#), Question 40.

The DOL [guidance](#) and temporary rule dictate that employers are authorized to obtain materials from employees sufficient to support requests for Public Health Emergency Leave to the extent permitted under certification rules for conventional FMLA leave requests and as specified in applicable IRS forms, instructions, and information for tax credits under the FFCRA. Employers should retain this documentation because the DOL and IRS will require documentation on the reason for the leave where an employer requests a tax credit. For more information on the FFCRA tax credit, see IRS, [COVID-19 Related Tax Credits for Required Paid Leave Provided by Small and Midsize Businesses FAQs; Coronavirus Tax Relief – Families First Coronavirus Response Act \(H.R. 6201\); and Coronavirus Aid, Relief, and Economic Security Act or the “CARES Act” \(H.R. 748\) – Miscellaneous Provisions](#). Also see the subsection entitled “Tax Credit” in the “Emergency Family and Medical Leave Expansion Act” section of FFCRA: Detailed Analysis below.

In response to the DOL guidance, Congress has stated that the DOL has impermissibly expanded the documentation and certification requirements of the FMLA. That is, the FFCRA does not allow employers to require documentation

of the need for leave beyond what is already permitted by the FMLA, and employers may not condition employee leave on what the IRS decides to require in terms of employer documentation for the refundable tax credit. Congress urges that the DOL guidance and, presumably, regulations) thwart the purpose of the law, which is to ensure employees are able to use their newly guaranteed paid sick and family leave during the COVID-19 pandemic to slow the spread of the disease, and thereby alleviating the burden on the healthcare system imposed by employees seeking doctor certifications. Ultimately, due to the disagreement between Congress and the DOL, it is currently unclear what, if any, documentation an employer may request or require in support of FFCRA leave.

The DOL and IRS guidance signal that both parents may not take simultaneous leave under the FFCRA. The IRS guidance indicates that if an employee takes leave to care for a child due to school closure or child care unavailability, an employer may obtain a representation that no other person will be providing care for the child during the requested leave period and, if the child is over the age of 14, a statement that special circumstances exist requiring the employee to provide care during daylight hours. See IRS, [COVID-19 Related Tax Credits for Required Paid Leave Provided by Small and Midsize Businesses FAQs](#), Question 44.

The DOL [guidance](#) indicates that if the employer and employee agree, telecommuting employees may take intermittent paid emergency family and medical leave (or paid emergency sick leave) in any agreed upon increment of time (e.g., hour or hour and a half increments). See [DOL Guidance: Families First Coronavirus Response Act: Questions and Answers](#), Question 20. Where an employee is not teleworking, if an employer and employee agree, an employee may take intermittent paid emergency family and medical leave. The DOL further states: “[I]f employers and [non-telecommuting] employees agree to intermittent leave on a day-by-day basis, the Department supports such voluntary arrangements.” See [DOL Guidance: Families First Coronavirus Response Act: Questions and Answers](#), Question 22. To the extent the DOL is suggesting that non-telecommuting employees must take paid emergency family and medical leave in full-day increments, Congress disagrees and cites the express language of the FFCRA, which imposes no such restriction or minimum increment on intermittent leave.

The DOL [guidance](#) provides that the ability to telework may be a key factor in evaluating an employee's ability to take FFCRA leave (both emergency paid sick leave and Public Health Emergency Leave). See Telecommuting Employees below. Even where an employer offers telework, the DOL

has recognized that employees may nonetheless become unable to telework for qualifying reasons. Thus, employers should communicate openly with their employees to determine leave eligibility.

The DOL [guidance](#) has also clarified that FFCRA benefits (both emergency paid sick leave and Public Health Emergency Leave) are limited when an employer is forced to shut down or when it furloughs employees. For example, an employer does not need to provide these benefits to its employees if it closes before April 1, 2020 (the effective date of the FFCRA), due to lack of business or pursuant to a federal, state, or local directive. See [DOL Guidance: Families First Coronavirus Response Act: Questions and Answers](#), Question 23. Similarly, an employer that closes after April 1, 2020, does not need to provide these benefits to employees who have not already gone out on leave. See [DOL Guidance: Families First Coronavirus Response Act: Questions and Answers](#), Question 24. Where an employee is already on FFCRA leave, an employer must pay for any FFCRA leave the employee used up to the time of the closure. See [DOL Guidance: Families First Coronavirus Response Act: Questions and Answers](#), Question 25.

The DOL [guidance](#) also provides that employees are not entitled to take FFCRA leave (both emergency paid sick leave and Public Health Emergency Leave) during a furlough caused by lack of work or business, even if the employer plans to reopen in the future. See [DOL Guidance: Families First Coronavirus Response Act: Questions and Answers](#), Questions 26–27. Similarly, if an employer has reduced (not eliminated) an employee's hours due to lack of work or business, the employee may not use this paid leave for the hours he or she is no longer scheduled to work. See [DOL Guidance: Families First Coronavirus Response Act: Questions and Answers](#), Question 28.

Congress has taken issue with the DOL's guidance, noting that nothing in the FFCRA permits employers to cut off employees' rights to paid sick or family leave by reducing hours, furloughing employees, or closing a worksite. Given the context in which the FFCRA was passed—a nationwide social distancing directive with several statewide shelter in place orders in effect—Congress urges that its intent was to allow such workers to qualify for paid leave in those circumstances. Consistent with this broader construction, Congress has stated that the paid leave requirements attach to any employee “unable to work” due to a qualifying reason under the FFCRA, and does not hinge on an employer's ability to provide work to the employee. Notably, Congress acknowledges that employers may shut down entirely and permanently lay off employees, suggesting this is the only way to avoid the FFCRA paid leave requirements.

In an apparent effort to resolve existing confusion regarding the application of the FFCRA to workers impacted by shelter in place and safer at home orders, Congress has stated that the only reasonable conclusion of both the FFCRA's text and congressional intent is for the FFCRA to encompass such orders. Congress has expressed disapproval of the DOL's suggestion that an employer's closing of its worksite due to such a directive relieves it of providing paid sick or family leave under the FFCRA. Ultimately, however, disagreement between the DOL and Congress leaves unanswered the question of whether shelter in place or safer at home orders entitle affected employees to sick or family and medical leave under the FFCRA.

### No Additional FMLA Time

Employees who take Public Health Emergency Leave are eligible for the same amount of FMLA leave (12 weeks) as employees who take leave for other FMLA-covered reasons. The DOL has [clarified](#) that an employee who has taken (or exhausted) FMLA leave for reasons other than Public Health Emergency Leave in the preceding leave year will have reduced (or no) leave time under the FMLA for a Public Health Emergency. See [DOL Guidance: Families First Coronavirus Response Act: Questions and Answers](#), Question 44. Similarly, employees who use some or all of their allotted Public Health Emergency Leave will have reduced (or no) leave time under the FMLA for an otherwise qualifying event within the following leave year. See [DOL Guidance: Families First Coronavirus Response Act: Questions and Answers](#), Question 45.

Additionally, employers in states like California, with their own state equivalents of the FMLA, face the potential of leave covered by the amended FMLA that does not exhaust leave under their state's FMLA equivalent law, unless those state laws also are amended. Thus, it is possible that an employee in a state like California could be entitled to up to 12 weeks of Public Health Emergency Leave in addition to up to 12 weeks of leave under the California Family Rights Act (CFRA), assuming qualifying reasons for both. See [Leave Law \(CA\) – Family and Medical Leave and Flexible Leave](#).

### Job Protection

In keeping with traditional FMLA leave, employers must restore employees to their same or a similar position upon their return from Public Health Emergency Leave.

Smaller employers (25 or fewer employees) are exempt from this job protection requirement, however, if:

- The position held by the employee does not exist due to economic conditions or other changes in operating

conditions that affect employment and are caused by a coronavirus-related emergency declared by a federal, state, or local authority

- The employer makes reasonable efforts to restore the employee to an equivalent position with equivalent benefits, pay, and other terms and conditions of employment –and–
- After those reasonable efforts fail, the employer makes reasonable efforts to contact the employee about an equivalent position, if one becomes available, for one year following the conclusion of the coronavirus-related emergency or the conclusion of the 12 weeks of coronavirus-related leave taken by the employee, whichever is earlier

See [DOL Guidance: Families First Coronavirus Response Act: Questions and Answers](#), Question 43.

### Pay Requirements for Public Health Emergency Leave

Employers need not pay employees who take Public Health Emergency Leave for the first 10 days of leave. 29 C.F.R. § 826.24. Employees may opt to use (substitute) any accrued paid time off, vacation time, sick leave, or other paid leave during this initial period (including sick leave under the Emergency Paid Sick Leave Act, discussed below). Employers cannot require employees to use those benefits, however.

After the first 10 days of Public Health Emergency Leave, employers must pay employees on such leave at a rate of two-thirds (2/3) the employees' regular rate of pay (as determined under the FLSA) and for the number of hours the employee would normally be scheduled to work. In no event, however, will the employee's paid leave exceed \$200 per day and \$10,000 in the aggregate. 29 C.F.R. § 826.24(a), (c).

For employees with variable work schedules, employers are to average the employee's hours worked per day over the previous six months or, if the employee has not worked during that period of time, the average daily hours the employee would have been reasonably expected to be scheduled to work when hired.

DOL [guidance](#) and the CARES Act provide that employers may choose to pay employees more than the mandated cap; employers may not, however, receive tax credits for any leave payments exceeding the statutory cap. See [DOL Guidance: Families First Coronavirus Response Act: Questions and Answers](#), Question 34. Employers may also allow and even require employees to use employer-provided leave to run concurrently with their paid Public Health Emergency Leave. See [DOL Guidance: Families](#)

[First Coronavirus Response Act: Questions and Answers](#), Question 33. In such a case, employers are required to pay the full amount to which an employee would be entitled under the employer's paid leave policy. Id. For employees who have exhausted their employer-provided leave, but not their normal FMLA leave, the employer still must pay those employees for subsequent periods of Public Health Emergency Leave at a rate of two-thirds (2/3) the employees' regular rate of pay (capped at \$200 per day and \$10,000 in the aggregate). Id.

## Tax Credit

On March 31, 2020, the IRS issued [guidance](#) on tax credits for leave taken under the FFCRA. For guidance on these tax credits, see [Coronavirus Tax Relief – Families First Coronavirus Response Act \(H.R. 6201\)](#) and [Coronavirus Aid, Relief, and Economic Security Act or the "CARES Act" \(H.R. 748\) – Miscellaneous Provisions](#). In addition, below we address IRS recordkeeping requirements for the tax credits and additional DOL guidance on tax credits.

### IRS Guidance on Tax Credit Recordkeeping Requirements

The IRS advises employers who intend to claim a tax credit to retain the following documentation the IRS will require to process the tax credits:

- **Records and documentation related to employee's leave.** The employer must keep records and documentation related to and supporting each employee's leave, which will include the employee's written request for leave setting forth:
  - o The employee's name
  - o The date or dates for which leave was requested
  - o A statement of the COVID-19 related reason and written support for which the employee is requesting leave:
    - **In the case of a leave request based on a quarantine order or self-quarantine advice**, the name of the governmental entity ordering quarantine or the name of the healthcare 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 childcare provider unavailability**, the name and age of the child (or children) to be cared for, the name of the school that 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 and 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 14 during daylight hours, a statement that special circumstances exist requiring the employee to provide care

- o A statement that the employee is unable to work, including telework, for such reason

See IRS, [COVID-19 Related Tax Credits for Required Paid Leave Provided by Small and Midsize Businesses FAQs](#), Question 44.

- **Documentation related to the determination of amount of sick and family leave.** The employer must keep documentation to show how the employer determined the amount of qualified sick and family and medical leave wages it paid to employees, including records of work, telework, and qualified sick and qualified family and medical leave. See IRS, [COVID-19 Related Tax Credits for Required Paid Leave Provided by Small and Midsize Businesses FAQs](#), Question 45.
- **Documentation related to the determination of health plan expenses.** The employer must keep documentation to show how the employer determined the amount of qualified health plan expenses it allocated to wages. See IRS, [COVID-19 Related Tax Credits for Required Paid Leave Provided by Small and Midsize Businesses FAQs](#), Question 45.
- **Tax form records.** Employers also should retain Forms 941, Employer's Quarterly Federal Tax Return, and 7200, Advance of Employer Credits Due to COVID-19, and any other applicable filings with the IRS requesting tax credits. Employers should maintain all records of employment taxes for at least four years after the date a tax becomes due or is paid, whichever is later. See IRS, [COVID-19 Related Tax Credits for Required Paid Leave Provided by Small and Midsize Businesses FAQs](#), Question 45.

## Additional DOL Guidance on Tax Credits

The DOL has also provided the following additional guidance concerning tax credits:

- **Denial of leave.** Employers may deny leave to employees who do not provide materials sufficient to support the applicable tax credit. See [DOL Guidance: Families First Coronavirus Response Act: Questions and Answers](#), Question 15.

- **Unavailability of tax credits in certain circumstances.** No tax credits are available for leave benefits in excess of, or for reasons that do not qualify for benefits under, the FFCRA. See [DOL Guidance: Families First Coronavirus Response Act: Questions and Answers](#), Question 34.

## Emergency Paid Sick Leave Act

Like the Emergency Family and Medical Leave Expansion Act, the Emergency Paid Sick Leave Act went into effect on April 1, 2020, and runs through December 31, 2020.

## Employer Coverage

The employer coverage requirements under the Emergency Paid Sick Leave Act are the same as under Emergency Family and Medical Leave Expansion Act. 29 C.F.R. § 826.40. It applies to private employers to the extent they have fewer than 500 employees, and it applies to all public employers. For more information on employer coverage under the FFCRA, see the “Employer Coverage” subsection in the “Emergency Family and Medical Leave Expansion Act” section of FFCRA: Detailed Analysis above.

Employers should also be cognizant of state and local ordinances that expand on the requirements of the FFCRA and Emergency Paid Sick Leave Act. For example, on April 7, 2020, Los Angeles Mayor Eric Garcetti issued an Emergency Order requiring companies with 500 or more employees within the City of Los Angeles or 2000 or more employees nationally to provide up to 80 hours of Supplemental Paid Sick Leave for COVID-19-related reasons with terms that deviate from the Emergency Paid Sick Leave Act. The cities of San Jose and San Francisco have also followed suit.

## Limited Small Business Exemption

Like the Emergency Family and Medical Leave Expansion Act, the Emergency Paid Sick Leave Act also allows the Secretary of Labor to issue regulations that exempt small businesses with fewer than 50 employees if the obligations would jeopardize the viability of the business as a going concern. See DOL [guidance](#), Question 58. For more information on this exemption, see the “Limited Small Business Exemption” subsection in the “Emergency Family and Medical Leave Expansion Act” section of FFCRA: Detailed Analysis above.

## Qualifying Events for Paid Sick Leave

As stated above, to demonstrate a qualifying need for emergency paid sick leave, an employee must be unable to work (or telework) due to one or more of the following seven reasons:

- 1 The employee is subject to a federal, state, or local quarantine or isolation order related to COVID-19. 29 C.F.R. § 826.20(a)(i).
- 2 The employee has been advised by a healthcare provider (i.e., a licensed doctor of medicine, nurse practitioner, or other healthcare provider permitted to issue a certification for purposes of the FMLA) to self-quarantine due to concerns related to COVID-19. 29 C.F.R. § 826.20(a)(ii).
- 3 The employee is experiencing [symptoms](#) of COVID-19 and seeking a medical diagnosis. 29 C.F.R. § 826.20(a)(iii).
- 4 The employee is caring for an individual subject to a federal, state, or local quarantine or isolation order related to COVID-19. 29 C.F.R. § 826.20(a)(iv).
- 5 The employee is caring for an individual who has been advised by a healthcare provider to self-quarantine due to concerns related to COVID-19. 29 C.F.R. § 826.20(a)(iv).
- 6 The employee is caring for his or her child for one of the following reasons: the child’s school or place of care has been closed, or the child’s care provider is unavailable, due to COVID-19 precautions. 29 C.F.R. § 826.20(a)(v).
- 7 The employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services in consultation with the Secretary of Treasury and the Secretary of Labor. 29 C.F.R. § 826.20(a)(vi).

According to the U.S. Centers for Disease Control and Prevention (CDC), the symptoms include fever, cough, shortness of breath, bluish lips or face, new confusion or inability to arouse, persistent pain or pressure in the chest, and trouble breathing. Employers should monitor the [symptoms page](#) of the CDC for updates as more information is uncovered about the coronavirus.

Many states and localities have issued shelter in place orders for their communities. Currently, there is no official guidance determinative on the issue of whether this qualifies as an order for quarantine or isolation for paid sick leave. Similarly, there is no official guidance on whether employees who have recently returned from international travel, who the CDC says should quarantine for 14 days before returning to work, are eligible for emergency paid sick leave. DOL [guidance](#) did not specifically address either issue. That guidance does, however, indicate that emergency paid sick leave does not extend to an employee who is sent home and who is not paid because an employer does not have work for him or her. That is true, the DOL states, whether the employer closes the

worksite for lack of business or because it is required to close pursuant to a federal, state, or local directive. Extended unemployment benefits provided under the CARES Act would cover an employee unable to reach his or her place of work because of a quarantine or the advice of a healthcare provider to self-quarantine. Thus, it is possible that the CARES Act benefits are meant to fill these gaps where emergency paid sick leave is unavailable to employees who are otherwise unable to work due to COVID-19-related reasons.

### Pay Requirements

As explained above, where an employee takes emergency paid sick leave for his or her own self-isolation, medical diagnosis, or treatment (i.e., reasons (1), (2), or (3) in the qualifying events list above), that employee will receive 100% of his or her regular rate of pay for the duration, subject to a \$511 daily and \$5,110 aggregate cap over the two-week period. See 29 CFR 826.22. Where an employee takes emergency paid sick leave to care for another individual, to care for the employee's child, or due to a substantially similar condition to COVID-19 (i.e., reasons (4), (5), (6), or (7) in the qualifying events list above), that employee will receive two-thirds (2/3) of his or her regular rate of pay or two-thirds (2/3) the applicable minimum wage, whichever is higher, for the duration, subject to a \$200 daily and \$2,000 aggregate cap over the two-week period. Id. Note that an employee taking emergency paid sick leave to care for his or her child (i.e., reason (6) in the qualifying events list above) may also be eligible for Public Health Emergency Leave under the FFCRA.

DOL [guidance](#) and the CARES Act provide that employers may choose to pay employees more than the mandated cap; employers will not receive tax credits for any leave payments exceeding the statutory cap. See [DOL Guidance: Families First Coronavirus Response Act: Questions and Answers](#), Question 34.

### Number of Sick Leave Hours Provided

Full-time employees are entitled to 80 hours of paid sick leave. Part-time employees are entitled to sick leave equivalent to those hours the employee works, on average, over a two-week period.

For those employees paid under atypical or unusual arrangements, employers should average the employee's hours worked per day over the previous six months or, if the employee has not worked during that period of time, the average daily hours the employee would have been reasonably expected to be scheduled to work when hired. Such a part-time employee may take paid sick leave for this number of hours per day for up to a two-week period. If

this calculation cannot be made because the employee has not been employed for at least six months, employers should use the number of hours that the employer and employee agreed that the employee would work upon hiring. If there is no such agreement, employers may calculate the appropriate number of hours of leave based on the average hours per day the employee was scheduled to work over the entire term of his or her employment.

### DOL Guidance on Employee Use of Paid Sick Leave

Pursuant to the CARES Act, an employer's requirement to provide paid leave under the Sick Leave act expires once an employee has been paid for the equivalent of 80 hours of work or upon the employee's return to work after taking paid sick leave under the Act. DOL [guidance](#), however, indicates that an employee may return to work before the exhaustion of these 80 hours and, prior to December 31, 2020, may use the remainder of any paid leave for the same or another qualifying reason. See [DOL Guidance: Families First Coronavirus Response Act: Questions and Answers](#), Question 21.

DOL [guidance](#) Question 21 asks: "May I take my paid sick leave intermittently while working at my usual worksite (as opposed to teleworking)?" The DOL responds that "[i]t depends on why you are taking paid sick leave and whether your employer agrees. Unless you are teleworking, paid sick leave for qualifying reasons related to COVID-19 must be taken in full-day increments." Congress disagrees that employees who are not telecommuting must take intermittent paid emergency sick leave in full-day increments, citing to the express language of the FFCRA, which imposes no such restriction or minimum increment on intermittent leave.

Section 5107 of the Emergency Paid Sick Leave Act (see 116 H.R. 6201) states that nothing in the Act will be construed to diminish rights or benefits to which an employee is already entitled under any other federal, state, or local law; collective bargaining agreement; or existing employer policy. Thus, employers should be cognizant that if they currently have a PTO/vacation policy and/or if they are in a state or locality that requires paid sick leave, such as California or the City of Los Angeles, they need to provide paid sick leave benefits under the FFCRA in addition to those already-existing benefits. See [Paid Sick Leave State and Local Law Survey \(Private Employers\)](#).

Furthermore, Section 5102(e)(2)(B) of the Act (see 116 H.R. 6201) states that an employer may not require employees to use other paid leave before he or she may use the paid sick leave entitlements afforded under this law. This also

tends to suggest that employers cannot retroactively apply this paid sick leave. For example, an employer cannot deduct from this paid sick leave allotment paid time that was afforded to the employee prior to the date the law went into effect.

Employers may allow employees to use employer-provided leave to supplement their emergency paid sick leave. See [DOL Guidance: Families First Coronavirus Response Act: Questions and Answers](#), Question 31. Unlike with Public Health Emergency Leave, however, employers may not require employees to use their employer-provided leave instead of or concurrently with their paid sick leave under the FFCRA, unless the employee agrees. See [DOL Guidance: Families First Coronavirus Response Act: Questions and Answers](#), Question 32.

### Job Protection

As with Public Health Emergency Leave, DOL [guidance](#) clarifies that employers must restore employees to their same or a similar position upon their return from emergency paid sick leave. See [DOL Guidance: Families First Coronavirus Response Act: Questions and Answers](#), Question 43.

### Penalties for Noncompliance

The Emergency Paid Sick Leave Act prohibits any employer from discharging, disciplining, or in any other manner discriminating against any employee who takes leave in accordance with the Act or who has filed a complaint or who has caused a proceeding to be instituted under the Act or who provides testimony in any such proceeding. 29 C.F.R. § 826.150(a). Any employer who willfully violates this prohibition is deemed in violation of the FLSA and is subject to penalties. 29 C.F.R. § 826.150(b)(2).

Employers that violate the terms of the Emergency Paid Sick Leave Act by not paying employees for the leave will be considered to have failed to pay minimum wage in violation of the FLSA and be subject to FLSA penalties. 29 C.F.R. § 826.150(b)(1).

As stated above, the DOL has clarified that its 30-day moratorium from enforcing the FFCRA ran from March 18 through April 17, 2020. After April 17, 2020, the DOL lifted the stay of enforcement and the DOL is now fully enforcing violations of the FFCRA. The DOL will retroactively enforce violations back to April 1, 2020, if employers have not remedied any violations after April 17, 2020. See [DOL Guidance: Families First Coronavirus Response Act: Questions and Answers](#), Questions 78–79.

### Tax Credit

Similar to the tax credit afforded to employers for Public Health Emergency Leave, the Emergency Paid Sick Leave Act also provides payroll tax credits to cover the cost of paid sick leave. Notably, certain “self-employed individuals” may also obtain benefits and tax credits under the Emergency Paid Sick Leave Act.

For more information on the FFCRA tax credit, see IRS, [COVID-19 Related Tax Credits for Required Paid Leave Provided by Small and Midsize Businesses FAQs, Coronavirus Tax Relief – Families First Coronavirus Response Act \(H.R. 6201\)](#), and [Coronavirus Aid, Relief, and Economic Security Act or the “CARES Act” \(H.R. 748\) – Miscellaneous Provisions](#). Also see the subsection entitled “Tax Credit” in the Emergency Family and Medical Leave Expansion Act section of FFCRA: Detailed Analysis above.

## Americans with Disabilities Act Issues

Even during a pandemic such as COVID-19, employers should still be conscious of their obligations to their employees and to the public so as not to impede on rights, including those related to public accommodations and employee health.

In light of the ongoing COVID-19 pandemic, the EEOC has offered [guidance](#) relaxing certain requirements related to the ADA and the Rehabilitation Act. For most employers, the most pressing EEOC guidance relates to the Americans with Disabilities Act (ADA), 42 U.S.C. § 12101.

### Permissible Medical Inquiries

The EEOC is giving employers leeway regarding certain medical inquiries, which the ADA generally previously prohibited. For example, the EEOC relates that during a pandemic, employers may ask employees who call in sick whether “they are experiencing symptoms of the pandemic virus[,]” which “include symptoms such as fever, chills, cough, shortness of breath, or sore throat.” See [What You Should Know About COVID-19 and the ADA the Rehabilitation Act, and Other EEO Laws](#). Also see the Medical Examinations and Medical Inquiries and Certifications sections in [Americans with Disabilities Act: Guidance for Employers](#).

Employers may also inquire about, and screen employees for, symptoms related to COVID-19, as determined by the latest CDC guidance. See [What You Should Know About COVID-19 and the ADA the Rehabilitation Act, and Other EEO Laws](#) (EEOC) and [Interim Guidance for Businesses and Employers](#) (CDC).

## Temperature of Employees and Fitness for Duty

The EEOC also has given employers leeway to take the body temperature of employees during the COVID-19 pandemic and to require employees to stay home if they have COVID-19 symptoms. Consistent with its general ADA guidance, the EEOC also has confirmed that employers may require such employees to provide a note from a physician certifying fitness for duty, but the EEOC warns that medical professionals may not now be able to provide notes in a timely manner. See [What You Should Know About COVID-19 and the ADA the Rehabilitation Act, and Other EEO Laws](#).

## Privacy and Discrimination Issues

The EEOC also has reminded employers of their obligation to “maintain all information about employee illness as a confidential medical record in compliance with the ADA.” *Id.* However, the EEOC now advises that an employer may release an employee’s identity to a public health agency when it learns that the employee has COVID-19.

Before visitors come on site, employers may want to evaluate whether it is feasible to have those visitors complete a questionnaire before coming on site, including questions on the individual’s recent travel; contact with individuals exposed to COVID-19; or whether he or she is currently showing symptoms of, awaiting test results for, or is diagnosed with the coronavirus.

Employers should also be cautious not to run afoul of any state-equivalent statutes to the ADA, such as California’s Fair Employment and Housing Act, which may have stricter or different requirements or considerations. See Disability Comparison Chart for ADA and FEHA (CA) and Discrimination, Harassment, and Retaliation State Practice Notes Chart. Additionally, employers should also consider whether they must make disclosures under privacy acts such as the California Consumer Privacy Act (CCPA) about the collection of any information from employees or visitors, including temperatures or other information. See California Consumer Privacy Act (CCPA) Overview and California Consumer Privacy Act (CCPA) Resource Kit.

## Accommodations for Employees

The EEOC warns employers that the COVID-19 outbreak does not nullify the need to explore potential accommodations for employees who may be at higher risk of infection due to a preexisting disability. According to the EEOC, “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.” See [What You Should Know About COVID-19](#)

[and the ADA the Rehabilitation Act, and Other EEO Laws](#). Employers should therefore consider reasonable actions when presented with accommodations requests from employees with disabilities. For more information on ADA accommodations, see [Accommodating a Disability under the Americans with Disabilities Act Checklist](#). For additional guidance regarding the ADA generally, see [Americans with Disabilities Act: Guidance for Employers](#). For more information on ADA and disability management, see the ADA and Disability Management page.

## Wage and Hour Issues

Because the COVID-19 outbreak has had vast economic consequences, mass layoffs and shutdowns have become prevalent. Employers who have managed to avoid such drastic options may want to consider other measures, such as reduced work hours, and wage/salary reductions. While these alternatives may help reduce labor costs, they are not risk-free propositions.

Reduced work schedules, for example, may jeopardize the exempt status of salaried exempt employees under the Fair Labor Standards Act (FLSA), 29 U.S.C. § 201 et seq., which could then trigger minimum wage and overtime pay requirements. For statutory requirements and exemptions under the FLSA, see the Wage and Hour Statutory Requirements and Exemptions page. For compensation issues, see Wage and Hour Compensation page.

## FLSA Compliance

Federal and state wage and hour laws have not changed in the COVID-19 environment. However, wage and hour laws may impact a number of actions employers may consider today in reaction to the coronavirus outbreak.

Employers considering temporary or permanent layoffs must consider any state-specific requirements related to payment of final wages, bonuses, commissions, and accrued but unused vacation time. The timing of these payments and what must be included in them or may be excluded from them varies from one state to another. For example, employers in California and Massachusetts must generally pay final wages to a terminated employee immediately upon termination, whereas an employer in Texas must generally pay final wages to a terminated employee no later than the sixth day after the date of termination. See the Pay Timing, Frequency, Methods, and Deductions column of [Wage and Hour State Practice Notes Chart](#).

Similarly, employers considering other cost-saving measures, like reduced work hours, wage/salary reductions and furloughs, may help reduce labor costs, but they are not risk-free propositions. For example, reducing employee’s

work hours by more than 50% over the course of several months can trigger the notice requirements under the Worker Adjustment and Retraining Notification (WARN) Act.

The selection of employees for reduced schedules or other cost-saving measures also can create the potential for disparate treatment and/or disparate impact claims. Employers should use objective selection criteria to reduce these risks. See [Reductions in Force and WARN Compliance](#).

Likewise, a furlough or reduced work schedule may jeopardize the exempt status of salaried exempt employees under FLSA, which could then trigger minimum wage and overtime pay requirements. See [Reduction in Force \(RIF\) Alternatives](#), [What Employers Need To Know About Furloughs](#), and [Furloughs: Weighing The Unemployment Costs And Benefits](#).

Employers should instead consider the following measures to reduce risk of noncompliance with the FLSA:

- **Full-week shutdowns (of one or more weeks).** This strategy avoids improper salary deductions and complies with the FLSA because employers must only pay exempt employees their salary for weeks during which they perform work. If an exempt employee performs no work during an entire workweek, the employee is not entitled to his or her salary for that week. Employers who implement this option must prohibit exempt employees from performing work and should consider eliminating an employee's ability to work remotely (e.g., by denying email access or remote connectivity). If an employee nevertheless performs work, the employer must pay his or her corresponding salary but may discipline the employee for violating a no-work directive.
- **Reduced workweek and reduced salary.** A prospective reduced workweek coupled with a reduction in salary may avoid violations of the salary basis test under the FLSA, provided the salary reduction is a bona fide change reflecting long-term business needs. Before implementing any changes, however, employers should notify, at least one week in advance if possible, affected employees in writing of a reduced workweek and salary plan.

Care must be taken to avoid salary reductions that are modified from time to time, as those may be misconstrued as being inconsistent with exempt status. The reduced salary cannot dip below the federal threshold (\$684 per week or \$35,568 per year) or applicable state standards exceeding the federal threshold. Otherwise, an exempt employee may become nonexempt. Employers also should keep in mind potential notice requirements under state or local laws, including

so-called Wage Theft Prevention Act (WTPA), as well as potential issues regarding eligibility for healthcare coverage for employers using an Affordable Care Act (ACA) lookback measurement period method. A reduced workweek may also affect healthcare eligibility and other benefits coverage.

- **Reduced salary without a reduced workweek.** Unless prohibited by an agreement or state or local law, an employer is typically free to set salary/wage rates at any level (subject to minimum wage and salary requirements). A prospective reduction in employee salaries generally does not violate the FLSA if it is a bona fide change reflecting long-term business needs. The guidance above regarding reduced salaries and workweeks also applies in this context.
- **Converting salaried employees to hourly employees and curtailing hours.** Employers may find helpful reducing the salary of an exempt worker beneath the federal or a state threshold for salaried exempt status. It also might consider this option if it anticipates making repeated changes to compensation depending on future business needs. This latter option, though, is useful primarily if the hours of the salaried exempt worker are subject to a rather stable weekly schedule and the employee records his or her hours on a daily basis and reports them weekly. Employer must instruct these employees not to look at work emails outside of their hourly schedules to avoid claims of additional "on call" hours. The considerations noted above, such as healthcare coverage and providing any WTPA notices, also should be considered.

## Vacation or Paid Time Off

Another potential cost-saving measure may be for an employer to require use of vacation or paid time off (PTO). While the FLSA does not address the use of vacation or paid time off and employers are generally free to require use of PTO in accordance with their policies or practices, some state laws impose restrictions on mandatory use of vacation or PTO. Before requiring employees to exhaust their vacation or PTO benefits, employers should consult state and local law requirements. For state law on paid vacation and PTO, see [Paid Vacation and PTO State Law Survey](#). Practically speaking, this option likely does not lead to immediate cost savings; employees simply would be substituting PTO for actual work time.

Employers must always remember to consult state and local laws, which are changing daily and consider whether any state wage and hour laws limit their ability to impose any desired cost-saving measure of the sort described here. For state wage and hour laws, see [Wage and Hour State Practice Notes Chart](#).

## Meal Periods and Rest Breaks

For hourly employees working remotely, employers should continue to require them to track their work hours and lunch breaks. For state laws on meal periods and rest breaks, see [Meal Period and Rest Break State Law Survey](#).

## Tracking Hours Worked and Overtime

Employers should require employees to submit weekly electronic time sheets that include total hours worked and a statement affirming the accuracy of the hours reported. See [Timekeeping Policy \(Long Form with Acknowledgment\)](#). See also [Compensation and Payroll Practices Policy](#). Employers may continue to enforce policies requiring authorization before employees may work overtime hours, keeping in mind they still must pay for any overtime hours worked but can discipline employees for violations of policies and directives. See [Overtime Policy](#). For more information on overtime requirements, see [Overtime Requirements for Hourly Non-Exempt Employees under the FLSA](#).

## Telecommuting Employees

Under the current COVID-19 circumstances, and even more generally, employers may require employees to work from home. However, there are numerous aspects of employment laws and regulations which employers cannot ignore when it comes to remote employees.

First, employers may not discriminate regarding any protected category when they assign employees to work remotely. Second, various state and federal laws still apply. In fact, legal and practical implications applicable to telecommuting employees may surpass those applicable to in-office employees. For example, an employee who works from home may need additional or other resources not available in his or her office location, such as ergonomic chairs or work stations that allow the employee to stand while working. Provided it does not present the business with undue hardship, employers will need to accommodate workers with those sorts of needs. Note that the EEOC has indicated delays in providing accommodations may be excusable.

Also, the Occupational Safety and Health Act (OSH Act) continues to apply to employees who work remotely. While OSHA indicates it will not inspect home work locations and will not hold employers responsible for accidents and injuries which occur there, nonetheless employers must still abide by OSHA reporting requirements, such as OSHA 300 logs.

In addition, with regard to employees working remotely, employers must continue to comply with other aspects of

the law already applicable to all of their employees. For example, employees who work remotely remain entitled to statutory and regulatory meal and rest breaks as well as the benefits of overtime pay. See Wage and Hour task page.

Employers also need to pay attention to cybersecurity issues attendant to telecommuting employees.

Finally, all employers need to understand that the current circumstances and legal implications are in flux and changing daily, if not hourly. Employers need to monitor closely legal developments and consult with counsel as they arise.

For more guidance on telecommuting employees, see [Telecommuting Employees: Best Practices Checklist](#).

## Traveling Employees

With regard to traveling employees during a pandemic, employers should consider suspending business travel based on the recommendations issued by public health authorities, including the CDC.

While employers have great leeway in controlling the work-related activities of their employees, including prohibiting or limiting business travel, they do not have the same control of employees' personal travel plans. However, employers can encourage employees to limit or abandon personal travel during a pandemic. Employers may be able to require employees who choose to engage in personal travel to self-quarantine for a specified period (e.g., generally 14 days for COVID-19 exposure) upon their return. These restrictions may be tailored depending on the nature of travel, the destinations visited, and the status of public health and employer policies. If an employee exhibits symptoms related to a pandemic illness upon return, employers may require them to stay home and, before they return to work, provide a doctor's certification clearing them for duty.

For additional guidance regarding employee travel during the COVID-19 outbreak, see [Coronavirus \(COVID-19\) Considerations for Traveling Employees](#).

## Labor-Management Relations

Employers with unionized workforces should consider whether they must bargain with their union(s) over decisions to implement layoffs, plant shutdowns, reduced work schedules, pay reductions, or other cost-saving measures or the effects those actions will have on unionized employees.

Employers with unionized workforces also should contemplate whether their collective bargaining agreements

limit their ability to implement cost-saving measures. For example, a collective bargaining agreement may address potential layoff decisions, including the order in which the employer may lay off employees (e.g., by department or company-wide seniority) and whether employees may replace, or “bump,” coworkers based on seniority. Collective bargaining agreements also may dictate the order in which an employer should recall employees from a layoff when the employer resumes operations or needs additional workers.

For more information on labor-management issues, see Labor-Management Relations practice note page.

## WARN Act Obligations / Business Closings

The federal Worker Adjustment and Retraining Notification (WARN) Act, 29 U.S.C. § 2101 et seq., generally requires employers with 100 or more employees to provide 60 days’ notice of a mass layoff or plant closing. Employers must provide notices to employees, employees’ collective bargaining representative (as applicable), and to certain state and local officials. See [WARN Notice to the Chief Elected Official of the Unit of Local Government](#), [WARN Notice to the State Dislocated Worker Unit](#), [WARN Notice to Affected Non-union Employees](#), and [WARN Notice to Union Representatives of Affected Employees](#).

The terms mass layoff and plant closing are defined as follows:

- **Mass layoff.** A mass layoff is a reduction in force at a single site of employment in which 50 or more employees comprising at least 33% of active employees or at least 500 employees are laid off for more than six months or have their hours reduced more than 50% during each month of the six-month period.
- **Plant closing.** A plant closing is the permanent or temporary shutdown of a single site of employment or facility or operating units within a single site of employment that results in 50 or more employees being laid off for more than six months or having their hours reduced more than 50% during each month of the six-month period.

Exceptions to the 60-day notice requirement may exist for faltering companies (but only as to plant closings) or for employers who experience unforeseeable business circumstances or natural disasters. If an employer believes any of these three exceptions may apply, the employer must provide as much notice as possible under the circumstances. Failure to provide any notice to affected employees may negate the exceptions.

Failure to provide 60 days’ notice, or as much notice as possible when relying on an exception, also may result in back pay and benefit awards to employees and civil penalties.

Employers must also consider state and local notice requirements (commonly known as “mini-WARN Acts”), some of which have notice requirements in addition to, or different from, the federal WARN Act. Note that some states have chosen or may decide to suspend some of their mini-WARN requirements during the COVID-19 pandemic. For example, through [Executive Order N-31-20](#), California Governor Gavin Newsom has conditionally suspended certain parts of its mini-WARN Act due to coronavirus. See [California Suspends Mini-WARN Obligations, But Still Mandates Notice](#) and [California Issues Guidance on Conditional Suspension of California WARN Act Notice Requirements](#). For information on mini-WARN Acts and state laws concerning mass layoffs and plant closings, see the Mass Layoff and Plant Closing Laws column of [Investigations, Discipline, and Terminations State Practice Notes Chart](#).

For more information on reductions in force and WARN, see [Reductions in Force and WARN Compliance](#) and [WARN Act Compliance Checklist](#).

For guidance on plant closings, see [Plant Closing Checklist](#).

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Richard D. Glovsky, a partner in Locke Lord's Boston office, co-chairs the Firm's robust Labor and Employment Practice Group. He handles employment litigation, including class actions, wage and hour issues, and discrimination and retaliation claims; prosecutes cases for Fortune 500 companies and other businesses to protect their trade secrets and to prevent former employees from violating non-competition and non-solicitation obligations; and is a valued counselor on employment related matters. Mr. Glovsky is recognized in both Chambers USA and The Best Lawyers in America for his work in labor and employment law. He is a former Assistant United States Attorney and Chief of the Civil Division of the United States Attorney's Office for the District of Massachusetts.

### **Jordon R. Ferguson, Associate, Locke Lord LLP**

Jordon Ferguson's practice is devoted to providing litigation and counseling services to employers on national and state-specific bases.

Jordon has extensive experience defending and prosecuting claims on behalf of employers on individual, representative, and class-wide claims before state and federal courts and governmental agencies, including the Equal Employment Opportunity Commission, the California Department of Fair Employment and Housing, and the California Division of Labor Standards Enforcement. He has assisted clients with defending myriad claims, including claims of employment discrimination and harassment, violation of family and medical leave laws, as well as class, collective, and representative actions brought under the Fair Labor Standards Act (FLSA), California Labor Code, and the California Private Attorneys' General Act (PAGA).

Jordon is an aggressive litigator that partners with his clients to promote "best practices" focused on litigation avoidance. He regularly advises employers regarding their drafting and implementation of new policies and procedures. Moreover, a large share of his practice involves working hand-in-hand with his clients to evaluate risk. To wit, Jordon is frequently called upon for internal and external investigations, on-site employee and management trainings, and the handling of sensitive workplace issues.

### **Rufino Gaytán III, Associate, Locke Lord LLP**

Rufino Gaytán counsels employers in every aspect of labor and employment law. Rufino has extensive experience advising clients on workplace health and safety issues, and he has represented clients before the Occupational Safety and Health Administration (OSHA). Rufino has advised and represented clients during OSHA's initial onsite inspections, negotiated the reduction or elimination of alleged violations and penalties and defended clients before the Occupational Safety and Health Review Commission.

Rufino has also developed considerable experience representing clients in labor disputes, including collective bargaining negotiations, unfair labor practice charges, union election petitions and most other aspects of a collective bargaining relationship. Rufino regularly defends clients before the National Labor Relations Board (NLRB) and has represented clients in labor arbitration proceedings.

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