

COVID-19: Top Employer Questions Answered

The following Q & A provides guidance on top employer questions related to COVID-19. The information provided is current at the time of publication, but because the governmental response to COVID-19 is constantly changing, the information provided may quickly become outdated. Continue to check the COVID-19 Resource Center for updates.

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Families First Coronavirus Response Act

Q Are my employees entitled to emergency paid sick leave or extended FMLA benefits if they are laid off, furloughed, or generally not working?

A No. Employees may only take advantage of FFCRA benefits if the employer has work for them to do, but the employee is unable to perform the work either in person or remotely because of one of the qualifying reasons. If the employer is not operational, does not have work for the employee, or the employee just refuses to come to work when work is available to them, they do not qualify for FFCRA benefits.

Q An employee claims a need to take care of their child whose school/childcare is closed/unavailable due to COVID-19, but I suspect their spouse/significant other is working from home too. Do they still get FFCRA benefits?

A If the employee otherwise qualifies for FFCRA benefits and they certify in writing that no other suitable person (such as a co-parent, co-guardian, or the usual childcare provider) is available to care or will be caring for the child during the period of requested leave, an employer may risk violating the FFCRA if they deny benefits due to a suspicion of another spouse/significant other's availability. A denial of benefits under the FFCRA is considered a wage and hour violation. Employers should review the situation with legal counsel before denying benefits on this basis.

Q An employee went out on leave before April 1st and has continued leave after April 1st, how do I count their leave entitlement under FFCRA?

A FFCRA entitlement began as of April 1st. All emergency paid sick leave is available to eligible employees as of that date regardless of what type of leave the employee took prior to April 1, and regardless of whether an employee's regular FMLA entitlement was exhausted prior to April 1. Extended FMLA is available as of April 1st provided that an employee's total FMLA entitlement (including regular FMLA) has not been exhausted. If some FMLA entitlement has been used to date, the employee is eligible to use Extended FMLA for the remaining portion of the 12-week entitlement that was not already exhausted. Extended FMLA adds an additional reason for taking FMLA leave, but it does not otherwise extend the amount of FMLA entitlement available to employees. Employers should review specific state laws for coordination with FFCRA.

Q What kind of isolation or quarantine order satisfies the requirements for EPSL benefits?

A For the purposes of emergency paid sick leave, a quarantine or isolation order includes quarantine, isolation, containment, shelter-in-place, or stay-at-home orders issued by any Federal, State, or local government authority that cause the Employee to be unable to work even though his or her Employer has work that the Employee could perform but for the order. This also includes when a Federal, State, or local government authority has advised categories of citizens (e.g., of certain age ranges or of certain medical conditions) to shelter in place, stay at home, isolate, or quarantine, causing those categories of Employees to be unable to work even though their Employers have work for them.

Q When can an employee self-quarantine for COVID-19 related concerns and receive emergency paid sick leave benefits?

A When a healthcare provider believes that the employee has or may have COVID-19, or is particularly vulnerable to COVID-19 and advises them to self-quarantine, and following the healthcare provider's advice prevents them from performing work either in person or remotely that the employer has available for them, the employee may be eligible for EPSL.

Q Does an employee experiencing COVID-19 symptoms qualify for emergency paid sick leave benefits?

A An employee experiencing fever, dry cough, shortness of breath, or any other COVID-19 symptoms identified by the U.S. Centers for Disease Control and Prevention, may be eligible for EPSL only for the period of time they are unable to work in person or remotely because they are taking affirmative steps to obtain a medical diagnosis, such as making, waiting for, or attending an appointment for a test for COVID-19.

Q An employee needs to care for an “individual” who can’t work because of either being subject to an isolation or quarantine order or has been advised by a healthcare provider to self-quarantine. How is “individual” defined?

A “Individual” includes an Employee's immediate family member, a person who regularly resides in the Employee's home, or a similar person with whom the Employee has a relationship that creates an expectation that the Employee would care for the person if he or she were quarantined or self-quarantined. For this purpose, “individual” does not include persons with whom the Employee has no personal relationship.

Q When can an employee take intermittent leave under the FFCRA?

A If reporting to the Employer’s worksite, intermittent leave is only available to care for a son or daughter whose school/childcare is closed/unavailable due to COVID-19 related reasons, when the Employer and Employee both agree. If the Employee is permitted to work remotely or normally works remotely from home, the Employer and Employee may agree on an intermittent leave schedule for any qualified reason under the FFCRA.

Q Can I require employees to substitute emergency paid sick leave for any other employer-provided paid sick leave?

A No. EPSL benefits are independent of employer-provided paid sick leave benefits, and must be provided in addition to employer-provided leave benefits.

Employees at Work

Q Can I take employees’ temperatures before entry at work?

A Yes. Keep in mind that nonexempt employees are on the clock and must clock in before having their temperature taken. Employers must pay for the time it takes to undergo a screening. Also, employers should make sure that appropriate precautions are taken and training is provided for the person conducting the screenings. Keep in mind that any information arising from a screening is confidential to the employee being screened.

Q Can I ask employees if they have been diagnosed with COVID-19?

A Employers can ask if they have been experiencing a fever and cough, and can have a policy that employees are required to notify the employer if they do receive a positive diagnosis. However, employers should stay away from asking employees if they have received a medical diagnosis.

Q Should employers allow employees to come to work who are asymptomatic but have a confirmed or suspected exposure to COVID-19?

A Generally, no. Employers cannot guarantee that other employees/customers/vendors/third parties (including building maintenance personnel) will not come into contact with the exposed employee in any way (e.g., entrance, bathroom, kitchen, work space, air space, shared tools/materials/paper, etc.) – keep in mind that a mask and gloves while working with others is not sufficient to prevent the spread of the virus and that the virus lives on surfaces and in the air for extensive periods of time. Employers should have the affected employee remain quarantined for the requisite period of time.

Q An employee does not want to come to work because they are afraid of getting sick. What should I do?

A In light of the employee's concerns, the employer may want to review if it is possible for the employee to work remotely. If not, determine the reason why an employee does not want to come to work. If someone has a condition that may qualify as a disability under the Americans with Disabilities Act (ADA), the employer must engage in the interactive process to determine if a reasonable accommodation can be made for the employee; this may include an unpaid leave of absence. Additionally, determine if any other protections or protected leave is available to the person. Further, have a plan for managing employees who do not qualify for protections under the ADA or any other protected leave. Does the employer want to allow employees to take accrued, unused paid time off, paid sick leave, or an approved unpaid leave of absence for this reason? Will they be enforcing other applicable employer policies? The employer may want to strategize on ways the employee may work that will minimize the employee's exposure. Whatever the decision, make sure it is implemented consistently, in a nondiscriminatory manner. Finally, ensure that proactive steps are taken to provide a safe work environment for all employees. Communicating with employees about measures the employer is taking to keep employees safe can help alleviate their concerns.

Note that Employees may refuse to work if they reasonably believe they are in imminent danger. OSHA defines "imminent danger" to include "any conditions or practices in any place of employment which are such that a danger exists which can reasonably be expected to cause death or serious physical harm immediately or before the imminence of such danger can be eliminated through the enforcement procedures otherwise provided by this Act."

Furloughs, Layoffs, and RIFs

Q What is the difference between furloughs, layoffs, and RIFs?

A A furlough is a temporary unpaid leave of absence while employees remain in employed status. A layoff is when employees are terminated from their position. Typically, employers may reconsider these employees for rehire when the company has work available again. A reduction in force (RIF) is termination of two or more employees, usually involving elimination of their positions.

Q How long can I furlough my employees?

A States have different rules on how long an employer may furlough employees. For example, the California Labor Commissioner is very strict about employees receiving their final pay within a reasonable period under these circumstances. Review relevant California Labor Commissioner opinions [here](#) and [here](#). Employers should review the rules for their state(s) of operation.

Q What information do I need to provide to employees when doing furloughs, layoffs, and RIFs?

A Generally, employees should be notified as soon as possible of the plan to furlough or terminate. Employers must provide whatever unemployment benefits pamphlets and notices are required in their state. There may also be federal and state WARN Act considerations (typically requiring 60-days' advance notice, except under limited and/or emergency situations). If conducting a furlough, identify the end period of the furlough and that the work situation will be reviewed again at that time. If conducting a layoff, communicate whether employees will be eligible for rehire once work becomes available. Keep in mind that employers must comply with state final pay requirements when terminating employees.

Q When do the federal WARN Act and state mini-WARN Act rules apply to employers?

A The federal WARN Act requires employers with 100 or more employees to give at least 60 days' advance notice when conducting a furlough, reduction in force, layoff, or relocation of 50 or more employees. The federal WARN Act has a "natural disaster" exception to the notice timing requirement, and an unforeseeable business circumstances exception that may be applicable to current circumstances. States with mini-WARN Acts have varying requirements, and varying exceptions that may be different from what is stated in the federal version. Employers must be sure to comply with both federal and state requirements.

Q What are some things employers should consider when returning employees to work following furlough or layoff?

A Following a furlough, provide employees advance notice of the end date of the furlough and the date they will be expected to return to work. They would typically be reinstated to their positions, wages, and benefits. If any of those are anticipated to change, review with legal counsel first. If employers need to reinstate employees in phases to match business demand following a furlough or layoff, employers should have a strategy in place on how this will be accomplished, using objective criteria for the order of reinstatement (e.g., seniority). Depending on the state of COVID-19 upon returning employees to the workplace, take into consideration the potential for ongoing exposure to the virus or employees exhibiting symptoms upon return. Also, ensure that your facility is thoroughly cleaned and safe for re-entry.

Wage and Hour Considerations

Q Can employers reduce their employees' pay to account for reduced business demand?

A Employers may reduce salaries and hourly rates for at-will employees, provided that nonexempt employees are paid at least the applicable minimum hourly wage, and exempt employees meet the salary basis requirement applicable in their state of employment. Keep in mind that exempt employees' pay cannot be tied to the quantity of their work, or they may risk losing their exempt status. Exempt employees get paid their salary regardless if they work over or under 40 hours in a workweek. Any reduction in pay for exempt employees should remain in place for a sufficient period of time to maintain exempt status. Selective reductions should be done in a nondiscriminatory manner and based on objective criteria.

Q Can employers determine when an employee can or cannot use paid sick leave or vacation time?

A It depends on what type of time off the employee is seeking to use. Generally, states permit employers to determine when an employee may take vacation or paid time off (PTO). Employers must be consistent in following their own vacation/PTO policies. However, paid sick leave that is mandated by a state or local authority must be provided when the employee qualifies for it and has accrued, unused time available; otherwise, the employer may be subject to penalties for refusing to allow the employee to use the paid sick leave benefit.

Workers' Compensation

Q An employee claims they contracted COVID-19 in the workplace. What should I do?

A Promptly provide the employee with the appropriate workers' compensation claim documents for them to file as applicable in your state of operation. Workers' compensation may cover the illness if it is work related. However, the workers' compensation carrier will determine, based on the facts of the individual case, whether or not the claim is valid.