

# COVID-19 EMERGENCY: 5 CRITICAL COMPLIANCE ACTIONS EMPLOYERS SHOULD TAKE NOW



# About This Guide

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The COVID-19 pandemic is creating unprecedented challenges for employers, largely due to new and sweeping employment legislation. These complex laws must be interpreted and acted upon quickly to protect your business and your employees. It's a tremendous undertaking for businesses of all sizes during an already difficult time.

The five steps in this e-guide will provide a firm foundation for legal compliance and appropriate employer response during this national emergency. It addresses the new Families First Coronavirus Response Act (FFCRA) and provides guidelines for handling leave requests, developing policies around remote work, reducing staff levels, and complying with mandatory COVID-related postings and notifications.

While we make every effort to provide the most accurate, up-to-date information at the time of publication, employment laws are constantly changing and this material is subject to change.

## STEP #1:

# Understand Employee Paid Leave Rights Under the Families First Coronavirus Response Act (FFCRA)

Effective April 1, the comprehensive FFCRA covers many different aspects of the federal response to COVID-19. It's intended to be a temporary measure that expires at the end of 2020.

Under certain provisions of the law, employers must provide employees with paid leave for specific COVID-19-related reasons. *Good news for employers: The federal government will cover the full cost of this paid leave.*

## Which Employers Are Affected?

In general, this law applies to private employers with fewer than 500 employees, as well as most public employers.

If you are a private employer with fewer than 50 employees, you may qualify for an exemption from certain provisions if you can show that complying with the law would cause your business to fail – for example, because expenses would exceed revenue or your business would not have enough workers to provide the services required to operate.

The law also specifies exceptions for certain healthcare workers and emergency responders.

### FMLA + FFCRA

If your business is subject to the federal Family and Medical Leave Act (FMLA), keep in mind that an employee can qualify for both types of leave for a COVID-related illness. Let's say an employee has symptoms and cannot work. In this case, the employee is entitled to two weeks of paid leave under the FFCRA. If the employee becomes seriously ill and it extends beyond two weeks, the employee may be eligible for up to 12 additional weeks of unpaid leave (along with job protection) under the FMLA.

However, this part of the law is being contested, so check with a qualified employment law expert before applying it. The Department of Labor advises employers to 'be judicious,' which means providing the paid leave if there's any question.

## Which Employees Qualify?

The FFCRA specifies the conditions under which an employee qualifies for emergency paid leave. The covered reasons are:

- The employee has symptoms of COVID-19 and is seeking a medical diagnosis
- The employee has been advised by a healthcare provider to self-quarantine due to concerns related to the virus
- The employee has been mandated to quarantine by a federal, state or local government agency
- The employee is experiencing any other substantially similar condition to COVID-19, as specified by the Secretary of Health and Human Services
- The employee must care for an individual who was mandated to quarantine by a government order or advised to do so by a healthcare provider
- The employee must care for a child because the child's school is closed or the child's usual caregiver (such as a daycare or a family member) is unavailable due to the pandemic



## How Much Paid Leave Do Employees Receive?

The amount of paid leave provided under the FFCRA varies based on the specific circumstances, as illustrated in the following three scenarios.

- 1 *The employee is quarantined by a government order or on the advice of a healthcare provider, OR the employee is experiencing symptoms and seeking a diagnosis.*

**Amount of paid leave:** The employee is entitled to up to 2 weeks, or 80 hours, of paid leave at his or her regular pay rate. The amount is capped at \$511 per day, up to a total of \$5,110.

- 2 *The employee is caring for an individual subject to quarantine OR the employee is experiencing a substantially similar condition to COVID-19.*

**Amount of paid leave:** The employee is entitled to up to 2 weeks, or 80 hours, of paid leave at two-thirds of his or her regular pay rate. The amount is capped at \$200 per day, up to \$2,000 in total.

- 3 *The employee is caring for a child whose school is closed or whose childcare provider is unavailable due to the pandemic.*

**Amount of paid leave:** In this case, there are two parts to the paid leave.

First, the employee is entitled to up to 2 weeks, or 80 hours, of paid leave at two-thirds of his or her regular pay rate.

Also, if the employee has been with the employer for at least 30 days prior to the leave request, the employee qualifies for up to an additional 10 weeks of paid leave at the two-thirds rate. The amount is capped at \$200 per day, up to \$12,000 over the 12-week period.

## STEP #2:

# Establish a Formal Process for COVID-Related Leave Requests

The federal government will reimburse employers for the cost of all qualifying COVID-related leaves, in the form of tax credits. To take advantage of these tax credits from the IRS, you must keep proper records to prove the leave meets FFCRA criteria.

## Maintain Recommended Documentation

To gather essential information, use a written leave request form that:

- Captures the employee's name, the qualifying reason for requesting leave and the date range of the leave
  - For quarantine reasons, employees should include the name of the government agency or healthcare provider that mandated the quarantine.
  - For childcare-related reasons, employees should provide the name of the school or daycare and the dates they were closed.
- Certifies (via an explicit statement and the employee's signature) that the employee cannot work, even remotely, due to the reason selected.
  - For childcare leave, employees should certify that no one else is available to care for the child, and provide additional details if the child is 14 or older.



### ComplyRight Tip

Emergency paid sick leave is in addition to any standard sick leave or paid time off offered by your business. Do not deduct this COVID-related leave from employees' regular sick leave or paid time off banks.

## STEP #3:

### Follow Best Practices for Reducing Staff Levels

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The impact of the COVID crisis on small businesses is beyond anything we've ever encountered. Despite the federal government's attempts to support continued employment, you may be forced to cut payroll expense to stay afloat. Here are some best practices to consider when evaluating a possible reduction in force.

#### First, Crunch the Numbers

Before deciding whether or how much to reduce payroll, take a step back and analyze your overall financial situation.

- **Estimate the impact on revenue** — Look beyond the next couple of months and create a 6- to 12-month income forecast. It's not easy to predict what's going to happen over that time, but do the best with the information you have.
- **Tighten up all other expenses** — Some expense categories will naturally decline, such as cost of goods and other supplies that scale to sales. Other categories that could be cut drastically without much effort include travel and entertainment. Where else can you trim back?
- **Weigh all of your options and incentives to maintain payroll** — Instead of permanent layoffs, you may be able to secure a forgivable loan from the federal government or pursue a private grant through one of the many organizations offering them. You can also reduce employees' hours or salaries, or implement temporary furloughs until the business starts to recover. Another option is to offer voluntary leaves of absence, which employees may choose to take for their own personal reasons.

## Use Objective Criteria

If you've considered all other options and still find that you have to reduce staff, how do you decide? It's one of the hardest tasks any business owner or manager will ever face, so strive to be as fair as possible. Here are a few guidelines.

- **Consider which business functions are essential during this period** — This will depend on your industry, as well as whether you are under a shutdown order or simply experiencing sales decline.
- **Determine how many people you need to perform each function** — Be realistic and use objective data wherever possible. For example, based on the projected sales decline, how many orders will need to be shipped or how many calls will need to be handled? Try to minimize the number of times you make cuts. Ideally, it's better to cut more people at the same time vs. cutting a few each week. This reduces stress for the employees who remain and helps them stay as productive as possible.
- **Use objective criteria for final decisions** — For example, use tenure or seniority to make the determination. For certain positions, such as sales or production, you can look at relative productivity. Or you can decide to cut temps and part-time workers first. You also want to consider any specialized skills or knowledge your business can't do without.

## Avoid Discrimination

As you make your decisions, be sure to consider any potential adverse impacts on protected classes of employees. You want to be careful that your decisions don't result in a disproportionate effect that could be considered discriminatory.



### ComplyRight Tip

If you're considering a group of employees who all perform essentially the same function, the fairest approach is often to cut by hire date (assuming all other factors are equal).



Be mindful of all federal laws, which protect employees based on race, color, religion, national origin, gender, age, disability and a few other factors. And don't forget state and local laws, which often add protections based on sexual orientation, marital status and even smokers.

## Consider Notification Laws

If you're conducting extensive layoffs, you must uphold certain employee notification laws, including:

- **The federal Worker Adjustment Retraining and Notification Act (WARN Act)**

For employers with more than 100 full-time employees, a mass layoff or plant closure typically requires giving written notice to employees at least 60 days in advance. However, the requirement does not apply for temporary layoffs or closures that will last six months or less. Exceptions also apply for natural disasters and for unforeseeable business circumstances.

The COVID-19 pandemic is likely to qualify for an exception, but you still need to notify employees as soon as 'practicable,' along with an explanation of why the notice period was reduced.

- **State and local laws**

Even if the WARN Act doesn't affect you, be sure to review state laws. Some states have their own requirements related to mass layoffs and plant closings, which may apply to the current situation.

And beyond advance notification laws, many state and local regulations require other written notices be provided to any employee who is laid off. These notices, which cover topics such as unemployment insurance and separation from the company, are changing rapidly as new COVID-related laws are passed.



## Determine Severance Packages and Other Benefits

Another critical consideration before implementing layoffs is severance benefits. Severance benefits are not required by federal law, but they can help ease the pain for employees and send a positive message about how you treat valued employees.

Severance packages vary widely, and may include:

- Severance pay (typically varies by length of service)
- Employer-paid benefits and COBRA premiums
- Letters of recommendation
- Outplacement services
- Access to internal job postings
- Waiver of non-compete restrictions
- Other employee assistance programs



### ComplyRight Tip

Consult an attorney when drafting a severance agreement, as there are federal, state and local regulations that may come into play.

If you offer a severance package, be sure to ask employees to sign a severance agreement in return. The agreement should include a clause that releases you from liability and protects you against legal claims such as wrongful discharge.

## Properly Communicate Layoffs

Following a few best practices when communicating a layoff can help you better handle the situation. Here are a few tips:

- **Prepare a script or a detailed outline to follow** — Delivering this message is never easy, and a script helps you keep to the point and communicate consistently to all affected employees. A script also helps make sure you don't skip important points.

- **Let the employee know the status of the layoff** — Specify whether it's a temporary furlough or permanent layoff, and discuss what's included in the final paycheck. Prepare a written document you can give the employee that explains any severance benefits, health insurance options, and information about other benefits or services being offered.
- **Be clear about future employment** — Explain whether the employee will be automatically called back to work when it becomes available. If it's a permanent layoff, let employees know whether they will be considered for new positions before external applicants are considered.

## Restrict Communication During Temporary Leaves/Furloughs

You may wonder whether it's acceptable to communicate with employees who are on temporary leave or furlough (for example, if you have questions about the work they left behind).

The answer is 'no.'

When you put an employee on a temporary leave of absence or furlough, you want to make it clear that no work-related communication is allowed once the furlough or leave begins. If possible, give the employee enough notice so he or she can transition essential work and information to coworkers on the last day of work.

You may, however, maintain contact with these employees to field questions about benefits or to discuss reemployment. And other employees can maintain social contact, as long as they don't reach out for help with the work.

## STEP #4:

### Review and Update Remote Work Policies

Many employers are allowing employees to work remotely during this crisis. When shifting to a remote work environment, it's important to address any new rules and expectations through formal workplace policies. Critical policies include:

#### ■ Remote work arrangements

- Clarify that the business will determine whether remote work is permitted and which jobs can be performed remotely.
- Reserve the right to end the remote work arrangement when and if the business determines it's no longer needed.
- State whether remote employees are allowed to enter business locations and facilities and the procedures for gaining access.

#### ■ Use of company equipment at home

- Set clear expectations for how the equipment should/should not be used. For example, can it be used for personal reasons?
- Restrict use of equipment by non-employees.
- If applicable, specify how employee should care for the equipment.
- Outline procedures for documenting and reporting loss or damage to company equipment.

#### ■ Time and attendance

- Review/update work schedules and time-tracking procedures for hourly employees working remotely.



- Address any overtime restrictions and authorization procedures. Or, you can implement a temporary “no overtime, no exceptions” policy.
- Reinforce that hourly employees should never work “off the clock,” including checking emails or responding to work-related calls or texts.
- Set expectations for when exempt employees must be available for virtual meetings or direct collaboration with colleagues (but do not track hours worked for exempt employees unless it is necessary for the role – e.g., to calculate billable hours, but not for payroll purposes).



### **ComplyRight Tip**

Remind remote employees that all current policies still apply, such as non-harassment/discrimination, rules of conduct and proper absence reporting.

#### ■ **Data security and confidentiality**

- Outline requirements for use of personal equipment (e.g., virus protection software on personal computers).
- Address any special measures that may be required to protect sensitive data in a home environment. This can include, for example, maintaining privacy of customers’ credit card data or HIPAA-protected healthcare information.
- Reinforce importance of protecting passwords to business systems as well as confidential company data, including properly disposing of paper documents.

## STEP #5:

# Comply with COVID-Related Employee Posting and Notification Requirements

Many employers are surprised to learn they're expected to comply with mandatory posting and notification laws even when employees do not report to a physical work location. In fact, compliance is even more critical under the current conditions because:

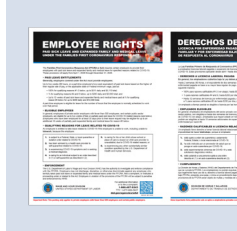
- **Government agencies are passing new COVID-related emergency employment laws** — In addition to new federal laws such as the FFCRA and CARES Act, legislative activity is increasing at the state, county and city levels. A new mandatory FFCRA posting is already in effect, and many new state and local laws include mandatory postings, as well.
- **Employee litigation risk is expected to rise in the coming months** — When times get tough, employees are more likely to find fault with employers and pursue legal action. And as the laws continue to get more complex, employers are prone to make mistakes.
- **New laws also impact requirements for mandatory employee handouts** — These are separate notices you must provide to employees in writing based on triggering events. Some of the most common triggers include employee leave requests and events that could result in unemployment claims. As current laws are being reviewed and updated during the COVID-19 crisis, the language in the notifications is also changing.

What options does an employer have for complying with these mandatory notice laws when your employees are not on-site? Fortunately, the Department of Labor (DOL) has issued guidelines on this matter. The federal agency recommends electronic postings for all employees who do not visit a physical work location at least three to four times per month. The DOL also explicitly states that electronic delivery — such as email distribution or intranet links — is an acceptable way to comply.



# COVID-19 COMPLIANCE SOLUTIONS BY COMPLYRIGHT

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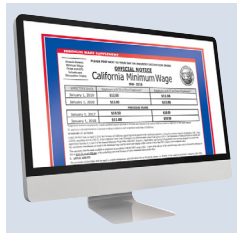
## **Mandatory FFCRA Notice**

This laminated poster guarantees immediate compliance with the mandatory FFCRA notice requirement. Includes Spanish translation for added legal protection.



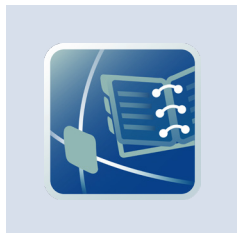
## **FFCRA Compliance Essentials (Downloadable)**

This electronic product includes the mandatory FFCRA notice, an FFCRA Quick Guide for employers, a COVID Leave Request Form, an Employee Fact Sheet in English and Spanish, and the full text of the FFCRA regulations – all in PDF format.



## **Intranet Licensing Service for Electronic Posters**

Satisfy mandatory federal, state, county and city posting requirements (including COVID postings) with this electronic poster service for remote workers. Available as a 6-month or 12-month service.



## **Company Policies Smart App**

Easily create, update and distribute employee policies, including new COVID-related policies on temporary remote work, infectious disease and emergency leave. Hundreds of pre-written policies are kept up-to-date by our legal team and guaranteed to be compliant with federal and state laws.



## **Mandatory Employee Handout Service**

Get access to electronic versions of all employee handouts required by federal, state and local laws to be distributed directly to employees based on triggering events such as leave requests or separation. Handouts are updated in real time as laws change, and cover all the latest COVID-related notices.

**To see the full scope of COVID solutions or learn more, go to**

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