

A woman with blonde hair tied back is focused on sewing a piece of grey fabric. She is wearing a patterned jacket and has a yellow measuring tape around her neck. The background shows a factory setting with sewing machines and other workers. A dark diagonal overlay covers the bottom left portion of the image.

# Small Business FAQs on COVID-19

We are still receiving many calls from concerned small business owners throughout the country facing unprecedented challenges during the COVID-19 pandemic. We've done our best to address the most common questions in this FAQ.

We cover the following:

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## Business Closure Questions:

### ■ Am I required to shut-down operations?

Many states and local officials have invoked public health codes requiring closure of certain businesses. Even while lifting restrictions on certain businesses, public health authorities may continue to impose restrictions on some industries. So, it is vital to check to see whether your business is allowed to operate or not at this time

Ogletree Deakins provides a very helpful chart covering [current business closure orders and rules for re-opening business here](#). Also, [here is another helpful resource](#), which provides a map of states with current stay at home orders and closures for non-essential businesses. There you can [find links to state and local guidance](#) defining “essential business” and “essential workers.”

**NOTE:** It is possible that public health authorities may impose new restrictions if we see a second wave of COVID-19 cases. So it may be wise to plan now for that eventuality.

- **Will employees qualify for unemployment insurance?**

In the event of a full or partial business closure, affected employees will be entitled to unemployment insurance. In most cases, an employee will not qualify if they are choosing not to work; however, at this time most states are awarding unemployment insurance to employees who have a legitimate reason to fear that they might develop a serious condition in contracting COVID-19, or if their exposure may threaten the life of someone with whom they live.

- **Do I have to provide federal paid leave for employees who are laid-off?**

No. Federal leave requirements will not apply if an employee is laid-off.  
**NOTE:** A business should have a legitimate business reason for laying an employee off.

## Re-Opening Business Questions:

- **What are the rules for re-opening business?**

You must ensure compliance with any rules imposed by public health authorities. Check to see whether your state or locality has imposed face mask requirements, limitations on how many customers may enter an establishment and other conditions on businesses at this time. There may also be industry specific rules and best practices. For example, at the federal level, the FDA provides [rules and guidance for the food industry](#).

Ogletree Deakins provides a very helpful chart covering rules for re-opening business [here](#).

## ■ Do I need to develop a formal plan for minimizing risks to my employees and customers?

Employers have a general duty to ensure a safe workplace. OSHA advises that businesses should have a written plan for reducing workplace risks. This is helpful also in ensuring that you are taking appropriate steps to reassure your employees that it is safe to return to work, and to reassure your customers as well.

You should continually assess your risk level, and act accordingly. Stay abreast of guidance from federal, state and local authorities. And while businesses are not required to follow CDC guidance, you should know that in acting consistent with CDC guidance your business will minimize potential liabilities. To the extent you decide to deviate from or not follow CDC guidelines, you should consider documenting your reasons for deciding against following those recommendations in case you are challenged in the future.

## ■ What measures can I take to minimize risks?

First, you should require employees exhibiting symptoms to stay at home; CDC recommends self-isolation for at least seven days, and that the worker be symptom free (without drugs) for three days. You should also consider asking employees to stay at home if they have come into close contact with someone who might have been infected.

Here are some additional practices to consider:

- **Heightened cleaning protocol.** Frequently [sanitize common surfaces](#).
- **Discourage sharing of equipment.** e.g., Only one employee should answer the phone.
- **Social distancing.** Establish practices to encourage social distancing. This may include limiting the number of employees and customers allowed on site.
- **Change operations.** Look for ways to minimize social interaction. E.g., curbside pick-up, new technologies, reconfiguring lay-outs, or discontinuing certain practices.



- **Train employees on best practices.** Make sure your employees are washing their hands and understand other protocols you are putting in place to minimize risks.
- **Requiring face masks.** You might require patrons and employees to wear masks. This might be an especially good idea if social distancing is difficult.
- **Taking temperatures.** This is permissible, as long as it is done for all employees.

## ■ How should I handle a confirmed case?

An employee with a confirmed case of COVID-19 should not be allowed to return to work until released by their health care provider and until allowed by your public health department. CDC guidelines provide that you should identify those employees who may have come in close contact with the employee (i.e., working within six feet for a prolonged period). If your workspace is small you might assume that anyone working in close proximity needs to self-isolate. If your workspace is larger then it is possible that the list of employees who will need to self-isolate will be limited.

CDC guidelines provide that employees who worked in close proximity should self-isolate for 14 days after the last exposure. But you should check also to see what your health department says.

Because of liability issues it's not recommended that you disclose to others the name of an employee who has been exposed. Nonetheless, it may be necessary to inform employees that there has been a confirmed case and that your company is taking special precautions to prevent the spread to others. In addition to having potentially exposed employees self-isolate, these added precautions may include short-term changes in operations and other temporary measures. To minimize risk to your employees and customers and to reassure everyone, it may be advisable to adopt increased cleaning protocols. Littler provides helpful [guidance on how you should be disinfecting a workplace when there is a confirmed \(or suspected\) case.](#)

(**NOTE:** It is important to plan for a confirmed case. And crucially, you should have a plan for how to handle a confirmed case, including how to communicate with employees or customers.)

## ■ Who do I hire back first?

In many cases a business may need to slowly on-board employees when re-opening, especially if they are concerned about continuing cash-flow issues. There are some legal considerations of which you should be aware when determining who to call back first.

If you are unionized then you likely have a collective bargaining agreement in place addressing this issue already.

Non-unionized businesses will have more freedom to make judgement calls about who to bring back and when. Just remember that you risk discrimination claims if you are choosing not to bring-back someone based on prohibited considerations like their age and or disabilities. Likewise, you may be violating the FFRCA if you choose not to re-hire employees with young children.

Best practice is to bring back employees either on the basis of seniority, merit or essential skill-sets. If an employee expresses concerns about returning to the workplace and would prefer to remain on unemployment, that may be a legitimate basis for calling-in the next person on your list.

## ■ Do I need to accommodate employees who are afraid to return to work?

The ADA requires employers to provide “reasonable accommodations” to employees with health conditions. This might entail a leave of absence, or other measures designed to minimize risks, like allowing an employee to continue teleworking, or limiting customer interaction.

Employers must engage in an “interactive process” with the goal of finding an accommodation if possible that will enable an employee to continue working and/or to eventually return to work. But, this can be an especially tricky matter. It is advisable to consult a trusted employment law attorney to ensure that you are complying with the

ADA's requirements before denying a request for accommodation or taking other adverse action against a disabled employee. But we provide more [general guidance on the ADA's workplace rules here](#).

## Other Workplace Safety Questions:

- **May an employer encourage or require employees to telework (i.e., work from an alternative location such as home) as an infection control strategy?**

Yes. An employer may encourage or require employees to telework as an infection-control or prevention strategy, including based on timely information from public health authorities about pandemics, public health emergencies, or other similar conditions.

But employers must not single out employees either to telework or to continue reporting to the workplace on a basis prohibited by any of the Equal Employment Opportunity laws (e.g., race, gender, country of origin).

- **Can I send employees home from work if they are showing symptoms?**

Yes. Employees should be sent home if they are showing COVID-19 symptoms even if the employee is not self-reporting.

- **Can I ask an employee if they are experiencing symptoms?**

Yes. The federal government has issued guidance directing that employers may ask about COVID-19 symptoms at this time.

- **Can I send employees home even if they are not experiencing symptoms?**

Yes. Employees may be required to stay home if they have been in

close contact with someone with COVID-19, or if they have traveled from an area with widespread transmission.

Employers may also choose to layoff employees for any non-discriminatory reason.

### ■ **Do I have to follow CDC guidance relating to COVID-19?**

No. But if you get a question from an employee or OSHA about what steps you are taking to keep your workplace and employees safe, you need to have an answer. For example, have a policy of communicating to your employees that you are routinely disinfecting our workplace, including wiping down open surfaces, doorknobs, and other repeatedly touched objects. See the “Re-Opening Business Q&A” above for further guidance.

### ■ **Can I take an employee’s temperature?**

Yes. But it is only permissible because COVID-19 has been declared a pandemic. Also, please remember COVID-19 is highly contagious. It may be best to have employees take their own temperature and text or e-mail you the results before they come in. If you or an employee is going to take the temperature of another worker, you should consult with a physician on how best to accomplish this without risking infection of the person taking the temperature of employees.

### ■ **When is a COVID-19 case deemed work-related for purposes of OSHA?**

Only when it is more likely than not that a worker is infected with COVID-19 as a result of performing their work-related duties.

### ■ **When do I have to report a COVID-19 case to OSHA?**

Only if it is a work-related case of COVID-19 and it results in in-patient treatment or the employee dies.



- **Will a COVID-19 case affect my workers compensation rates?**

Whether or not a workers' compensation claim can be made for a COVID-19 case will be determined by state law. But generally, an employee is less likely to be awarded workers compensation benefits if you are proactive in working to minimize risks. See the "reopening business Q&A" above for further guidance.

## Federal Paid Leave Questions:

- **Do I have to pay employees if they are not working?**

Ordinarily the rule is that **Hourly employees** are paid only for the time they actually work. But the newly enacted Family First Coronavirus Response Act (FFCRA) may require small employers to provide two weeks (10 days) of emergency paid sick leave. In addition, FFCRA may require paid FMLA leave to take care of a child when their school or daycare has been closed.

**Salaried exempt employees** must still be paid their normal salary as long as they performed **any work** within the workweek. The only exception is if the employee chooses to stop working for personal reasons, including for a self-imposed quarantine; however, they may then qualify for emergency paid sick leave or paid leave to care for a child under the FFCRA.

**NOTE:** If an exempt employee is required to quarantine under public health codes or because the employee is sent home from work by the employer, they must be paid their usual salary if they have performed any work within the workweek.

## ■ Under what circumstances does an employee receive emergency paid sick leave?

Beginning no later than **April 1, 2020** and throughout the rest of the year, covered employers must provide paid emergency sick leave to any employee—regardless of how long they have worked—who is unable to work for any one of the following reasons:

1. The employee is subject to a federal, state, or local quarantine or an isolation order related to COVID-19.
2. The employee has been advised by a health care provider 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 who is 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 health care provider to self-quarantine due to the concerns related to COVID-19.
6. The employee is caring for his/her child in the event of school or daycare closure due to COVID-19, or if the childcare provider of the son or daughter 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 the Treasury and the Secretary of Labor.”

## ■ Is there a small business exemption for federal emergency paid sick leave or paid FMLA leave?

Under the FFCRA, small businesses with **fewer than 50 employees** may qualify for an exemption from providing paid sick leave and/or expanded family and medical leave **due to the closure of a child’s**

**school or place of care** due to a COVID-19 public health emergency if doing so would jeopardize the viability of the business. FFCRA delegates authority to the Secretary of Labor to decide what businesses qualify.

The Secretary of Labor says that a business with fewer than 50 employees qualifies if providing paid leave to an employee (due to closure of their child's school or daycare) would jeopardize the viability of the business as a going concern. To claim this exemption the business must determine that at least one of the following applies:

1. **Cash-Flow Problems.** The provision of paid sick leave or expanded family and medical 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;
2. **Substantial Risk to Financial Health or Operational Capabilities.** The absence of the employee or employees requesting paid sick leave or expanded family and medical leave would entail a substantial risk to the financial health or operational capabilities of the small business because of their specialized skills, knowledge of the business, or responsibilities; or
3. **Insufficient Workers Available.** 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 paid sick leave or expanded family and medical leave, and these labor or services are needed for the small business to operate at a minimal capacity.

There is currently no requirement to expressly seek DOL's approval prior claiming the exemption. But, DOL guidance advises businesses should maintain documentation for the reasons they've claimed exemption.

**NOTE:** Health care providers and emergency responders are exempt from paid FMLA requirements. Fisher Phillips provides further guidance on these exemptions [here](#).

## ■ What documentation should I require from an employee claiming paid leave?

It is prudent to require employees who are out to provide written attestation as to the reason for their leave so that you can confirm whether it qualifies. DOL guidance provides that employers should keep records confirming: (1) the name of the employee; (2) the qualifying reason for requesting leave; (3) a statement that the employee is unable to work, including telework, for that reason; (4) the dates for which leave is requested; and (5) associated documentation, which may include a copy of a government quarantine or isolation order, written documentation from the healthcare provider, and or documentation that employee's child is unable to attend school or daycare as a result of a COVID-19 closure. For school and daycare closures, DOL guidance urges employers to maintain a copy of notice posted on a government, school or daycare website, or published in a newspaper. Alternatively, an email or letter from an employee or official of the school or place of care will suffice.

**NOTE:** Employers should maintain these records, especially if they intend to claim tax credits for payment of federal paid sick leave and or paid FMLA.

## ■ How do I provide required notice to employees about paid leave?

Employers may satisfy the notice requirements of the law by emailing or direct mailing the notice to employees, or posting the notice on an employee information internal or external website. Since the law only applies to current employees, the notice does not have to be shared with laid-off individuals.

You can obtain the notices free of charge by contacting DOL's Wage and Hour Division at 1-866-4-USWAGE (1-866-487-9243) or you can [download and print the notice yourself](#).

## ■ How will the new federal paid leave laws be enforced?

There are penalties for non-compliance; however, good faith mistakes will not be penalized in the first 30 days.

- **If my employees are unable to work because of a government ordered business closure, will they qualify for paid leave under the FFCRA?**

DOL defines a government “quarantine or an isolation order” broadly to cover “stay at home” and “shelter in place” orders that require closure of non-essential businesses, as well as orders requiring specific workers to stay home (i.e., requiring individuals to self-quarantine when they return from another state, or requiring individuals with certain conditions to remain on lock-down). Accordingly, the presumption is that employees are entitled to paid sick leave if they are unable to work remotely under these orders.

Yet there is no requirement to provide paid leave if there would be no work available to the employee during the time in question. For example, a business that closes (temporarily or indefinitely) due to a downturn in business is not required to provide paid leave during this time. DOL explains that if the business would not be able to remain open due to lack of customers it would not have to provide paid leave. DOL makes clear that this is true even if a government stay at home order is the reason for which the business is unable to attract customers. Fisher Phillips offers [further insights here](#).

- **Will I have to provide paid leave if the employee has been furloughed?**

No. An employee who has been laid-off or furloughed, will not be eligible for paid federal leave. But they should qualify for unemployment insurance.

- **How many hours of emergency paid sick leave do I need to provide?**

Fulltime employees are entitled to a total of 80 hours (i.e., two weeks) of paid emergency paid sick leave. Part-time employees are entitled to paid sick leave to cover their average hours worked in a typical two-week period. If hours vary from week to week, employers should look to the average of hours worked over the prior six months as a guide. For



new hires, emergency paid sick leave should be granted based on a reasonable estimate of weekly hours.

### ■ **At what rate must I pay an employee taking emergency paid sick leave?**

The amount of emergency paid sick leave depends on the reason for which leave is taken:

**School closures.** If the employee is unable to work because they must care for their child due to closure of schools or daycares, they are entitled to 2/3<sup>rd</sup> their usual rate of pay or salary. But federal emergency paid sick leave is capped at \$200 per day and \$2,000 over ten days.

**Care for an Individual subject to mandatory quarantine.** If the employee is unable to work because they must care for an individual who is subject to a federal, state or local quarantine or isolation order, they are entitled to 2/3<sup>rd</sup> their usual rate of pay or salary. But federal emergency paid sick leave is capped at \$200 per day and \$2,000 over ten days.

**Employee is subject to a mandatory quarantine.** If the employee is unable to work because they are subject to a federal, state or local quarantine or isolation order, they are entitled to their usual wage or salary subject to a cap of \$511 per day or \$5,110 over ten days.

**Employee is advised to quarantine by a health care provider.** If the employee is unable to work because their health care provider has advised that they self-isolate, they are entitled to their usual wage or salary subject to a cap of \$511 per day or \$5,110 over ten days.

**Employee is experiencing symptoms and seeking diagnosis.** If the employee is unable to work because they are experiencing symptoms and seeking diagnosis of a suspected COVID-19 case, they are entitled to their usual wage or salary subject to a cap of \$511 per day or \$5,110 over ten days.

**NOTE:** The pay requirements are based on the employee's usual wages or salary over a typical two-week period; however, sick leave pay may not be lower than required minimum wage in your jurisdiction. For example, some employers pay tipped employees less than the

state/local minimum wage because ordinarily they make-up the difference in tips. (This is known as a “tip credit”). The employee’s ordinary wage might be something like \$5.00 per hour, while state/local minimum wage might be significantly higher. In that scenario paid sick leave must be paid out at the highest applicable minimum wage rate.

- **What if I choose to provide full pay when I’m only required to provide 2/3rds pay?**

An employee is only entitled to 2/3rds of their usual pay when they take leave for the purpose of providing care to an individual subject to a mandatory quarantine or when providing care for a child as a result of a COVID-related school or daycare closure. But there is nothing stopping an employer from providing full pay if they choose. In any event, they may only pursue tax credits for 2/3rds of the employee’s usual wage or salary.

- **Do I have to provide emergency paid sick leave for overtime hours?**

Yes, if the employee typically works more than 40 hours in a week; however, DOL guidance provides that the employer need not provide “premium” pay for overtime hours where the employee is drawing emergency paid sick leave. And in any event, the employer is permitted to cap paid sick leave pay at 80 hours over two weeks.

- **What if I provided paid sick leave prior to April 1, 2020?**

Paid leave provided prior to April 1, 2020 will not count to fulfill your obligation to provide emergency paid sick leave under the FFCRA.

- **Can I require an employee to exhaust accrued PTO time and state/local paid sick leave before providing federal emergency paid sick leave?**

No. The FFCRA prohibits employers from requiring an employee to exhaust accrued PTO or state/local paid sick leave.

- **Do I have to give emergency paid sick leave if I already provide PTO or if I am already required to provide paid sick leave by state/local law?**

Yes. Employees are entitled to utilize federal emergency paid sick leave before using state or local paid sick leave, or accrued PTO.

- **Can I require my employees to use PTO?**

It depends on state law. But, generally employers may require exempt or non-exempt employees to use accrued PTO if they are taking leave for personal reasons, as in the case of a self-imposed quarantine. In any event, employers are prohibited from requiring an employee to use PTO before using federal emergency paid sick leave time.

While DOL provides that “[n]o employer shall require, coerce, or unduly influence an employee to use another source of paid leave before taking expanded family and medical leave[,]” DOL regulation provides that “an eligible employee may elect to use, or an employer may require that an employee use, leave the employee has available under the employer’s policies to care for a child, such as vacation or personal leave or paid time off, concurrently[,]” with paid FMLA time.

- **Am I required to allow intermittent leave?**

DOL does not require intermittent leave under the FFRCA; however, an employee may be allowed to take intermittent leave if there is an agreement between the employee and the employer. For example, ABC Corp. might agree to allow Kate to take a few hours of paid sick leave or paid FMLA in the afternoons so she can homeschool her children during the COVID crisis, assuming that their schools are closed and she has no other suitable person to help her.

NOTE: Intermittent leave is generally permissible (with an agreement) for employees who are teleworking. For employees who must report to a worksite, intermittent leave is permissible if the reason for intermittent leave is to provide care for a child due to a school or daycare closure. But intermittent leave is not permissible for leave taken for other reasons. Fisher Phillips provides further guidance here.

- **Am I required to pay for an employee out on leave after they have exhausted federal emergency paid sick leave?**

Yes, if the employee has unused state or local paid sick leave, or if the employee has unused PTO.

Additionally, the FFCRA has amended the Family Medical Leave Act (FMLA) to require paid leave to qualifying employees who are unable to work because their children are unable to attend school or daycare as a result of COVID-19. Under these new rules the employer must begin providing FMLA for these parents at 2/3rds the employee's usual rate of pay or salary; however, the benefit is capped to \$200 per day and \$10,000 in the aggregate.

**NOTE:** FMLA usually applies only to companies with 50 or more employees; however, under the FFCRA, paid FMLA leave requirements apply to small employers unless they qualify for an exemption.

- **When does an employee qualify for paid FMLA leave?**

Any employee who has worked for at least 30 days is entitled to take job protect FMLA leave to care for a child when their school or daycare is closed as a result of the COVID-19 pandemic. This applies to any business with fewer than 500 employees.

- **How long must I provide paid FMLA for employees caring for children home from school or daycare as a result of COVID-19?**

FMLA provides job protected leave for up to 12 weeks for qualifying employees. While the FMLA does not usually provide for paid leave, the FFCRA requires employers to begin paying for leave related to child-care after the employee has been out of work for ten days as a result of a school or daycare closure. Required paid FMLA leave is capped at \$10,000 over 12 weeks.

**Note:** An employer may choose to provide full pay but is not required. In any event, they may only pursue tax credits for 2/3rds of the

employee's usual wage or salary.

### ■ If an employee takes FMLA leave and asks to return to work, what are my obligations as an employer?

Under prior FMLA law, the employee must be restored to either their former position or an equivalent position. A position is equivalent only if it is virtually identical to the employee's previous position, including pay, benefits, job duties, schedule, and worksite. The returning employee must be reinstated immediately once the employee reports back for duty. However, the employer may require the employee to provide advance notice of a return date. Reinstatement may not be required if the employee can no longer perform an essential function of the job – in which case they may be entitled to reasonable accommodations under the ADA.

DOL regulation allows an exemption from the usual reinstatement rules for employers with fewer than 25 employees if the following four conditions are met:

1. The employee took leave to care for his or her son or daughter whose school or place of care was closed or whose child care provider was unavailable;
2. The employee's position no longer exists due to economic or operating conditions that (i) affect employment and (ii) are caused by a public health emergency (i.e., due to COVID-19 related reasons) during the period of the employee's leave;
3. The employer has made reasonable efforts to restore the employee to the same or an equivalent position; and
4. The employer makes reasonable efforts for a year to contact the employee if an equivalent position becomes available

### ■ How long should I maintain paid leave records?

DOL requires employers to maintain paid leave records—including any determination that the business is exempt from providing paid leave—for at least four years. But it may be advisable to maintain these records longer. You should consult your CPA or tax attorney.



## Other Wage & Hour Questions:

- **Can I reduce an exempt employee's salary to cope with cash-flow issues?**

DOL guidance provides that an employer may reduce an exempt employee's salary only prospectively. But a salary reduction must be for a bona fide business reason, and "not used as a device to avoid salary the salary basis requirements." [See DOL Factsheet No. 70.](#)

That said, employers should understand that there are now tax incentives for retaining existing wage and salary thresholds. You should talk to your CPA about changes under the CARES Act.

- **Do employers have to pay employees their same hourly rate or salary if they work at home?**

Assuming you do not have an employment or union contract in place with the employee, non-exempt, hourly employees must be paid for the hours they actually work, whether at home or at the employer's office. Current FLSA laws still apply, so employers are required to pay non-exempt workers at least the minimum wage for all hours worked, and at least time and one half the regular rate of pay for hours worked in excess of 40 in a workweek. Therefore, hourly employees should be tracking and reporting their time to their employer.

Salaried exempt employees generally must receive their full salary in any week in which they perform any work, subject to certain very limited exceptions. Please be sure to check your state wage and hour law for any additional requirements.

- **How do I track the time of my non-exempt, hourly employees when they work from home?**

Under the FLSA, non-exempt, hourly employees must be paid at least minimum wage for every hour worked and one-a-half times the rate of pay for any hours worked over 40. Employers should require employees to submit their work hours each week and have a policy in place that prohibits underreporting or over-reporting of time. Time sheets should accurately reflect that the employee took required meal and rest breaks. Additionally, employers should consider making sure that the employee cannot work overtime without prior approval.

- **Are businesses and other employers required to cover any additional costs that employees may incur if they work from home (internet access, computer, additional phone line, increased use of electricity, etc.)?**

For non-exempt, hourly employees, the employer must assure that any work-related expenses the employee covers does not result in reducing the employee's earnings below the required minimum wage or overtime compensation.

Employers should also be aware that state law may require the employer to provide reimbursement to reasonably cover the portion of an employee's cell phone or internet bill, or other such expenses, if they are required to work remotely. For more guidance, check-out our recent [Wage & Hour webinar here](#).

## Other Employment Law Questions:

- **When can I lay-off an employee?**

An employment relationship may generally be terminated for any reason not prohibited by public policy as established by enacted law and regulation. Employers may terminate an employee if they have a legitimate business reason, as in the case of an employer eliminating a position that is no longer needed or if the company must layoff employees to remain financially viable. Employers must avoid any inference of discrimination and or retaliation where an employee has exercised his or her legal rights. For example, it may be problematic if a company is picking and choosing which employees to lay-off, and

disproportionately lays-off employees who are likely to qualify for paid leave—i.e., employees with young children.

### ■ Do I have to accommodate employees who are unable to work?

It depends on whether the employee needs accommodation due to a disability protected by the [ADA](#). If an employee is saying that he or she has a disability that gives them reason to fear returning to work you have to engage in an interactive process with the goal of providing reasonable accommodations that will enable the employee to work or to eventually return to work. Reasonable accommodations may entail limiting the employee's interactions with others, allowing telework to the extent possible, and or approving an extended leave of absence.

In some cases leave related to COVID-19 may implicate [FMLA](#) or other state law protections. For example, California requires up to 40 hours of leave for [school-related emergencies](#) for certain employers.

### ■ When do I have to provide FMLA Leave?

The FMLA generally only applies to companies with 50 or more employees and provides a right to job-protected (unpaid) leave for up to 12 weeks when the employee is dealing with a serious medical issue and/or providing care for a spouse, child or parent who is dealing with a serious medical issue. So COVID-19 might implicate FMLA under those circumstances.

An employee taking traditional FMLA leave might use accrued sick leave or PTO time; however, the employer is not required to provide pay. But again the FFRCA now requires paid FMLA leave if the employee is unable to work because they are at home taking care of a child who cannot attend school or daycare as a result of COVID-19. See the “federal paid leave” Q&A above.

### ■ How long will an employee be allowed to remain on my health insurance if they are no longer working?

A group health plan will generally define how long an employee may go

without working before their health care coverage expires. It is advisable to consult your insurance carrier for guidance.

**NOTE:** Employees are entitled to remain on their employer's plan while taking paid leave under the FFCRA or if taking job protected FMLA leave.

### ■ **Do OSHA regulations apply to home offices?**

The Department of Labor's Occupational Safety and Health Administration (OSHA) does not have any regulations regarding telework in home offices. The agency issued a directive in February 2000 stating that the agency will not conduct inspections of employees' home offices, will not hold employers liable for employees' home offices, and does not expect employers to inspect the home offices of their employees. If OSHA receives a complaint about a home office, the complainant will be advised of OSHA's policy. If an employee makes a specific request, OSHA may informally let employers know of complaints about home office conditions, but will not follow-up with the employer or employee.

Employers who are required to keep records of work-related injuries and illnesses will continue to be responsible for keeping such records for injuries and illnesses occurring in a home office.

## Financial and Tax Questions:

### ■ **Can I receive unemployment if I'm self-employed?**

Unemployment insurance is not usually available to self-employed individuals. But, unemployment insurance has been expanded—temporarily—under the CARES Act to cover independent contractors and the self-employed during the COVID-19 crisis if they cannot continue their work remotely. Fisher Phillips provides [additional guidance here](#).

## ■ Where can I turn if I am having cash-flow problems?

The President has now signed the CARES Act, which will assist small businesses struggling with the COVID-19 crisis. The CARES Act provides emergency business loans that may be waived in part—including for payroll and other qualified expenses. You can learn more about the [Paycheck Protection Program here](#).

Additionally, some states and localities are offering small business assistance programs. Also, certain financial institutions are offering assistance to customers dealing with financial hardship as a result of the COVID-19 pandemic.

**NOTE:** SBA is also offering EIDL loans and grants for a short time. You can learn more about the [EIDL program here](#).

## ■ How do I ensure that my Paycheck Protection Program loan will be forgiven?

It's advisable to work with your CPA. But there are a few basic requirements. First, you should understand that you have only eight weeks to spend PPP loan money on qualifying expenses if you are seeking waiver. Anything spent after that will have to be repaid.

Second, you must ensure that at least 75% of the loan is spent on payroll. Third, you must bring your employee head-count back-up to pre-crisis levels by June 30th. And finally, you must ensure that you are not reducing pay for employees making less than \$100,000 by more than 25%. For more guidance, check-out our [archived webinars on the Paycheck Protection Program](#).

## ■ Will there be tax relief?

Yes, there will be tax credits for employers that provide paid sick leave or paid FMLA. There is a refundable tax credit for 100% of qualified paid sick leave wages and qualified family leave wages paid by an employer. These credits are permitted against the employer portion of Social Security taxes (This now includes costs for group health plan expenses



and Medicare and HI taxes too – meaning the total credit now covers the full 7.65% employer-side payroll tax liability).

For the self-employed, there is a refundable tax credit for 100% of qualified sick leave wages for individuals in quarantine for coronavirus, or 67% when caring for a quarantined family member or child whose school or place of care was closed because of coronavirus. This tax credit is allowed against income taxes. Self-employed individuals may also take a refundable tax credit for family leave equal to 100% of qualified family leave wages.

Additionally, the CARES Act provides additional tax incentives for businesses that maintain employee salaries and wages during this time of crisis. Consult your CPA for more information.

IRS has automatically extended the filing deadline for all taxpayers until July 15, 2020 for up to \$1 million of their 2019 tax due. Many state and local governments are likewise extending filing deadlines, but each taxpayer should consult with their local taxing agency for accurate updates.

Additionally, some state and local taxing authorities may be allowing deferment on quarterly filings and other relief measures. You should consult with a trusted tax attorney.

## ■ How do I take federal tax credits for paid sick leave or paid FMLA?

Most employers pay their quarterly payroll tax obligations by filing a [Form 941](#). Businesses may take immediate advantage of the new paid leave credits by retaining funds that would otherwise go to the IRS. Employers may retain both the employer's and employees' shares of Social Security and Medicare taxes, as well as withheld federal income tax. If an employer does not have sufficient withheld Form 941 funds, they may submit a request for an accelerated payment from the IRS. The IRS expects to release these forms soon.

Example: If an eligible employer paid \$10,000 in sick leave and was required to deposit \$8,000 in taxes, the employer could use the entire \$8,000 of taxes in order to make qualified leave payments, and file a request for an accelerated credit for the remaining \$2,000.

NOTE: [IRS provides helpful guidance here.](#)

- **I am unsure if I am properly taking the credit, and I am unable to access any guidance to address my situation. Will the IRS go after me?**

The IRS has stated that it “will not bring an enforcement action against any employer for violations of the Act so long as the employer has acted reasonably and in good faith to comply” for a 30-day period. Instead, the IRS will focus on “compliance assistance” during this time.

- **As a landlord, what steps can I take to help tenants meet their rent obligations?**

Landlords may suggest that their tenant file for unemployment insurance, which will expand under the CARES Act to include independent contractors and the self-employed. If the tenant is a commercial tenant, the renting business may be able to use an SBA relief loan to help make rent.

**NOTE:** Landlords may seek to enforce lease agreements through collection or eviction actions; however, it is possible some jurisdictions may disallow evictions during this crisis. Therefore it may be advisable for landlords to work out alternative agreements with tenants to the extent possible. Additional guidance is available to landlords [here](#).

- **As a renter, I am struggling to make rent. Is there any relief for renters?**

Renters may be able to collect unemployment benefits under the CARES Act, even if they are an independent contractor or self-employed. Additionally, relief loans under the CARES Act may be used for rent payments.

**NOTE:** It is advisable to check with your insurance carrier to see if you have business interruption coverage. If so, the insurance carrier may be required to provide assistance, depending on the terms of coverage.

## ■ At what point should I consider filing for bankruptcy?

If you have no or significantly reduced income, and you can no longer pay your debts, filing for Chapter 7 bankruptcy may be an option. Under Chapter 7 bankruptcy, your assets, including your business, are liquidated and distributed to creditors, and most types of debt are discharged.

You should consult your CPA or a bankruptcy attorney for advice.

If you have additional questions, please reach-out to the NFIB Small Business Legal Center at 800-NFIB-NOW. You may also want to check-out our [COVID-19 webinars here](#).

\*The information provided here is intended to be accurate, but should not be construed as legal advice. Please understand that we are awaiting further guidance from US DOL and the IRS. The answers provided here will be revised once we receive additional information. Additionally, Congress is currently considering additional legislation that also may require further revisions. The answers provided here are based on our best understanding of the existing legal landscape as of May 5, 2020 at 1:30PM Eastern.