

**The Corona Virus Pandemic and Current Employment Laws**

*(last updated April 1, 2020)*

The COVID-19 pandemic has had a major disruptive effect on the lives of all employees and employers, as well as myriads of well-intentioned efforts to clarify the situation. While there is no one best way to send a message, we want to provide answers to questions we are receiving from our clients, as well as anticipating those questions that have not yet been asked.

As always, your particular situation may differ from others', and we invite you to contact us with your own workplace specific questions.

**I. The Effect of the “Families First Coronavirus Response Act”:**

The Families First Coronavirus Response Act (“FFCRA”) was passed by Congress and signed by the President last week. It takes effect on **April 1, 2020** and expires automatically on December 31, 2020.

The FFCRA provides two benefits, one called “emergency paid leave” and the other called “public health emergency leave.” Both laws apply to employers of 500 or fewer. Employers of 50 or fewer can seek an exemption from the Department of Labor if compliance will jeopardize the viability of the business as a going concern (See FAQ #11 below). In addition, there are tax credits available to certain employers who pay leave benefits under the law. Addressing the tax credits is well beyond the scope of what we can provide here, but the IRS issued a lengthy FAQ concerning the tax credits which is available at: <https://bit.ly/3dL2PAb>.

**“Emergency paid leave”** is for any of the following occurrences:

1. The employee is subject to a federal, state, or local isolation or quarantine order;
2. The employee has been advised by a health care provider to self-quarantine;
3. The employee is experiencing symptoms of coronavirus and seeking a medical diagnosis for the symptoms;
4. The employee is caring for an individual who is subject to a quarantine order or who has been advised to quarantine by a health care provider; OR
5. The employee is caring for a child because the child’s school or place of care has been closed due to COVID-19.
6. 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.

*Any* employee who meets any of the above requirements is eligible for this benefit, regardless of how long the employee has been employed. Up to 80 hours of leave is available for full time employees. If the leave is for the first three reasons above, payments are capped at \$511 per day and \$5,110 in the aggregate per employee. If the leave is for any of the fourth through sixth reasons above, the payments are capped at \$200 per day and \$2,000 in the aggregate.

**“Public Health Emergency Leave”** is a special but limited expansion of the Family and Medical Leave Act (“FMLA”). That law ordinarily *only* applies to employers of 50 or more, but for this particular benefit, the law applies only to employers of 500 or less. That leave is available *only* for an employee with 30 or more days of tenure who is unable to work from home due to a need to care for their child or children if their school or place of care has been closed because of a declared emergency by a federal, state or local government authority.

For those employers of fewer than 500 employees but greater than 50 employees, there is no change to the applicability of FMLA. For instance, an employee with at least a year of service and 1250 hours who contracts COVID-19 would qualify for FMLA under its standard requirements, because COVID-19 is a “serious health condition.”

Public Health Emergency Leave is also paid at a reduced rate of \$200/day up to an aggregate of \$10,000.00 for a period of up to twelve (12) weeks. As with FMLA, an employee can request to use his or her accrued PTO, but the employee is not required to do so. Also, unlike FMLA, this special FMLA is *not* available until after 10 days (the period during which “emergency paid leave” is available.) Intermittent leave is available with the employer’s permission.

Employer tax credits are available for any leave paid under this section. It is critical for employers to secure documentation of the need for any leave provided for subsequent filing with the IRS. Our office can prepare policies and HR forms which will facilitate this process for your business. Verbal approval, however, is permitted under the law until an employee can provide written substantiation of the need for such leave.

For those employers who are already subject to the FMLA, these special benefits do not extend the 12 week period of leave provided for by the FMLA. An employee who has already used up FMLA during the year will *not* be eligible for additional leave. An employee who has used up less than 12 weeks will be eligible only to the extent they do not use more than 12 weeks in total. However, the initial 80 hours of Paid Emergency Leave are *not* included in calculation of the 12 weeks. The 12 weeks begin *after* any period of Paid Emergency Leave.

## **II. The Effect of the PA Governor’s Emergency Order Closing Non Life-Essential Businesses:**

If your business is a “life-essential” business as identified on the list, you may continue “business as usual.” It goes without saying that to the extent employees are required to have contact with the public, that should be kept to an absolute minimum or avoided altogether to the maximum extent possible. For instance, if your business is a dental office, patient contact should be limited to emergencies. If your office sells insurance, all contact should be electronic and not face-to-face.

Even if your business is identified as “non-life-essential,” you may continue to operate to the extent you may do so remotely. Obviously, the same admonition applies with respect to public contact.

There is a process for seeking and obtaining an exemption from the Governor’s list, and that is available at:

<https://expressforms.pa.gov/apps/pa/DCED/Waiver-process-keeping-physical-locations-open>

We are advising our clients to contact us to assist with the process of applying for an exemption so the best possible argument can be made to remain open where appropriate.

If your business is a life-essential business as defined by the Governor’s Order, your workplace will likely be subject to the provisions of the new FFCRA. If, however, you *completely* close your business in response to the Pennsylvania Governor’s Order, your employees will qualify for PA Unemployment Compensation Benefits. In such instance, the FFCRA will not apply. If you continue to operate, albeit on a reduced staffing basis, those employees who are sidelined under the conditions described in the FFCRA will qualify for “emergency paid leave” if they otherwise meet the law’s requirements.

If you continue to operate on a reduced hourly basis, that is, the hours of employees are cut, then the non-exempt employees, i.e., your hourly workers, may qualify for partial unemployment compensation. If the reduction in hours is not considerable, the employee may not be eligible for benefits because benefit rates are usually significantly less than actual income rates. Unfortunately, there are no hard and fast rules on what kind of reduction in pay or hours is sufficient to trigger eligibility for partial unemployment compensation --- claims are reviewed on a case-by-case basis. Also, if an employee refuses the reduction and elects to resign his or her position and then claims *full* unemployment benefits, depending upon circumstances, the bureau may view that quit as “necessitous and compelling” and still award benefits.”

Your salaried employees will not qualify for unemployment compensation under these circumstances, as they receive full pay for any week in which they work, regardless of how much of the week they work.

**III. Frequently Asked Questions:**

1. *Can I lay off my staff?*

Yes. You can either furlough or lay-off your staff. In either instance your employees will be eligible for UC benefits. A “furlough” is time off the job from which the employee may reasonably anticipate being recalled. For instance, many agricultural workers are routinely furloughed in the winter, then recalled in the spring. Staff that is terminated will also qualify for UC benefits. Termination implies that there is no intention of recalling the individual.

Previously, those who collected unemployment were required to certify on an ongoing basis that they were looking for work. That requirement has been lifted temporarily during this crisis.

You may furlough or lay employees off in any way you want, according to seniority, skill-set, or even availability by shift. You are prohibited, however, from using a “protected” category such as age (over 40), race, color, national origin, family status, or disability to make the determination. One option is to reduce all employees’ time by a particular percentage. The important thing is to use an objective method in trimming your workforce.

2. *Can I pay my staff anything while they wait for aid?*

If you wish to make payments prior to the applicability of the FFCRA, you can permit your employees to draw on their PTO; you can permit them to “borrow” PTO, you can even continue their compensation if you can afford to do so. You *cannot* make “under the table payments” to employees.

3. *If an employee cannot telecommute, should I pay them?*

If an employee cannot telecommute due to the need to care for a child or children who are home, then they will qualify for both emergency paid leave and public health emergency leave (if they meet all other qualifications).

If they cannot telecommute for some other reason not covered by the FFCRA (e.g., their job cannot be performed remotely), they are not entitled to any benefits.

4. *If I am able to keep my place of business open, can my employees insist upon certain sanitizing processes?*

If your workplace remains open, you should engage in appropriate safety measures, including social distancing in the workplace, appropriate hand-washing, and sanitizing of your workplace. OSHA requires that you provide a safe workspace for your employees. But employees individually cannot superimpose their own judgment on the judgment of management as to how far is far enough. A healthy employee not subject to any of the provisions of the FFCRA should continue to work at an open workplace.

5. *What happens to me if as an employer I violate this new law?*

If an employer can show that it has made “reasonable, good faith efforts to comply with the act,” and as long as the violation was not intentional, and the employer complies with the law and promises not to violate it further, the US Department of Labor has indicated that it will not prosecute employers who are confronting challenges complying with the FFCRA until after April 17, 2020. This should provide enough time for employers to fully and correctly implement the provisions of the FFCRA.

6. *Can I require that every employee’s temperature be taken when they arrive each shift?*

During this pandemic, employers who are subject to the ADA (at least 20 employees) may ask employees if they are suffering any symptoms of COVID-19, such as chills, cough, fever, shortness of breath, or sore throat. Responsive information must be retained confidentially. Taking an employee’s temperature is considered a “medical examination” under the ADA. Thus, if an employer takes *all* employees’ temperature, there is no violation of the ADA. Note, however, that not all COVID-19 sufferers even have a fever.

7. *If an employee sneezes or coughs, can I send them home?*

No. Springtime is allergy time. People occasionally cough or sneeze. You can insist upon appropriate sanitary behavior, but you cannot isolate employees based upon single incidents. You can, however, impress upon all your employees that “it’s okay to go home sick,” if they have any symptoms at all, to avoid infecting anyone else in the workplace with COVID-19, or any other communicable ailment.

8. *Can I require a doctor's note before permitting an employee to return to work?*

For employees who qualify under the FMLA or the special leave provisions provided by the FFCRA, the employer *can* require a back-to work certification, however, with the medical community taxed as it is due to the pandemic, it is preferable not to burden primary-care physicians who are likely working with reduced staffs to complete paperwork like a "note."

However, for an employer to be able to recover the available tax credits for paying such leave, documentation is ultimately going to be required by the IRS. Therefore, while not insisting upon documentation at the outset, employers should be careful to ensure that all leave paid is also documented appropriately.

Our office can provide employers subject to these laws with appropriate policies and forms for their HR department to facilitate securing such documentation.

9. *May I withdraw a job offer to a prospect who finds out they have COVID-19?*

Yes. The CDC has recommended that no employees with COVID-19 be in the workplace. Another alternative is to defer the hiring date until the employee has fully recovered and the quarantine period has expired.

10. *What tax credits are available to an employer who pays emergency paid leave or public health emergency leave?*

An employer who pays leave under the FFCRA will be able to obtain a credit for each calendar quarter for an amount equal to 100 percent of the paid leave, including some of the costs associated with providing and maintaining any group health insurance during such leaves. Again, documentation is important for tax purposes. While a verbal approval is acceptable, eventually all leave granted under these laws should be documented to secure any tax credit.

11. *I have a small business with fewer than 50 employees. Are there any exceptions to these new benefits?*

On April 1, 2020 the Department of Labor issued temporary regulations under the FFCRA including provisions for securing an exemption from the law for employers of fewer than 50 employees. Those regulations are at 29 C.F.R. §826.40. To secure the exemption, a qualifying employer must demonstrate either that:

- (i) Payment of the requested 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;

- (ii) The absence of the employee or employees requesting leave would entail a substantial risk to the financial health or operational capabilities of the business because of their specialized skills, knowledge of the business, or responsibilities; or
- (iii) 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 employees requesting leave and these labor or services are needed for the small business to operate at a minimal capacity.

Under the regulations, documentation of the exemption requires the employer to document that a determination has been made pursuant to the criteria set forth in the regulations, but does *not* require that this documentation be forwarded to the Department of Labor. The business should retain the records in its files, and continue to post the workplace as otherwise required by the FFCRA.

12. *Will my business income interruption insurance cover my losses?*

No. Your business income interruption insurance covers losses resulting from a reduction or elimination in income due to *property damage*. The coronavirus, at worst, remains on surfaces for a few days, but does not cause property damage. In addition, most policies have a 72 hour elimination period which would cover the period of the virus' vitality on surfaces. Moreover, almost all standard business income interruption policies include an express exclusion for viruses. Finally, even those policies which cover "government action" refer to property damage where the area within a mile of your workplace is cordoned off by the government.

On the other hand, you may want to consider filing a claim anyway. In the event that certain business loans are made available through FEMA or the SBA, proof of no insurance may be required, and a denial from your carrier may serve as adequate proof.

13. *What if I have a deadline to make a claim, how can my lawyer file a lawsuit if the courts are closed? If I have an emergency that requires court action, what do I do?*

While the courts are closed, the Pennsylvania Supreme Court has suspended all statutes of limitation to April 6, 2020 for the time being. It is anticipated that this stay will be extended to April 30<sup>th</sup> at this point, as the Supreme Court extended its order to the end of April on April 1, 2020. Some limited emergency matters are still being addressed, and you should contact us if you believe you have a genuine legal emergency so we can advise you what steps we can take on your behalf.

14. *Is there short term relief for small businesses in Pennsylvania?*

Yes. The Commonwealth of Pennsylvania has introduced a COVID-19 Working Capital Access (CWCA) Program which enables for-profit business entities that are involved in business-to-business, business-to-public, mercantile, commercial or point of sale retail sectors (as well as agricultural producers). It makes available up to \$100,000 in loans for working capital at 2% interest (0% for agricultural producers) payable over 3 years with a 12 year amortization. For information on this program, go to [dced.pa.gov/CWCA](https://dced.pa.gov/CWCA).

15. *What about this “CARES Act?” Is there any relief in there for me? For my employees? For my business?*

Yes. There are provisions for a “Paycheck Protection Plan” loan through the Small Business Administration; there are provisions for the expansion of unemployment compensation benefits; there are a variety of tax relief provisions, all of which are too numerous to include in *this* memorandum, but we will provide another brief summary of the CARES Act and post it on the website like we have with this one.

16. *Where else can I find helpful information?*

There are many online resources for finding guidance and information regarding this pandemic. The below list is by no means exhaustive. The important thing is to be certain you are relying upon *current* and *official* information. Unfortunately, the crisis has also encouraged some to take unreasonable (or even unlawful) advantage, and we advise the utmost caution whenever going online for answers to any questions.

- Centers for Disease Control (CDC): <https://www.cdc.gov/coronavirus/2019-ncov/>
- Information for PA employees affected by COVID-19: <https://www.uc.pa.gov/Pages/covid19.aspx>
- Responding to COVID-19 in Pennsylvania for businesses: <https://www.pa.gov/guides/responding-to-covid-19/#ForBusinesses>
- Equal Employment Opportunity Commission Guidance: [https://www.eeoc.gov/eeoc/newsroom/wysk/wysk\\_ada\\_rehabilitaion\\_act\\_coronavirus.cfm](https://www.eeoc.gov/eeoc/newsroom/wysk/wysk_ada_rehabilitaion_act_coronavirus.cfm)
- Occupational Safety and Health (OSHA): <https://www.osha.gov/SLTC/covid-19>
- IRS information on tax credits: <https://www.irs.gov/SLTC/covid-19/>



Updates like these cannot possibly address all situations. If you have a question we have not addressed here, please contact **David Kraut** at [dkraut@krautharris.com](mailto:dkraut@krautharris.com) or **Harold Goldner** at [hgoldner@krautharris.com](mailto:hgoldner@krautharris.com), or call 215-542-4900. While we are all working remotely, we are checking our voicemail on an hourly basis and stand ready to assist you during these difficult times.



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