

## FAQ'S FOR EMPLOYERS REGARDING COVID-19

Last Update: April 1, 2020

### **FAQ: What do I do if one of my employees appears to be sick?**

**Answer:** Based upon the guidance provided by the [Centers For Disease Control \(CDC\)](#), we recommend that you ask any sick employee to leave work until they “are free from fever (defined as 100.4 degrees or greater using an oral thermometer), signs of fever, and any other symptoms for at least 24 hours, without the use of fever-reducing or other symptom-altering medicines (e.g., cough suppressants).” However, if the individual was diagnosed with COVID-19, we recommend an additional step of quarantining the employee for 14 days. If you are unsure, you may want to err on the side of caution and quarantine the employee for 14 days.

### **FAQ: Can I perform any health checks of my employees during the COVID-19 Pandemic?**

**Answer:** Yes. The Equal Employment Opportunity Commission (EEOC) recently said that “employers may measure employees’ body temperature.” This is true even though such tests are typically prohibited medical examinations under the ADA and the Rehabilitation Act. The EEOC further said that nothing should interfere with “or prevent employers from following the guidelines and suggestions made by the CDC or state/local public health authorities about steps employers should take regarding COVID-19.” In the CDC’s recently-released [mitigation strategies](#), the CDC encourages employers to consider “health checks,” such as “temperature and respiratory symptom screening” of all staff and visitors entering the workplace. In addition, in response to this same question during the 2009 pandemic, the [EEOC stated](#):

Generally, measuring an employee’s body temperature is a medical examination. If pandemic influenza symptoms become more severe than the seasonal flu or the H1N1 virus in the spring/summer of 2009, or if pandemic influenza becomes widespread in the community as assessed by state or local health authorities or the CDC, then employers may measure employees’ body temperature.

Therefore, employers are allowed to conduct both temperature and respiratory checks for employees coming into work since it is a reasonable measure to protect a workforce from exposure to an illness.

**FAQ: What do I do with any employee who reports that they may have been exposed to COVID-19, or tests positive for COVID-19?**

**Answer:** First, if the employee is at the workplace, we recommend that you provide them with a facemask in order to prevent any exposure to other employees. You should then send the employee home right away and encourage them to contact their health care provider to see if they should be tested for COVID-19. You should also require that the employee stay quarantined for at least 14 days. During this time, this employee may utilize their PTO, vacation, sick pay, or may work from home (if possible). In addition, the employee may qualify for either Emergency FMLA or Paid Sick Leave under the new Families First Coronavirus Response Act (“FFCRA”) depending on the size of your workforce. *You can review our expanded summary of your obligations under the FFCRA entitled [COVID-19 Paid Leave Law is Final and Effective](#).*

Lastly, to the extent these employees had any contact with your other workers, we encourage you to investigate all contacts to determine if anyone else was potentially exposed. You can also sanitize any work stations or facilities and notify your workforce that an employee tested positive and that they should watch for symptoms of COVID-19. Any employee who may have been exposed, you may want to send them home with instructions to quarantine and watch for symptoms. In addition, consider monitoring the exposed employees to determine whether they develop symptoms and if you need to record the injury on your OSHA log. In drastic situations, you may want to ask your workforce to work from home (if possible) in order to clean and sanitize the workplace.

**FAQ: If an employee is exposed to COVID-19 in the workplace, do I need to report it to OSHA?**

**Answer:** Yes. If the employee was exposed by another employee in the workplace, it is a best practice to record the injury. If, however, the employee was exposed outside of work, then it is not generally a recordable injury. This becomes increasingly difficult to determine as the virus becomes more widespread, but we nevertheless recommend erring on the side of caution and reporting all exposure on your OSHA logs. In addition, if any hospitalization or death results from the exposure, you would have to inform OSHA right away

**FAQ: Several employees of mine expressed that they are “high risk”—what should I do?**

**Answer:** If an employee is a high-risk individual (defined as older adults or people with serious underlying health conditions like heart disease, diabetes, and lung disease), and expressed concern about working during this time, you may want to first determine whether teleworking is an option. The EEOC stated in previous guidance that “employees with disabilities that put them at high risk for complications of pandemic influenza may request telework as a reasonable accommodation to reduce their chances of infection during a pandemic.” If teleworking is not an option, you may encourage them to utilize their paid time off, vacation, or unpaid time without repercussions.

Not only are these options good for your employee(s), but they are also good for your business since an employee contracting COVID-19 in the workplace may be a recordable event under OSHA. Lastly, we caution against terminating any employees who express reservations about coming into work due to a disability since it may be unlawful age or disability discrimination.

**FAQ: I employ workers who transport cargo—what happens in the event of a state or federal quarantine?**

**Answer:** Depending on what you are transporting, employers who are classified as “critical infrastructure,” such as food supply, may be exempt from such quarantines, curfews, or shelter-in-place orders. For example, President Trump recently spoke with numerous grocers to discuss supply chain logistics during the COVID-19 pandemic. During this conversation, President Trump reassured grocers that the government would coordinate with them to ensure that the nation’s roadways would remain open to cargo transport. Thereafter, the White House authored the “[President’s Coronavirus Guidelines for America – 15 Days to Slow the Spread](#),” in which the White House further stated that those in critical infrastructure have a “special responsibility to maintain [their] normal work schedule.” Minnesota has provided similar [guidance](#).

Thus, it appears that if the state or federal government orders a quarantine or curfew, employers who transport critical cargo will likely be exempt.

**FAQ: Do I need to do anything if I change my employee’s start date, pay, or hours?**

**Answer:** The Minnesota Wage Theft laws require that employers provide each employee with a [written notice](#) at the start of their employment that discuss, among other things: rate of pay, hours, allowances, benefits, deductions, employment status with respect to minimum wage and overtime, etc. If the COVID-19 pandemic requires you to change any of the terms of the employment relationship with a given employee – such as pay or hours – you must provide those employees with a wage notice, which must be signed. This notice must be provided *before* the changes take effect. If this happens, please contact your Felhaber Larson attorney and we can draft the notices for you.

**FAQ: Can we make any prospective reductions to employees’ salaries due to an economic downturn brought about by the COVID-19 pandemic?**

**Answer:** Pursuant to Department of Labor, an employer may be able to reduce the predetermined salary of an employee who is exempt under 29 C.F.R. § 541 as a result of any downturn in business as long as the change is bona fide and not used as a device to evade the salary basis requirement. However, the employee must still receive at least \$684 per week (in some cases \$455 per week). In addition, this is to be used for long-term business needs and is not lawful to use for short-term needs, such as week-to-week or day-to-day arrangements. If the reduction is not done due to a business downturn, then the employee’s exemption will be lost and the employee must be paid hourly and compensated for any overtime hours worked.

With respect to hourly employees, the Fair Labor Standards Act (“FLSA”) does not prohibit an employer from lowering an employee’s hourly rate, provided that the rate is at least the minimum wage, or from reducing the number of hours the employee is scheduled to work.

**FAQ: Do I have any rights if I, or the other party to a contract, is unable to perform as a result of the COVID-19 outbreak?**

**Answer:** Yes. Depending on the language in your contract, there may be a *force majeure*, act of God, impossibility, or impracticability provision. Such provisions will generally allow a party to delay or excuse any nonperformance due to unforeseen circumstances. Whether the COVID-19 pandemic will be considered a *force majeure* will depend upon the contractual language previously agreed to by both parties. Nevertheless, some courts have held that similar outbreaks in other contexts may be *force majeure* events. That said, these provisions vary greatly in scope and allocation of risk, so we encourage you to speak with your Felhaber Larson attorney about whether you may be able to exercise your rights under any *force majeure* provisions.

**FAQ: Will I be subject to a workers’ compensation claim if an employee contracts COVID-19?**

**Answer:** It depends, but probably not. Whether being exposed to the COVID-19 depends on two factors: (1) whether the disease is occupational (meaning that it arose out of and was in the course and scope of employment); and (2) the disease was caused by conditions peculiar to the work (meaning that the illness is found almost exclusively in workers in certain fields, or there is an increased exposure to the illness or disease because of the employee’s working condition—*e.g.*, asbestos-related illnesses).

If the worker is able to successfully connect their exposure to the workplace, and that it was caused by the conditions of the work, they may have a compensable injury. However, with the spread of the virus, and the World Health Organization recently declaring COVID-19 a pandemic, it would be difficult for an employee to show a causal connection between the exposure and the employee’s workplace. In addition, it would be even more difficult to show that the illness is found almost exclusively in workers in a certain field (*e.g.*, black lung disease for coal miners). Thus, it is unlikely that COVID-19 is an occupational disease. But, there may be circumstances where COVID-19 *could* be compensable under workers’ compensation, such as first responders or other medical personnel who contract the disease in the course of employment outside of a hospital.

In summary, COVID-19 is likely not an occupational disease and the fact that an employee may contract the virus at work or from a co-worker would not constitute a compensable occupational illness. However, if there is something peculiar about the work that increases the likelihood of contracting COVID-19, an employee may be able to prove a compensable work injury. That said, this is a fluid situation and the ultimate determinations of compensability would depend on the interpretations of the workers’ compensation laws in the respective jurisdiction. For more information on this, please review our expanded blog on workers’ compensation [COVID-19 and Workers Compensation](#).

**FAQ: Will the DOL enforce the WARN Act against my business if I must layoff my workers or close a plant?**

**Answer:** It is unknown currently. The Department of Labor (“DOL”) has not specifically addressed enforcement in light of the COVID-19 pandemic yet. But, the DOL previously [stated](#), “In lieu of laying off employees in this situation, we would encourage you to consider other options such as telecommuting and to prepare a plan of action specific to your workplace.” Accordingly, prior to making the difficult decision of whether to lay off your workers or close your facilities, we first recommend analyzing all options to determine if any alternative arrangements may work for your business. Of course, we realize with the current uncertainty surrounding the COVID-19 it may not be an option for some to implement such arrangements, but in light of the penalties associated with a WARN Act breach, we suggest thoroughly analyzing your options and keeping documentation of your decision.

In the event of a qualifying WARN Act event, we recommend providing the requisite 60 days’ notice. If that is not possible, there may be an exception to the 60 days’ notice requirement where you may be able to provide notice “as soon as is practicable” due to the unforeseen nature of the COVID-19 pandemic. *For more information on the WARN Act, please review our article entitled [The WARN Act and COVID-19](#).* In any event, we encourage you to speak with your Felhaber Larson attorney before making such a decision.

**FAQ: Will I be able to change my workplace policies for my unionized workforce?**

**Answer:** Under the National Labor Relations Act (“NLRA”), employers have a legal duty to bargain in good faith with unions regarding their employees’ wages, hours, and other conditions of employment. As employers update or craft new policies governing their response to COVID-19, whether on new safety protocols, furloughs, or sick leave, these policies likely trigger the duty to bargain. However, a collective bargaining agreement (“CBA”) may have provisions – including management rights, health and safety, leaves of absence, and PTO – that allow an employer to take action unilaterally on these issues.

Should the CBA not plainly grant the employer the right to implement needed policies, employers should promptly give the Union notice of the planned changes and an opportunity to bargain if requested, with the expectation that exigent circumstances may require fast action. Acts by a union that appear to be designed to delay an employer’s ability to move forward should be documented and you should consult labor counsel regarding lawful strategies and options in response.

**FAQ: How do I change my unionized workforce’s hours, schedules, or job duties in response to the COVID-19 outbreak?**

**Answer:** Employers may need employees to work outside of their job duties, or to work different shifts or fewer hours as businesses face issues relating to COVID-19. Because employers generally have a duty to bargain with unions over substantive changes to the terms and

conditions of represented employees' employment, management must be careful to avoid "direct dealing" with employees regarding reducing their hours or changing their schedules in response to COVID-19. Keep in mind, however, that management may find latitude in their CBA's "Management Rights" clause to direct the workforces and in so doing, determine employees' schedules and work assignments. In addition, health care employers may have "low-need" language that allows them to send segments of the workforce home for a prescribed period of time.

Most CBAs contain at least one article, sometimes several, which address work hours, including in some cases, work week definitions and guarantees. That language must be carefully scrutinized to determine if the contract places specific restriction on reduction of hours.

### **FAQ: What do I have to do if I need to lay off a portion of my unionized workforce?**

**Answer:** Employers who are forced to lay off workers due to the economic impact of COVID-19 may have an obligation to bargain with the union both over the decision to lay off employees, and the effects of the layoffs on those employees. Effects bargaining may include issues such as the order of layoffs, health insurance continuation, severance, bumping rights and return-to-work scenarios. Neither decisional bargaining nor effects bargaining will necessarily prevent the actions the employer has determined are necessary, but it may impact the timing. Failing to bargain when legally obligated to do so, however, could expose an employer to potentially significant financial liability down the road should a union challenge the action.

Additionally, employers should review their CBAs and be aware of any Union and employee notice requirements and seniority provisions that govern the timing of layoffs and their implementation.

### **FAQ: What if a unionized employee refuses to come to work out of fear of being exposed to COVID-19?**

**Answer:** If an employee refuses to come to work out of fear of COVID-19, employers should consider first allowing an employee to work from home, to utilize his/her sick time or PTO as provided in the CBA, and review whether any other leave-of-absence provisions of the applicable CBA apply that an employee could draw from.

An employer may have the ability to terminate or otherwise discipline an employee for a refusal to work, but this depends on whether the employee *reasonably* believes that he or she is in imminent danger. If an employee reasonably believes that he or she is in imminent danger, an employer may not terminate or otherwise discipline that individual for refusing to come to work under the Occupational Safety and Health Administration's anti-retaliation guidelines. Thus, the common adage in labor law of "work now, and grieve later" may not apply. In enacting any discipline for a refusal to work, employers again should first review their specific contract language regarding discipline and discharge and consult labor counsel for advice in how to minimize risk.

In addition, employers should be alert to the fact that if multiple employees together refuse to come to work, this conduct likely would be considered to be “protected and concerted” activity under Section 7 of the NLRA.

*Note:* If an employee is actually ill or has a family member ill or a child home from school due to COVID-19, other federal or state leave laws may apply, such as FMLA or the newly enacted Public Health Emergency Leave and Emergency Paid Sick Leave (which applies only to employers with “fewer than 500 employees”).

### **FAQ: What do I do if my unionized workforce is asking about our plans for responding to COVID-19?**

**Answer:** Many employers, particularly in the healthcare industry, are being inundated with extensive requests for information regarding the employer’s plans for responding to COVID-19, and employee absence, infectious disease, workplace exposure and safety policies. Many of these requests involve topics that are considered mandatory subjects of bargaining and therefore are presumptively relevant to the union’s role in representing employees.

When there is a duty to respond to these requests, employers should remember that (1) they are not required to create information that does not exist, (2) if a document or policy is responsive to a specific question, that document can be provided by way of answer; (3) a union’s requested turn-around time may not be reasonable, given the current circumstances; (4) employers must preserve confidentiality around employees’ medical conditions; and (5) there may be an ongoing duty to update unions as employers revise policies in response to changing circumstances of dealing with COVID-19.

### **FAQ: What if my organization is approaching negotiations for a new or successor CBA?**

**Answer:** Employers who are either in the midst of, or who may be approaching, negotiations for a new or successor CBA still have a statutory duty to bargain despite the pandemic. That said, the majority of employers in this situation have neither the time nor the staff to dedicate to negotiations right now. Experience to date shows consistent cooperation between management and labor on postponing bargaining or, if necessary, turning to video conferencing to conduct negotiations. Parties may also wish to consider entering into extension agreements for expired/expiring CBAs to add a level of stability to the workplace until the pandemic subsides. We strongly recommend against open-ended extensions that do not contain the right of the employer to insist on resumption of bargaining, in case concessions become necessary. Similarly, we recommend against making any commitments as to financial retroactivity once bargaining resumes and an agreement is reached. Far too much is still in flux to feel that such retroactivity commitments would be prudent.

*For more FAQs specifically related to unionized employers, please see our blog post entitled [COVID-19 Issues for the Unionized Employer](#)*

## **FAQ: Will my business be able to recoup any costs associated with COVID-19-related leave?**

**Answer:** Yes. The IRS, the Treasury Department, and the Department of Labor announced on March 20, 2020 that small and midsize employers would be able to take advantage of two new refundable payroll tax credits to fully reimburse them for any of the costs associated with providing COVID-19-related leave. This relief comes by way of the Families First Coronavirus Relief Act recently passed on March 18.

For reference, the new law provides for a refundable tax credit toward social security and Medicare taxes up to the maximum amount of each employee's compensation paid under both the Emergency Paid Sick Leave Act and Emergency Family and Medical Leave Expansion Act. In addition, the wages paid as a result of the Emergency Paid Sick Leave Act and the Emergency Family and Medical Leave Expansion Act are not included for purposes of determining employer Social Security taxes owed. If the credit exceeds the employer's total liability of the tax imposed, the excess credit is refundable to the employer.

The law also provides a refundable tax credit equal to 100% of the family leave equivalent a self-employed individual would receive if the employee was not self-employed. The credit is allowed against income taxes and is refundable. A self-employed individual is eligible for the benefit if the individual would be entitled to receive paid leave pursuant to the Emergency Family and Medical Leave Expansion Act if the employee were not self-employed.

## **FAQ: Does a temporary layoff trigger any obligation under COBRA?**

**Answer:** Potentially. The Consolidated Omnibus Budget Reconciliation Act of 1986 ("COBRA") requires that employers with 20 or more employees provide temporary continuation group health coverage if a qualifying event occurs. "Qualifying events" are "certain events that would cause an individual to lose health coverage under a group health plan." The Department of Labor ("DOL") provides that a qualifying event for a covered employee includes: termination of the covered employee's employment for any reason other than gross misconduct; or a reduction in the covered employee's hours of employment if such reduction of hours causes the employee to fall below the group plan eligibility. 29 U.S.C. § 1163. This reduction can include changing an employee from full-time to part-time, a temporary layoff or furlough, or an absence from work due to disability or any other reason (other than FMLA leave). Thus, you should consult your group health plan to determine the exact parameters of any loss of coverage.

If a qualifying event does occur, an employer is obligated to notify its group health plan administrator within 30 days after an employee's employment is termination, or employment hours are reduced. 29 U.S.C. § 1166(a)(2). The notification has a number of requirements and we suggest you reach out to your Felhaber Larson attorney for more information.



# FAQ'S For Employers Regarding the "Families First Coronavirus Response Act" or "FFCRA"

## FAQ: What are the paid leave requirements in the FFCRA?

**Answer:** In addition to providing funding for food-assistance programs, state unemployment insurance, and COVID-19 testing, the FFCRA requires employers with "*fewer than 500 employees*" to provide two types of *paid* leave:

- **Emergency FMLA**—The FFCRA amends the Family and Medical Leave Act ("FMLA") to provide employees with 12 weeks of *job-protected* Emergency FMLA.
  - **Leave Must be Because Child's School or Daycare Is Closed**—The FFCRA allows employees to take leave only if "the employee is unable to work (or telework) due to a need for leave to care for the son or daughter under 18 years of age of such employee if the school or place of care has been closed, or the child care provider of such son or daughter is unavailable, due to a public health emergency." Prior versions of the law allowed the leave for other reasons, but they were removed.
  - **First 10 Days Are Unpaid**—While the first 10 days of leave are unpaid, an employee may choose to use accrued vacation days, personal leave, or any other available paid leave for unpaid time off. The employee may also use his or her balance of Emergency PSL, which is described below.
  - **Remaining Leave is Paid at Two-Thirds Pay**—While the first 10 days of leave are unpaid, the remaining leave (up to 12 weeks total leave) would be *paid* by the employer at two-thirds of the employee's "regular rate." The weekly compensation owed to the employee would be paid based on "the number of hours the employee would otherwise be normally scheduled to work."
  - **Paid Leave Is Capped at \$200 per day (or \$10,000 Total)**—An employee's payout for Emergency FMLA is capped at \$200 per day or \$10,000 total per employee. This aligns with tax credits that are available to employers. This means that employers are not required to pay out more in benefits than they can obtain back from the government in terms of refundable tax credits.
- **Emergency PSL**—The FFCRA also requires employers with *fewer than 500 employees* to provide employees with a bank of paid sick leave that can be used as a result of absences related to COVID-19. The leave must be immediately available 15 days after enactment (i.e., April 2, 2020) and must be used on or before December 31, 2020.
  - **Amount of Emergency PSL**—Employers with *fewer than 500 employees* must provide *all* full-time employees with a bank of 80 hours of Emergency PSL.

Part-time employees must receive an amount based on the “number of hours that such employee works, on average, over a 2-week period.”

- **Uses of Emergency PSL**—The FFCRA provides that Emergency PSL may be used for any of the following purposes if the employee is “unable to work (or telework) due to a need for leave because”:
  - (1) The employee is subject to a federal, state, or local quarantine or isolation order related to COVID-19;
  - (2) The employee has been advised by a health care provider to self-quarantine because of COVID-19;
  - (3) The employee is experiencing symptoms of COVID-19 and is seeking a medical diagnosis;
  - (4) The employee is caring for an individual subject or advised to quarantine or isolation;
  - (5) The employee is caring for a son or daughter whose school or place of care is closed, or child care provider is unavailable, due to COVID-19 precautions; or
  - (6) The employee is experiencing substantially similar conditions as specified by the Secretary of Health and Human Services, in consultation with the Secretaries of Labor and Treasury.
  
- **Coordination with Existing Paid Leave Policies**—As written, the FFCRA suggests that Emergency PSL must be *separate and apart* from other types of paid leave (e.g., PTO, sick time, etc.). However, an earlier version of the law mandated that Emergency PSL be provided “*in addition to*” any other paid sick leave provided by the employer “on the day before the enactment of the Act.” By removing this provision, it may be possible for an employer to comply with the law by providing Emergency PSL *before* the effective date of the law (i.e., April 2, 2020). A more difficult question is whether the employer can satisfy the Emergency PSL requirement by providing the leave via an *existing* PTO or sick leave policy that meets or exceeds the minimum requirements of the law. That question may be answered by additional guidance from the DOL.
  
- **Payment Is Capped**—An employer’s payment of Emergency PSL is capped at \$511 per day (\$5,110 in the aggregate) if the leave is taken for an employee’s own illness or quarantine and \$200 per day (\$2,000 in the aggregate) if the leave is taken for the care for others or school closures. Again, this aligns the employer’s payments with the caps on available tax credits.

### **FAQ: When does the law go into effect?**

**Answer:** The paid leave provisions of the FFCRA go into effect on *April 1, 2020*.

### **FAQ: What employers need to provide Emergency FMLA?**

All businesses with *fewer than 500 employees* need to provide 12 weeks of job-protected Emergency FMLA to eligible employees.

It is true that the FMLA generally applies only to employers with “*50 or more employees.*” However, the FFCRA would create a different definition of “qualified employer” for Emergency FMLA – namely, an employer with “fewer than 500 employees.”

Small employers may, however, be eligible for one of the following possible exemptions:

- *First*, the DOL has the regulatory authority to exempt employers with “fewer than 50” employees, if the DOL determines that the requirements of the FFCRA would “jeopardize the viability of the business as a going concern.”
- *Second*, employers with fewer than 25 employees may be exempt from the reinstatement requirement if certain conditions are met, including: the elimination of the employee’s position and the employer takes reasonable steps to restore the employer to a similar position.
- *Third*, the FFCRA provides that employers with fewer than 50 employees cannot be sued by a private plaintiff under Section 107(a) of the FMLA for violating the Emergency FMLA provision (Section 102(a)(1)(F) of the FMLA, as amended). The employer may, however, still be subject to an enforcement action by the DOL under Section 107(b) of the FMLA.

### **FAQ: Who is eligible for Emergency FMLA?**

**Answer:** Instead of the normal FMLA definition of “eligible employee,” which includes a one-year and 1,250-hour service requirement, the FFCRA broadens eligibility for Emergency FMLA to *any* employee “who has been employed for at least *30 calendar days.*”

### **FAQ: What if an employee has already exhausted their FMLA for this leave year?**

**Answer:** While the law does not provide specific guidance, a plain reading of the amended FMLA statute suggests that, regardless of reason, an employee is only eligible for “a total of 12 workweeks of leave during any 12-month period.” The Emergency FMLA is a new type of FMLA leave and would seemingly reduce an employee’s eligibility for other types of FMLA.

Thus, unless there is contrary guidance from the DOL, it appears likely that an employee who has already exhausted 12 weeks of leave in conjunction with another qualifying reason (e.g., the birth or adoption of a child), it is likely that employee would not be eligible for Emergency FMLA in the same leave year. If, however, the previous leave related to a “qualifying exigency” or care of a military member, it is possible that the employee could be eligible for additional FMLA (i.e., up to 26 weeks of leave).

### **FAQ: What about an employee who are currently out on FMLA?**

**Answer:** This is a difficult question and not addressed by the new law. As noted above, the employee’s previously-used FMLA in the same leave year would likely be credited against any entitlement for Emergency FMLA. It is not clear, however, whether an employee could convert from one type of unpaid FMLA (e.g., in conjunction with the birth or adoption of a child) to paid Emergency FMLA. Nothing expressly prohibits it, but we will likely need additional guidance from the DOL.

### **FAQ: What employers need to provide Emergency PSL?**

**Answer:** All businesses with *fewer than 500 employees* need to provide full-time employees with 80 hours of Emergency PSL on *April 2, 2020* (i.e., the effective date of the FFCRA). Part-time employees receive a prorated balance based on the number of hours that they work, on average, over a 2-week period.

For small employers, FFCRA provides the DOL with the authority to exempt employers with “fewer than 50 employees” from the Emergency PSL requirement, if the DOL determines that the requirement would “jeopardize the viability of the business as a going concern.”

### **FAQ: Who is eligible for Emergency PSL?**

**Answer:** The definition of “employee” for purposes of Emergency PSL incorporates Section 3(e) of the FLSA. The FLSA has a broad definition of employee: “any person acting directly or indirectly in the interest of an employer . . . .”

Importantly, for Emergency PSL, there is no “hours of service” requirement, similar to the 30-day service requirement for Emergency FMLA. This likely means that *all* employees who are employed by a covered employer on April 2, 2020 are entitled to a bank of Emergency PSL based on their hours worked (up to 80 hours).

Unlike many paid sick leave laws, there is no “waiting period” before an employee can use Emergency PSL. Indeed, the FFCRA provides that Emergency PSL “shall be *immediately available for use*.”

### **FAQ: How do you determine whether you have 500 or more employees?**

**Answer:** Remember, employers with 500 or more employees do *not* need to provide Emergency FMLA and Emergency PSL.

While the law does not specify how employees are to be counted, the Emergency PSL defines “employee” by reference to the FLSA. The FMLA definition of “employee” similarly incorporates the FLSA definition.

Thus, for counting purposes, employers should look to the broad definition of “employee” under the FLSA – that is, “any person acting directly or indirectly in the interest of an employer.” 29

U.S.C. § 203(e). This would presumably include, for example, any employees who are “*jointly employed*” by the employer under the DOL’s current definition of “joint employment.”

### **FAQ: Are there exceptions for small employers?**

**Answer:** Yes and no. As noted above, both the Emergency FMLA and Emergency PSL requirements of the FFCRA apply to *all employers with 1-499 employees*.

However, the FFCRA provides the DOL with the regulatory authority to exempt employers with “fewer than 50 employees” (i.e., 1-49 employees) from either (or both) paid-leave requirements if the DOL determines that “imposition of such requirements would jeopardize the viability of the business as a going concern.” We will therefore have to wait for the regulations from the DOL.

In addition, as noted above, the job-restoration requirements of Emergency FMLA may be waived for employers with fewer than 25 employees, provided certain conditions are met. And, employers with fewer than 50 employees are not subject to private FMLA lawsuits.

### **FAQ: Are certain types of employees exempt?**

**Answer:** Yes, both the Emergency FMLA and the Emergency PSL include exclusions for “Health Care Providers” and “Emergency Responders.” The exclusions basically give their employer the ability to “elect” to exclude the individual from the requirements of each form of leave. There does not appear to be any limit on the employer’s discretion to make this election.

The FFCRA also directs the DOL to provide regulatory guidance on this issue, so we expect further guidance on this.

### **FAQ: Does the FFCRA Apply to Employers with a CBA?**

**Answer:** Yes, as noted above, the law would apply to *all* businesses with *fewer than 500 employees*, including those who have a CBA.

In fact, the law specifically provides that employers who are signatory to a multiemployer CBA are permitted to satisfy their paid leave obligations under the FFCRA by making contributions to a multiemployer fund, plan, or program. The law makes clear, however, that employees must be able to receive payment from the fund, plan, or program for any paid leave that would have otherwise been paid by their employer.

By specifically providing an alternative method of compliance, the law appears to assume that employers subject to a CBA will be covered, provided that they employ fewer than 500 employees.

**FAQ: Do I have to pay “fringes” (health insurance, pension, etc.) on the payments I make to union employees taking Emergency FMLA or Emergency PSL?**

**Answer:** Likely no. The payments under both the Emergency FMLA and the Emergency PSL are tied to the definition of “*regular rate of pay*” under the FLSA (29 U.S.C. § 207(e)). Remember, too, that the amounts are capped per the amounts discussed above.

Under the FLSA, the definition of “*regular rate*” *excludes* several amounts, including: “*contributions irrevocably made by an employer to a trustee or third person pursuant to a bona fide plan for providing old-age, retirement, life, accident, or health insurance or similar benefits for employees.*” 29 U.S.C. § 207(e)(4). Thus, any payments to employees pursuant to the provisions of the FFCRA would, by definition, *exclude* amounts payable to a pension plan or health and welfare plan.

The Union may claim that the CBA requires payment of fringes on amounts paid pursuant to the FFCRA. While the strength of this argument would likely depend on the text of your CBA, it would be very difficult for the Union to claim that the amounts paid under the FFCRA were contemplated by the parties at the time they negotiated the CBA and, somehow, intended that these amounts be paid to the fund.

**FAQ: Is there any other steps that a unionized business must take?**

**Answer:** Remember, if you have a current CBA, you’ll need to give the union notice and an opportunity to bargain before implementing any changes that affect employees’ terms and conditions of employment.

However, we recommend having a plan in place for complying with the FFCRA requirements before agreeing to meet with the Union. If the Union reaches out, let them know that you are reviewing the law with labor counsel and will be in contact soon.

**FAQ: If a jobsite is closed and everyone is laid off, would I still have to provide paid leave?**

**Answer:** This is a difficult question and, in the absence of regulatory guidance from the DOL, we can only provide general guidance. Each situation is different and you should seek legal advice before making any decision. Indeed, in addition to your potential obligations under the FFCRA, you may have obligations under *other* state and federal laws, such as the WARN Act, the FLSA, ERISA, and COBRA.

As an initial matter, employees whose employment is terminated (or employees who are laid off because of lack of work) *before* April 2, 2020, would likely *not* be eligible for Emergency PSL or Emergency FMLA. This is because they do not need “leave” for a job that does not exist. The text of the FFCRA appears to assume that (i) work is available and (ii) that the employee is “unable to work (or telework)” because of a qualifying reason. As a result, if there is no work

for the employee to perform (because of layoff or termination), there should be no Emergency PSL or Emergency FMLA obligation. The employee would, of course, likely be eligible for unemployment pursuant to the state unemployment statute.

A more difficult question is posed by a situation where an employer decides to close a jobsite (and lay off everyone) *on or after* April 2, 2020. Akin to the example above, the absence or inability of the employee to work is *not* effectuated by an employee's "need for leave" as defined by the FFCRA but rather by the lack of work available (because the employer has closed or the jobsite is closed). Thus, it is likely that Emergency PSL and Emergency FMLA are not available in this circumstance.

This analysis is buttressed by the fact that employees are typically not allowed to use paid sick leave or PTO for times when they are not scheduled to work. Likewise, the FMLA (at least before it was amended) made clear that an employee on leave is entitled to no greater protection from a layoff as any other employee. See 29 C.F.R. § 825.216(a)(1). Thus, an employee on a job-protected FMLA leave (e.g., birth of a child or "serious health condition") was not protected from termination if the employer made a non-discriminatory decision to conduct a layoff or reduction in force that happened to affect the employee on FMLA. It remains to be seen whether the FFCRA changed this standard, and we will likely need additional regulatory guidance from the DOL before we have a definitive answer.

As you can see, this issue is a difficult one and, given the questions surrounding the new law, it is best to get legal advice regarding your obligations.

## **FAQ: How does my company get reimbursed by the IRS?**

**Answer:** As to Emergency FMLA, the FFCRA provides that "there shall be allowed as a credit against the tax imposed by section 3111(a) of the Internal Revenue Code of 1986 for each calendar quarter an amount equal to *100 percent of the qualified family leave wages* paid by such employer with respect to such calendar quarter."

There is a cap on the employer's tax credit for each employee's paid Emergency FMLA: \$200 per employee per day and \$10,000 total per employee. As noted above, this aligns with the maximum payout to employees who use Emergency FMLA.

With respect to Emergency PSL, the FFCRA provides that "there shall be allowed as a credit against the tax imposed by section 3111(a) of the Internal Revenue Code of 1986 for each calendar quarter an amount equal to *100 percent of the qualified sick leave wages* paid by such employer with respect to such calendar quarter."

There are, however, caps on the employer's tax credit:

- \$511 per day (\$5,110 in the aggregate) if the leave is taken for an employee's own illness or quarantine, and
- \$200 per day (\$2,000 in the aggregate) if the leave is taken for the care for others or school closures.

Nevertheless, as noted above, tax-credit caps are aligned with the maximum payout to employees under the circumstances outlined above.

**FAQ: How do I provide the paid leave if my business is having cash-flow issues or in danger of going out of business?**

**Answer:** During the news conference on March 14, Treasury Secretary Steven Mnuchin stated that the Treasury Department will be issuing guidance allowing companies to *get the money in advance* from the IRS:

*I want to emphasize, small and medium size businesses that have ‘cash flow problems’ – we will issue guidelines, [and] you will be able to come to the IRS and get the money in advance, so that you don’t have cash flow issues.*

In addition, as noted above, the FFCRA does provide the DOL with the regulatory authority to exempt businesses with fewer than 50 employees from providing Public Health Emergency Leave and Emergency Paid Sick Leave if the DOL determines that “the imposition of such requirements would jeopardize the viability of the business as a going concern.”

**FAQ: What if my business has significant tax liability due on April 15?**

**Answer:** On March 18, the IRS announced that, for C Corporations, income tax payment deadlines are being automatically extended until July 15, 2020, for up to \$10 million of their 2019 tax due. This relief also includes estimated tax payments for tax year 2020 that are due on April 15, 2020.

**FAQ: Do I have to notify my employees of their rights under the FFCRA?**

**Answer:** Yes. The DOL has prepared a poster of employee rights that must be posted in a conspicuous place on the company’s premises. But in recognition of the fact that much of the American workforce is currently teleworking, an employer may satisfy the “posting” requirement by (1) emailing or direct mailing the notice to employees; or (2) posting the notice on an employee information internal or external website.

The notice need only be published in English and need not be provided to recently laid off employees. The DOL has also published a series of FAQs concerning the FFCRA employee rights notice, which may be accessed [here](#).