

## Continuing with COVID-19 – More FAQs

As we have gotten further along in this process, we have received additional questions and wanted to provide information related to those question to our clients to hopefully help moving forward. Please see the questions and answers below from a recent webinar and, as always, please contact with additional questions. We are here to help and glad to do so.

### A. Reorganization Questions

1. What is the difference between furlough, lay off, and reduction in force?

The above terms are sometimes used interchangeably, but they do have difference meanings, as well as different messages to employees. A furlough is either a reduction in hours or period of unpaid leave for employees for a limited period of time, typically not more than one or two months. Employees are usually able to continue benefits and there no change in the “active” status of the employee. Furloughs can also be rotating or intermittent. A lay off is a typically a separation of the employee from active payroll. It does not necessarily represent a full separation of employment, but there is a longer and more defined period of leave associated with the employee’s position. Depending the requirements of the insurance carrier, an employee many not be able to continue to receive benefits. A reduction in force represents a full separation of employment for the affected employees, based on what the employer believes to potentially be a permanent reduction in business. Employees are not able to continue benefits and should be provided with post-separation continuation options.

Depending on the state, an employee may be able to obtain unemployment benefits for all three actions. In many states, a sustained, significant reduction in hours will trigger the benefits.

2. Can I just do a chart for my reorganization?

Generally, a chart will not be sufficient to establish the legitimate reasons for the actions an employer took. A narrative document that sets out the following information should be prepared at the earliest possible time when a reorganization or reduction in hours or employees appears to be a possibility.

- I. Current Events Leading to Need for Personnel Action (Furlough/Lay Off/Reduction in Force)

[in this section it is important to describe what is occurring that is causing the need for the decisions both from an external point of view and also how that is affecting the operations of the business-in this instance, it is the virus along with the government mandates, which are causing certain events in the practice-be descriptive, particularly if different sections are affected differently and decisions are being made based on that.]

- II. Other Actions Taken to Avoid Personnel Actions

[in this section, if there are other actions that were or could be taken to avoid personnel reductions, include those actions-this may not always be the case, but if it is, it is important to show efforts were made.]

- III. Basis for Personnel Actions and Anticipated Timing of Actions

[in this section, you are describing the manner in which decisions were made in choosing positions that are effected-examples are “last in, first out,” or “essential vs. non-essential,” but the goal is to express a measured, thoughtful approach that demonstrates a legitimate basis and opposes any claim of targeting a protected class or person.]

#### IV. Anticipated Impact of Actions

[in this section, you are describing the effect you believe will result from the actions in section III-it does not have to be precise and it can be actually different, but you are trying to express the expected result.]

#### V. Plan for Return of Personnel

[In this section, you outline under what conditions positions will be added back into the business, with the understanding that some may not be returning.]

At the end, include a statement that the above information is an estimate and may require modification or could produce different results and, therefore, may require amendment based on future events or information.

#### 3. Can I have a reduction of one person?

In many instances, this can create a possibility of exposure based on the employee being able to assert he or she was singled out based on a protected class. However, if you are able to demonstrate that there is a legitimate business reason for the position to be reduced or eliminated, that will help to reduce that exposure.

#### 4. Can I offer pay?

Yes, but it this may depend on financial ability of the organization. Further, any potential offering should be carefully evaluated to prevent a claim of disparate treatment.

#### 5. What are my obligations as to leave time?

In general, this is determined by the language of your leave policy. There is no federal or state law requiring payout of leave time. However, if either through your policies or past practice, there is a reasonable expectation for payout of a certain amount of leave, that obligation will remain. Employers do have the ability to temporarily modify or suspend leave programs based on financial need.

#### 6. Can I continue benefits?

Please see the section above related to the type of employer action. However, in general, employees will likely be able to continue benefits during a furlough or lay off. Be certain to contact your carrier to make sure you have discussed all the options and requirements.

#### 7. Can I use “independent contractors?”

We would recommend against using an individual in the form of an independent contractor to perform duties that are ordinarily performed by an employee. The likelihood is too great that the person would be considered an employee using the typical control-based factors.

8. What do I tell the employees?

Be honest. This does not mean you have to share confidential organizational information, but if you have developed an appropriate narrative plan, it is appropriate to share as much of that information as you are comfortable sharing. Much like a medical condition, this is not the time to offer false hope or inaccurate predictions. Employees should have accurate, honest information and be allowed to make decisions based on such information. It will also likely have the effect of avoiding certain claims based on the idea that the employer is hiding information or true motivations.

9. How long should the furlough/lay off/reduction be?

Similar to the issue of “how many employees should be included,” this is something that an organization must decide. However, such a decision should be based on the anticipated effect of the changes made and a documented analysis of the expected results. It is anticipated that careful, reasoned analysis will offer greater protection against claims of improper actions than uneducated guesses.

10. Do I have to bring employees back at one time?

No, but as stated above, having a proposed plan will help to allow for consistency and documented legitimate reasons for the actions taken.

B. Executive Order 2020-91

1. Are at-risk people permitted to work?

Yes – the Governor’s Office clarified this issue with a subsequent publication on April 3, 2020.

2. Do we have any obligation to notify employees of the EO?

No – unlike the FFCRA, there are no publication or posting requirements for the EO.

3. Should we be asking employees if they have conditions making them at-risk?

No – this may result in exposure under the ADA or the Rehabilitation Act.

4. What if we have certain information to indicate an employee is at-risk?

Employees have an obligation to come and seek an accommodation or leave and this should be something that you rely on the employee to report to you.

5. Can employees choose not to work based on the EO?

If the employee is within the at-risk group in Section 1A of the EO, it does appear that the employee can choose not to work. They are permitted to work, but it does not appear they should be required to work if they fall within the at-risk category.

If an employee is not within the at-risk group, the EO would not give them the ability simply to not come to work if they are in essential industry or position. While employees may have concerns, that does not automatically enable them to not work if they are not covered by a reason for leave, and the concerns are not reasonable or without specific basis.

The best process may be to first ensure you are taking all possible steps to ensure employees' safety and then send out a communication or update to all employees advising what steps you have taken to lessen the possibility of infection. In the communication, advise that, unless there are particular concerns related to an individual (which can be addressed with HR privately), you are asking all employees to report for their regularly scheduled work times. This would essentially operate as a reset and from that point forward, address any further attendance issues on a one-on-one basis, allowing accommodations where appropriate. If there proper reason for an employee to not be at work, begin imposing discipline on a progressive basis. You may also want to revise any existing leave policies to state that employees taking leave without proper approval or notice will not be permitted to use PTO.

6. If employees choose not to work, are they due leave under the FFCRA?

Yes if they are considered at-risk per Section 1A of the EO. If not at-risk, no, unless the employee otherwise qualifies for a leave category.

7. If at-risk employees choose to work, should we do anything?

To reduce the possibility of exposure, we are recommending an acknowledgement of the risks related to continuing to appear at work. A copy of the acknowledgement is included with this document.

### C. FFCRA Questions

1. Can an employee use the 12 weeks of leave for childcare under the EFMLA, choose not to take the paid leave under the EPSLA, and then use the leave under the EPSLA for the childcare reason after exhausting EFMLA, effectively receiving 14 weeks of leave?

While there appears to be an intent for the EPSLA and the EFMLA to work together on the issue of childcare leave, this is not mandatory. There is no language requiring an employee to use the leave under the childcare category for the EPSLA at the beginning of the EFMLA period. Further, the guidance from the DOL is that an employee would be able to use the EPSLA leave for a qualifying reason until 12/31/2020. Therefore, it appears that an employee would be permitted to delay use of the EPSLA leave until after the exhaustion of the EFMLA leave and receive a longer period of leave. However, it is possible that a person may not qualify at a later date if the issues related to childcare being unavailable no longer exist.

2. Is any of the new leave available intermittently?

The leave related to childcare is available intermittently.

3. In what situation would an employee caring for a child not have leave fully covered for 12 weeks (at the 2/3 rate)?

If the employee has used leave under the EPSLA for a reason other than childcare and has exhausted that leave, the employee would not receive additional leave under the EPSLA for the childcare reason.

4. Can parents in a two-parent household both take leave under the EPSLA or EFMLA?

Yes – There may be situations where, because of a loss of childcare, one parent may need the assistance of the other parent to help in caring for the children. This should be based on reasonable circumstances, but given the purpose of the leave laws, this is likely to be a low burden. Another situation may exist in which parents are switching off in caring for the children, but also working.

5. What can I ask for to support the leave requested?

The DOL and IRS have issued guidance on the information that can be requested and we have incorporated those questions into our proposed leave request forms, included with this document.

6. Is it possible for an employee to qualify for two different forms of FMLA leave, paid and unpaid?

Yes – an employee may have a basis to qualify for the prior forms of FMLA leave and at the same time also qualify for the EFMLA.

7. How do I designate FMLA leave if an employee has more than one reason for the leave?

This should be an option for the employee.

8. Where do I get the poster I need?

To find the poster, go to [www.dol.gov](http://www.dol.gov), locate “For Employers,” then “Resources,” then “Posters.”

**Acknowledgement of Risks Related to COVID-19 in the Workplace**

I, \_\_\_\_\_, have been informed by my employer of the information related to persons who may be at a higher risk of either infection or complications from contracting the COVID-19 illness. After receipt of the above information, I notified my employer of my belief that I am a person who would be included in the “at-risk” category related to the COVID-19 illness. I was offered the opportunity to remain away from work based on my belief I am within one or more of the “at-risk” categories, but have voluntarily elected to continue to appear at work. I understand that I am permitted to change my decision or status at any time, but that I may be required to provide medical certification of the condition(s) that I believe establish me as being “at-risk.” If I do choose to change my decision or status, I will notify my employer immediately.

\_\_\_\_\_  
Name of Employee

\_\_\_\_\_  
Signature of Employee

\_\_\_\_\_  
Date

\_\_\_\_\_  
Witness Name/Signature/Date

# COVID-19 Emergency Family and Medical Leave Request

Name: \_\_\_\_\_ Date of Hire \_\_\_\_\_

Job Title: \_\_\_\_\_ Supervisor: \_\_\_\_\_

Anticipated Start Date for Leave: \_\_\_\_\_ Number of Weeks Requested (12 max): \_\_\_\_\_

Anticipated Schedule for Leave if Not Consecutive: \_\_\_\_\_

Name(s) and Age(s) of Child(ren): \_\_\_\_\_

Name of School or Childcare Provider Unable to Provide Care: \_\_\_\_\_

***I certify the following:***

- ***no other person will be providing care for the child during the period for which I am receiving family medical leave;***
- ***if my child is older than 14 years of age, special circumstances exist requiring care for him or her during daylight hours; and***
- ***I am unable to work due to a need to care for my child, because the school or place of care has been closed or the child care provider is unavailable, because of a public health emergency.***

Employee Signature \_\_\_\_\_

Date \_\_\_\_\_

Eligibility Affirmed \_\_\_\_\_

Approved By: \_\_\_\_\_

Date \_\_\_\_\_

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## **Calculation of Paid Leave**

First Day of Leave \_\_\_\_\_

First Day of *Paid* Leave \_\_\_\_\_

Employee's Hourly Rate of Pay \$ \_\_\_\_\_

Two-thirds Hourly Rate of Pay \$ \_\_\_\_\_

Weekly Hours Worked \_\_\_\_\_

Amount of Pay Per Pay Period \$ \_\_\_\_\_

Paid Leave Ends \_\_\_\_\_

Cost of health insurance coverage per pay period \$ \_\_\_\_\_.

## COVID-19 Emergency Sick Leave Request

Name: \_\_\_\_\_

Job Title: \_\_\_\_\_ Supervisor: \_\_\_\_\_

Anticipated Start Date/End Date for Leave: \_\_\_\_\_ No. of Hours Requested (80 max): \_\_\_\_\_

Reason for sick leave request under the Emergency Paid Sick Leave Act (Check the appropriate box and provide the applicable information. Use back of form if needed.)

Reason for Paid Sick Leave	Rate of Sick Leave Paid
<input type="checkbox"/> I am subject to a Federal, State, or local quarantine or isolation order related to COVID-19 issued by:	Hourly rate not to exceed \$511 per day
<input type="checkbox"/> I have been advised by a health care provider to self-quarantine due to concerns related to COVID-19. Health Care Provider:	Hourly rate not to exceed \$511 per day
<input type="checkbox"/> I am experiencing symptoms of COVID-19 and am seeking a medical diagnosis.	Hourly rate not to exceed \$511 per day
<input type="checkbox"/> I am caring for an individual who is subject to a Federal, State, or local quarantine or isolation order related to COVID-19 or has been advised by a health care provider to self-quarantine due to concerns related to COVID-19. Individual Name/Relationship: Government Agency Issuing Order: Health Care Provider Name:	2/3 hourly rate (or at least minimum wage) not to exceed \$200 per day
<input type="checkbox"/> I am caring for my son or daughter because the school or place of care of the son or daughter has been closed, or the child-care provider of my son or daughter is unavailable, due to COVID-19 precautions. The name(s) and age(s) of my child(ren) is/are:  The name of the childcare provider unable to provide childcare is:  I certify that no other person will be providing care to the above children during the period I am seeking leave and that for any child above 14 years of age, special circumstances exist requiring care during daylight hours.	2/3 hourly rate (or at least minimum wage) not to exceed \$200 per day
<input type="checkbox"/> I am 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.	2/3 hourly rate (or at least minimum wage) not to exceed \$200 per day

***I certify I am unable to work (telework) due to the reason marked above. I understand that falsification of any information regarding this absence may be grounds for disciplinary action, including termination.***



Employee Signature \_\_\_\_\_

Date \_\_\_\_\_

Approved By: \_\_\_\_\_

Date \_\_\_\_\_