

Frequently Asked Questions – California COVID-19

Legislative Update 3/31/2020



Q: Under the Families First Act there is a healthcare and emergency responder exemption. Is there a breakdown of what is considered healthcare? All healthcare workers or specific MD/DC/PT/PA/NP/RN, etc.? How do you apply for the exemption?

A: According to the DOL website, they state:

“...a health care provider is anyone employed at any doctor’s office, hospital, health care center, clinic, post-secondary educational institution offering health care instruction, medical school, local health department or agency, nursing facility, retirement facility, nursing home, home health care provider, any facility that performs laboratory or medical testing, pharmacy, or any similar institution, Employer, or entity. This includes any permanent or temporary institution, facility, location, or site where medical services are provided that are similar to such institutions.”

An emergency responder is considered:

“...anyone necessary for the provision of transport, care, healthcare, comfort and nutrition of such patients, or others needed for the response to COVID-19. This includes but is not limited to military or national guard, law enforcement officers, correctional institution personnel, fire fighters, emergency medical services personnel, physicians, nurses, public health personnel, emergency medical technicians, paramedics, emergency management personnel, 911 operators, child welfare workers and service providers, public works personnel, and persons with skills or training in operating specialized equipment or other skills needed to provide aid in a declared emergency, as well as individuals who work for such facilities employing these individuals and whose work is necessary to maintain the operation of the facility. This also includes any individual whom the highest official of a State or territory, including the District of Columbia, determines is an emergency responder necessary for that State’s or territory’s or the District of Columbia’s response to COVID-19.”

<https://www.dol.gov/agencies/whd/pandemic/ffcra-questions> (Questions 55-57)

Q: If you are an employee in California, you may be eligible for State Disability Insurance (SDI) if you’re unable to work due to medical quarantine or illness related to COVID-19. Or, you may be eligible for State Paid Family Leave (PFL) if you’re unable to work because you are caring for an ill or quarantined family member with COVID-19. At the time, you are also eligible for the Emergency Federal Paid Sick Leave under FFCRA up to maximum of 80 hours. Do you get both benefits (SDI or PFL and FFCRA) for the first 80 hours? Do you have an option to choose which benefit you’d like to take?

A: The answer from myhrconciierge states: The laws regarding Covid 19 are rapidly changing and our team is monitoring all updated closely to assist our clients. Based on the current available information, the CA PFL, Disability and paid sick leave are the only benefits the employees will be eligible for until April 2. The Families First law that was passed last week does not go into effect until April 2. Employees who are currently out on the CA various paid leaves, will continue at least through April 1. Once the FFCRA comes into effect, there does not appear to be any guidance on coordination. The FFCRA does appear to be a more generous benefit than the current CA paid leaves. In a typical environment, the most generous would apply, although, it is not clear at this time how it will be applied during this pandemic.

Q: We have a client that makes machine parts for the government in addition to other industries. Last week they told their employees that coming to work was optional. This week, they are seeing a pick-up in business and are need the employees to come back to work. Is there anything they do to require employees to return to work?

A: If this is an essential business and they are following the CDC safety protocols, they can request that their employees return. The company should be mindful if the employee now has themselves or someone to care for due to COVID-19 and should refrain from retaliating against those employees for not being able to come into to work. For privacy purposes, the company should also be careful to not disclose an employee's name if they find out they have COVID-19.

Q: If an employee has their wages reduced right before the Work Sharing Program (WSP) is put in place, does that make the employee ineligible for benefits? Does that make the company ineligible for the program?

A: The EDD site states that employees are eligible if their "Hours and wages [are] be reduced by at least 10 percent and not exceed 60 percent"

https://www.edd.ca.gov/unemployment/Work_Sharing_Program.htm

Q: The objective of the Work Sharing Program (WSP) is to avoid permanent lay-offs, but what happens in the event that a temporary layoff has to become permanent?

A: The company should consult with outside counsel to asses the situation before moving forward with permanent layoffs.

Q: What if a current employee is classified as exempt but does not earn the minimum required to be considered exempt by the FLSA Exemption Test? If an employee is classified as exempt but earns a salary that is less than \$54,080 will this impact the employee's benefits or present a liability for the company?

A: The company should consult a specialist to determine if employees are classified correctly. If they are not, it could pose a liability to the company.

Q: Who has to comply with the Emergency Leave and Paid Sick Leave Acts?

A: The CARES Act applies to businesses with 500 or less employees. Additionally, certain provisions may not apply to certain employers with fewer than 50 employees. The employer should refer to the Department FFCRA regulations (expected April 2020).

Q: How many hours is an employee paid under the Emergency Paid Sick Leave Act? What rate do I use when paying sick leave?

A: It depends upon various factors including the reason for the leave, including:

"Under the FFCRA, an employee qualifies for paid sick time if the employee is unable to work (or unable to telework) due to a need for leave because the employee:

1. is subject to a Federal, State, or local quarantine or isolation order related to COVID-19;
2. has been advised by a health care provider to self-quarantine related to COVID-19;
3. is experiencing COVID-19 symptoms and is seeking a medical diagnosis;
4. is caring for an individual subject to an order described in (1) or self-quarantine as described in (2);
5. is caring for a child whose school or place of care is closed (or child care provider is unavailable) for reasons related to COVID-19; or
6. is experiencing any other substantially-similar condition specified by the Secretary of Health and Human Services, in consultation with the Secretaries of Labor and Treasury."

Q: What happens if someone is eligible for both the Emergency Paid Sick Leave and the Emergency Paid Leave?

A: The employer should refer to the Department of Labor FFCRA regulations (expected April 2020) for guidance when its available.

Q: Will I get reimbursed for the Emergency Paid Sick Leave and Emergency Paid Leave act payments?

A: "Covered employers qualify for dollar-for-dollar reimbursement through tax credits for all qualifying wages paid under the FFCRA. Qualifying wages are those paid to an employee who takes leave under the Act for a qualifying reason, up to the appropriate per diem and aggregate payment caps. Applicable tax credits also extend to amounts paid or incurred to maintain health insurance coverage." For more information, please see the Department of the Treasury's website.

<https://www.dol.gov/agencies/whd/pandemic/ffcra-employee-paid-leave>

Q: What are companies with over 500 employees obligated to do for employees who test positive for COVID-19 as far as paid time off goes? And what are they obligated to do for employees that are not COVID-19 positive, but due to age and medical history are considered high risk and instructed by their provider not to work?

A: Companies with over 500 employees may be bound by the Family Medical Leave Act (FMLA) which provides eligible employees up to 12 weeks off to care for their own serious health condition or a serious health condition of a dependent. The FMLA is unpaid, so the employee is free to use their own sick time/PTO (unless required by the employer handbook to use sick/PTO time while on FMLA). The employee may be eligible for an employer sponsored disability or state disability program, if it covers COVID-19.

If the company has an employee that has medical documentation stating they cannot work, the can be put on a leave of absence under the FMLA, or if not eligible, the employer can explore offering a LOA as an accommodation under the ADA. It is recommended the employer consults outside counsel on their options.

Q: What about companies under 50? What are they required to offer, etc.?

A: Certain provisions may not apply to certain employers with fewer than 50 employees. The employer should refer to the Department FFCRA regulations (expected April 2020).

Q: Will CARES Act apply to full time and part time employees?

A: CARES Act applies to full time employees. Part time employees may be eligible, but it depends on the specific state they live in and how many hours work in a week. The employee should consult their state's labor website for details.

Q: How long will California UI be available, and how long will CARES Act unemployment benefits be available?

A: It varies by state, but most states provide access to unemployment benefits for a maximum of 26 weeks. The CARES Act provides federal funding for an additional 13 weeks for those who need it. Funding for this expires December 31, 2020.

Q: Employees that can work from home (telework), but are now required to take a pay cut, will they be eligible for unemployment?

A: No, if the employee can telework, they would not be eligible for UI.

Q: Will 1099 contractor be considered eligible for the benefits if the contract is put on hold for a few months?

A: Yes. Self-employed and independent contractors, like gig workers and Uber drivers, are eligible for Pandemic Unemployment Assistance. This also covers workers laid off from churches and religious institutions who may not be eligible under the state's program.

Q: Will employees working for religious organization (non-profit 503c) be eligible for state disability benefits and CARES act? Are seasonal employees eligible? Are interns eligible?

A: Possibly — it depends on the specific state they live in and how many hours work in a week. The employee should consult their state's labor website for details.

Q: Are H-1B VISA employees eligible? Are illegal immigrants that hold a matricular ID to work in CA eligible?

A: Possibly. If they can show that they're authorized to work in the US, they can file for unemployment, including green card and temporary visa holders. For visa holders who have been laid off during the crisis, they will only be eligible for unemployment for as long as their visa stays valid. That's a period of 60 days for those on H-1B skilled worker visas, unless they find another job in that time.

Q: If employer has enrolled under a PEO (or MEWA) plan, and the PEO (or MEWA) has over 1000 employees, how will that impact the employees' eligibility for FFCRA?

A: The employer should consult with their PEO and/or outside counsel to determine if they are a covered employer.

Q: If an active employee (primary breadwinner in the family) become critically ill, or passed away due to COVID19, will the following be available for spouses and dependents – Cobra/Cal-Cobra, Unemployment benefits, or Disability benefits? In other words, are there any source of income available if dependents have not been actively at work when primary breadwinner passed away, and does not have a job prior?

A: If there was an active life insurance policy in place, that policy should pay out. The dependents should contact their state programs regarding survivor benefits.

Q: Can you define Furloughed, Leave, vs. Termination?

A: Furlough: mandatory suspension from work without out pay. It is a temporary leave for employees due to special needs of a company or employer, which may be due to economic conditions at the specific employer or in the economy as a whole. It may be required that insurance benefits are continued throughout the leave.

Leave: is a period of time that one must be away from one's primary job, while maintaining the status of employee.

Termination: the end of an employee's contract with a company.

Q: If small employer group does not have employee handbook, and the carrier refers the employer to refer to handbook, what should they do?

A: The employer should consult with counsel for guidance in the absence of an employee handbook.

Q: Can employer be selective of who they furloughed or who they laid off? Or must this be handled by class?

A: There may be many factors at play, including any employment contracts or collective bargaining agreements which may dictate the furlough or reduction in force process. The employer should consult with counsel before making these employment decisions.

Q: Employers with less than 25 employees — are the employees guaranteed to have the same position back after furlough?

A: For private employers, there are no specific regulations they are required to follow regarding retuning employees from a furlough, but there is an expectation that the employee will return to the same role as before the furlough. The employer should consult with counsel on specifics of their situation to assess any liability if they feel there will need to be job changes when returning employees from furlough.

Q: For employer groups with under 25 or under 50 employees, what do I need to know in terms of FFCRA, Emergency paid leave, CARES Act, and HR compliance? Any additional state level regulations?

A: The employer will need to consult with their state websites and counsel for specifics on how these programs may apply to them.

Q: For CA employees, are the additional CA level state disability benefits/unemployment benefits and CARES Act unemployment benefits affect their eligibility for Medi-Cal program?

A: The employee will need to consult with their case worker to determine which programs the employee is eligible for and how they may affect current program enrollments.



This material is not intended as an offer of coverage or "Invitation to Contract." It is for informational purposes only and is not intended to provide legal counsel. Please consult with an appropriate professional for legal and compliance advice. Any Emergency COVID-19 Paid Sick Leave, Disability Benefits Law (DBL) and/or Paid Family Leave (PFL), information is as April 7, 2020; it is based on the applicable statutes and regulation, and is based on our best understanding of the law, and may change as regulations evolve.

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