

COVID-19 Guidance for Hospital Employers

FFCRA, OSHA, and Confidentiality



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Resources

- The slides will be posted online shortly after this presentation, available at www.foulston.com/resources/covid-19-updates
- Additional resources related to COVID-19 are also available at the same location

Agenda

- Big Picture Considerations
- Summary of Families First Coronavirus Response Act
- Update from the Department of Labor Regulations
- OSHA and Confidentiality Considerations
- Q&A with panel of Foulston employment attorneys:

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Big Picture Considerations

- FFCRA Leave
- CARES Act
 - SBA Loans: Paycheck Protection Plan (PPP) & Economic Injury Disaster Loan Program (EISL)
 - Employee Retention (Payroll) Tax Credit
 - Federal Unemployment Benefits
- Insurance Coverage
- WARN and OWBPA Obligations
- State-law unemployment
- Contractual obligations

Summary of Families First Coronavirus Response Act

Two New Types of Paid Leave

- Emergency Paid Sick Leave: Up to two weeks of paid sick leave for quarantine, illness, care of others, or childcare responsibilities due to COVID-19
- Emergency FMLA Leave: FMLA childcare leave to care for a child who cannot go to school or daycare because of COVID-19
- Effective APRIL 1, 2020 through December 31, 2020

Covered Employer

- Private employers with fewer than 500 employees at the time leave is to be taken
 - Small Business Exemption
 - Fewer than 50 employees
 - Leave due to school closure/caregiver interruption
 - Authorized officer determines:
 - Granting leave would result in expenses exceeding revenues causing the business to cease operations at a minimal capacity, or
 - The absence of employees requesting leave would entail substantial risk to financial health of the business due to the employee's specialized skill, knowledge, or responsibilities, or
 - There are not sufficient workers able, willing, and qualified to perform labor/services required to operate at a minimal capacity
- Public agency and government employers regardless of number of employees

Emergency Paid Sick Leave if employee cannot work or telework because:

1. Employee is subject to a federal, state, or local quarantine or isolation order;
2. Employee is advised by a healthcare provider to self-quarantine due to concerns related to COVID-19;
3. Employee is experiencing symptoms of COVID-19 and is seeking a medical diagnosis;
4. Employee is caring for an individual who is subject to a quarantine order or direction to self-quarantine;
5. Employee is caring for son/daughter if the child's school or childcare provider is closed due to COVID-19; and
6. Employee is experiencing any substantially similar condition specified by the Secretary of Health and Human Services

Emergency Paid Sick Leave

- Amount of paid leave: Up to two weeks
 - 80 hours for full-time employees
- Payment amount:
 - For rationales 1-3 (quarantine/illness), employee's regular rate, capped at \$511/day and \$5,110 total
 - For rationales 4-6 (caring for children or others), two-thirds of employee's regular rate, capped at \$200/day and \$2,000 total
- May not require employees to use other paid leave first.
- All employees are eligible, regardless of length of employment.

Emergency Family & Medical Leave Act

- EFMLA only if employee cannot work or telework due to need for leave to care for son/daughter if school/daycare closed or other childcare giver interruption because of COVID-19.
- Must have been employed for at least 30 calendar days.
- No EFMLA for quarantine/illness.
- 12 workweeks of FMLA total, **including EFMLA**

Emergency Family & Medical Leave Act

- First two weeks of FMLA childcare leave may be unpaid
 - Employee may substitute existing paid leave
 - Employee may use EPSL
 - Employee can elect or employer can require use of pre-existing PTO
 - No tax subsidy for payment of pre-existing PTO
- After week 2 of EFMLA, paid leave of:
 - 2/3 employee's regular pay for hours otherwise normally scheduled to work
 - Up to \$200/day and \$10,000/twelve-week period
 - Employee can elect or employer can require use of pre-existing PTO to make up final 1/3 of wages.
 - No tax subsidy for payment of pre-existing PTO
- If employee's scheduled has been reduced due to pandemic, only pay for reduced schedule.

Department of Labor Regulations

Healthcare Employers

- Which employees are considered “healthcare providers” who can be denied EPSL/EFMLA?
 - **Any** employee 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 anything similar
 - Any entity that contracts with one of the above
 - Also emergency responders necessary for transport, comfort, nutrition of COVID-19 patients

Healthcare Employers

- Does this mean that all employees who are health care providers are ineligible for FFCRA leave?
- Does a healthcare employer have to approve some types of paid leave (e.g., for employee's own COVID-19 illness or quarantine)?
- Can an employer approve some health care provider employees for leave, and deny others?

Can employee take EPSL or EFMLA intermittently/reduced schedule?

- While teleworking:
 - By agreement, if employees are unable to telework their normal schedule of hours for a qualifying reason
 - If you are prevented from teleworking for childcare related reasons, emergency FMLA leave can be taken while teleworking
- While working at usual worksite:
 - It depends on why the employee is taking leave
 - Childcare leave – can only be taken intermittently with employer's permission
 - Other reasons related to COVID-19 symptoms - no

Can employees use PTO at the same time as FFCRA paid leave?

- Employer cannot mandate use of PTO prior to using EPSL
- DOL clarified regulations on April 10, 2020 regarding use of PTO while taking EFMLA:
 - Employee can choose, or employer can require use of PTO during first two weeks of unpaid EFMLA
 - Employee can choose, or employer can require use of PTO to supplement 2/3 wages during paid portion of EFMLA
 - No tax subsidy for any portion of EFMLA that is covered by pre-existing PTO

Can employee use FFCRA paid leave if business closes or if employee is furloughed?

- Employer closes or employee furloughed before April 1 – no FFCRA leave
- Employer closes or employee furloughed after April 1, but before employee goes out on leave – no FFCRA leave
- Employee furloughed while on FFCRA leave – FFCRA paid leave up to closure/furlough

- Bottom line: FFCRA paid leave is not intended to pay employee when there is no work/insufficient work; only for COVID-19 related leave from work.

How to Calculate Employee Hours:

- Full-time: if employee is normally scheduled to work at least 40 hours/workweek then 80 hours of EPSL
- Part-time: normal weekly schedule over two-week period, if employee works a regular schedule
- Variable schedule:
 1. use a six-month average to calculate average daily hours
 2. if not employed for six months,
 - use the number of hours you and employee agreed upon at hiring, or
 - average hours per day the employee was scheduled to work over the entire term of employment

How to Calculate Pay:

- Pay greater of:
 - Regular rate of pay;
 - Federal minimum wage in effect under FLSA; or
 - Applicable state/local minimum wage
- Up to applicable daily and aggregate caps
- Regular rate of pay = weighted average of regular rate of pay over the completed workweeks during the 6 months prior to the date you take leave
 - If not employed 6 months, average of regular rate for all completed workweeks
- Tips, commissions, and piece rates are included into that calculation to same extent they are included in calculation of regular rate under FLSA

Required documentation

- An employee is required to provide:
 - a. The employee's name,
 - b. The date(s) for which leave is requested
 - c. qualifying reason for requesting leave,
 - d. statement that the employee is unable to work, including telework, because of the qualifying reason

Required documentation

- Reason 1: Name of the government entity ordering quarantine
- Reason 2: Name of the healthcare provider advising quarantine
- Reason 3: Name of healthcare provider diagnosing/treating COVID-19 symptoms
- Reason 4: Leave to care for another individual
 - Individual's name, relationship to the employee, and
 - Name of government entity/healthcare provider

Required documentation

- Reason 5 or EFMLA: Leave based on the need to care for a child
 - a. The name and age of the child
 - b. The name of the school, place of care, or provider that is unavailable
 - c. A representation that no other suitable person will be providing care for the child during the need period
 - d. If leave is for a child older than fourteen, and leave is requested during daylight hours, a statement that special circumstances exist requiring the employee to provide care

Recordkeeping

- Maintain documents for at least four years after tax becomes due or is paid, whichever is later
- Also maintain:
 - Documentation to show how the employer determined the amount of qualified sick and family leave wages paid to employees that are eligible for the credit, including records of work, telework and qualified sick leave and qualified family leave.
 - Documentation to show how the employer determined the amount of qualified health plan expenses that the employer allocated to wages.
 - Copies of any completed Forms 7200, Advance of Employer Credits Due To COVID-19, that the employer submitted to the IRS.
 - Copies of the completed Forms 941, Employer's Quarterly Federal Tax Return, that the employer submitted to the IRS (or, for employers that use third party payers to meet their employment tax obligations, records of information provided to the third party payer regarding the employer's entitlement to the credit claimed on Form 941).

Required Notices

- Employer:
 - Must post notice in a conspicuous place on its premises notice
 - Must mail or email if employees are working remotely
- Employee:
 - Notice may not be required in advance
 - Notice may only be required after the first workday for which the employee takes FFCRA leave
 - After the work workday, it is reasonable for employers to require notice as soon as practicable under the circumstances

EMPLOYEE RIGHTS

PAID SICK LEAVE AND EXPANDED FAMILY AND MEDICAL LEAVE UNDER THE FAMILIES FIRST CORONAVIRUS RESPONSE ACT

The Families First Coronavirus Response Act (FFCRA or Act) requires certain employers to provide their employees with paid sick leave and expanded family and medical leave for specified reasons related to COVID-19. These provisions will apply from April 1, 2020 through December 31, 2020.

▶ PAID LEAVE ENTITLEMENTS

Generally, employers covered under the Act must provide employees:

Up to two weeks (80 hours, or a part-time employee's two-week equivalent) of paid sick leave based on the higher of their regular rate of pay, or the applicable state or Federal minimum wage, paid at:

- 100% for qualifying reasons #1-3 below, up to \$511 daily and \$5,110 total;
- ⅔ for qualifying reasons #4 and 6 below, up to \$200 daily and \$2,000 total; and
- Up to 12 weeks of paid sick leave and expanded family and medical leave paid at ⅓ for qualifying reason #5 below for up to \$200 daily and \$12,000 total.

A part-time employee is eligible for leave for the number of hours that the employee is normally scheduled to work over that period.

▶ ELIGIBLE EMPLOYEES

In general, employees of private sector employers with fewer than 500 employees, and certain public sector employers, are eligible for up to two weeks of fully or partially paid sick leave for COVID-19 related reasons (see below). *Employees who have been employed for at least 30 days prior to their leave request may be eligible for up to an additional 10 weeks of partially paid expanded family and medical leave for reason #5 below.*

▶ QUALIFYING REASONS FOR LEAVE RELATED TO COVID-19

An employee is entitled to take leave related to COVID-19 if the employee is unable to work, including unable to telework, because the employee:

- | | |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <ol style="list-style-type: none"> 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); | <ol style="list-style-type: none"> 5. is caring for his or her child whose school or place of care is closed (or child care provider is unavailable) due to COVID-19 related reasons; or 6. is experiencing any other substantially-similar condition specified by the U.S. Department of Health and Human Services. |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|

▶ ENFORCEMENT

The U.S. Department of Labor's Wage and Hour Division (WHD) has the authority to investigate and enforce compliance with the FFCRA. Employers may not discharge, discipline, or otherwise discriminate against any employee who lawfully takes paid sick leave or expanded family and medical leave under the FFCRA, files a complaint, or institutes a proceeding under or related to this Act. Employers in violation of the provisions of the FFCRA will be subject to penalties and enforcement by WHD.



WAGE AND HOUR DIVISION
UNITED STATES DEPARTMENT OF LABOR

For additional information
or to file a complaint:
1-866-487-9243
TTY: 1-877-889-5627
dol.gov/agencies/whd



WH1422 REV 03/20

Restoration rights following Emergency FMLA Leave:

- Generally – Employees are to be restored to the same or equivalent position
- For employers with fewer than 25 employees, no restoration requirement if:
 - A. Leave was due to school/daycare closure/caregiver interruption
 - B. The employee's position no longer exists due to economic conditions or other changes in operating conditions that:
 - i. Effect employment
 - ii. Are caused by public health emergency
 - C. The employer makes reasonable efforts to restore the employee to an equivalent position
 - D. The employer contacts the employee if an equivalent position becomes available
 - E. Employer continues to make effort to contact you within one year

Tax Credits

- Public agency employers are not eligible for tax credits, but must still comply with paid leave provisions
- Eligible employers can retain an amount of payroll taxes equal to the amount of qualifying paid leave
 - Amount of credit allowable for any quarter cannot exceed Social Security Taxes owed, but any credit in excess is treated as an overpayment and the employer is eligible for a refund
- Any paid leave provided in excess of the maximum requirement is not creditable

Retaliation Provisions

- Employers may not discharge, discipline, or otherwise discriminate against any employee who takes paid sick leave under the FFCRA and files a complaint or institutes a proceeding under or related to the FFCRA.

Penalties

- Penalty based on Paid Sick Leave – FLSA act
- Penalty based on child care FMLA Leave – FMLA act
- Liquidated damages (double damages)
- Attorney fees
- Collective actions
- Temporary non-enforcement through **April 17, 2020**, so long as employer acted reasonably and in good faith
 1. Violations are remedied and the employee is made whole
 2. Violations were not willful
 3. The Department receives a written commitment from the employer to comply in the future



Protecting Your Employees

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Screening Employees for COVID-19

You should:

- Ask employees about exposure to COVID-19, recent travel, and symptoms of the virus;
- Screen employees for fever or respiratory symptoms;
- Require self-reporting;
- Send home employees who report or show signs of illness; and
- Follow CDC guidelines for return to work.

Employees Discontinuing Isolation

- CDC recommends employees with symptoms who have not been tested remain isolated until:
 - No fever for at least 72 hours without fever-reducing medication;
 - Other symptoms have improved; AND
 - At least 7 days have passed since symptoms first appeared.
- Employees who tested positive may discontinue isolation when:
 - No fever without fever-reducing medication;
 - Other symptoms have improved; AND
 - Two negative tests in a row, 24 hours apart.

New CDC Guidance Regarding “Critical Infrastructure Workers”

- CDC advises that critical infrastructure workers may be permitted to continue work following potential exposure to COVID-19 if they are asymptomatic and take additional precautions
 - Healthcare and Public Health are among critical infrastructure industries
- A potential exposure means being a household contact or having close contact within 6 feet of an individual with confirmed or suspected COVID-19, including within 48 hours of that individual becoming symptomatic.
- Additional precautions if returning to work:
 - Pre-screen – employers to measure temperatures before work
 - Employee self-monitoring for symptoms
 - Wear a mask at all times during 14-day period after last exposure
 - Social distancing
 - Disinfecting workspaces/common areas and not sharing equipment
 - Send employee home if they become sick during work day
- <https://www.cdc.gov/coronavirus/2019-ncov/community/critical-workers/implementing-safety-practices.html>

Notice to Coworkers/Others of COVID-19 Positive/Presumptive Positive

- CDC Guidance:
 - “If an employee is confirmed to have COVID-19 infection, employers should inform fellow employees of their possible exposure to COVID-19 in the workplace but maintain confidentiality as required by the Americans with Disabilities Act (ADA). The fellow employees should then self-monitor for symptoms (i.e., fever, cough, or shortness of breath).”
- KDHE Guidance
 - “If an employee is confirmed to have COVID-19, employers should inform fellow employees of their possible exposure to COVID-19 in the workplace but maintain confidentiality as required by the Americans with Disabilities Act (ADA). Employees exposed to a co-worker with confirmed COVID-19 should refer to KDHE guidance for how to conduct a risk assessment of their potential exposure.”
- OSHA and EEOC: silent on notice to co-workers/others issue, other than adhering to confidentiality requirements

Duty to Protect Employees from Workplace Exposure

- Hospitals have a legal duty to maintain a safe workplace
 - Specific standards and the general duty clause
 - Take feasible measures to reduce the likelihood that your employees will be exposed to COVID-19
 - Remember you could be liable for hazards to employees, contractors, and subcontractors
- Follow CDC guidance for healthcare facilities and check CDC website frequently for updates
- Implement your CMS emergency preparedness plan

OSHA Rules for Personal Protective Equipment

- Hospitals must follow OSHA rules for PPE use:
 - Assess workplace virus hazard
 - Can you reduce/eliminate the hazard with controls
 - Provide PPE at no cost to employees
 - Train employees how to use PPE
- Follow hospitals existing respiratory protection program
- Surgical masks are different from respirators
 - Surgical masks protect against fluid splatter
 - Respirators protect against airborne contaminants. Be aware of special “respirator” definition (includes N95 mask)

N95 Respirator



Photo: California Dept. of Public Health

Healthcare personnel wearing a surgical mask.



Photo: California Dept. of Public Health

Healthcare personnel wearing a filtering facepiece respirator.

Respirator Issues

- OSHA has stated that employees who work closely with patients known or suspected of being infected with coronavirus should wear respirators
- Certain types of procedure require respirators
- If you *require* respirators, follow 29 C.F.R. § 1910.134:
 - Implement a respiratory protection program
 - Follow fit-testing and medical screening procedures
 - Train employees on proper use
- If you *permit* respirators, provide the notice found in 29 C.F.R. § 1910.134, Appendix D.

Questions and Answers with Foulston panel



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