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# TODAY'S TOPICS

- COVID-19
  - Overview of benefits under FFCRA emergency FMLA and Sick Leave provisions
  - Hardship exemption explained
  - Most common questions
  - Common mistakes made during work furloughs
- Workplace Safety
- Reopening America
- **This webinar is for informational purposes only and is not intended to provide legal advice. Seek legal counsel or government guidance for specific factual situations or questions.**
- **THE SITUATION IS CHANGING RAPIDLY. STAY UP TO DATE**

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# FAMILY FIRST COVID-19 EMERGENCY BILL

## FMLA PROVISIONS

**Family First COVID-19 Paid FMLA**

Effective date: **April 1, 2020 to December 31, 2020**

- Private Employers with less than 500 employees (including those reduced to less than 500 from a larger number)
- Who/when do you count?
  - employees on leave, temp employees, day laborers, part-time and full-time employees and joint employees
  - Don't count: Independent contractors
  - Count on the day the leave would begin

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## FAMILY FIRST COVID-19 EMERGENCY BILL FMLA PROVISIONS

- **ONLY PURPOSE:** To care for children under 18 if their school or place of care has been closed (including moving to online classes) OR the childcare provider is unavailable due to COVID-19
- Leave is available only when it is needed to care for the employee's child and the employee is actually providing the care and unable to work or telework because of that care. **If a co-parent, co-guardian or usual child care provider is available, the employee is not eligible for the leave**
- Son or Daughter – your own child, including a biological, adopted or foster child, stepchild, legal ward or a child for whom you are standing in loco parentis – someone with day to day responsibilities to care for or financially support a child (or adult child with physical or mental disability who cannot provide self care)

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## FAMILY FIRST COVID-19 EMERGENCY BILL FMLA PROVISIONS

- Leave entitlement:
  - Applies to any employee who has been employed for at least 30 days (on payroll for 30 days, doesn't have to actively worked for 30 full days) and is unable to work (or telework)
  - Receive up to 12 weeks of paid leave
  - First two weeks is unpaid (but can substitute emergency Paid Sick leave if they qualify or other accrued, unused vacation/PTO/sick leave)

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## FAMILY FIRST COVID-19 EMERGENCY BILL FMLA PROVISIONS

- Leave Benefits
  - Up to 12 workweeks of leave during a 12-month period (expires 12/31/20)
  - First 10 days unpaid (Employee can substitute emergency paid Sick leave for the first 10 days, or substitute any other available PTO, vacation or sick leave)
  - Amount of Paid Leave for Regular full-time or predictably scheduled employees
    - An amount not less than 2/3 of regular rate of pay, at the number of hours the employees is regularly scheduled to work. Not to exceed \$200/day or \$10,000 in aggregate
    - If an employee's hours have been reduced by an employer, the amount they are paid is based on the hours they would be scheduled to work if they were not taking leave.
    - If they are furloughed for a week, they are not scheduled to work and would not be eligible for pay for that week.

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## FAMILY FIRST COVID-19 EMERGENCY BILL FMLA PROVISIONS

- Paid Leave for Variable Hours Employees:**
  - Varying schedule hours calculation: If an employee's schedule varies from week to week such that there is no certainty, the employer shall pay a number equal to the average number of hours the employee was scheduled per day over the 6-month period ending on the date on which the employee takes such leave, including hours for which the employee took leave of any type
  - If the employee did not work over such period, the reasonable expectation of the employee at the time of hiring of the average number of hours per day the employee would be scheduled to work
  - Same \$200/day and \$10,000 aggregate limit applies
  - Payments made are reimbursed through a tax credit
  - Seek tax attorney/CPA advice on the credits available if you have questions

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## FAMILY FIRST COVID-19 EMERGENCY BILL FMLA PROVISIONS

- If an employee has already taken some FMLA leave in last 12 months, emergency FMLA leave benefit will be reduced by # of days/weeks already taken
- Prior use of FMLA does not impact eligibility for paid Sick Leave

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## FAMILY FIRST COVID-19 EMERGENCY BILL FMLA PROVISIONS

- Job Restoration:** Employers with 25 or fewer employees need not restore the employee to his/her position if the job is no longer available because of covid-19 related economic conditions or other changes
- Job Restoration:** Employers with 26 or more employees must try to restore the person to their job:
  - Highly Compensated Key Employee Exception (but presumably must provide advance notice)
  - No greater right to reinstatement than those not on leave (in other words, if position ends)
  - Must make a reasonable effort to restore the employee to an equivalent position to the one the employee held when leave started. Equivalent = same benefits, pay and terms and conditions of employment
  - If reasonable efforts initially fail, must continue to make reasonable effort to restore person to position for 1-year period beginning on the earlier of the date on which the qualifying need related to COVID-19 concludes or the date that is 12 weeks after the leave began.

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## FAMILY FIRST COVID-19 EMERGENCY BILL SICK LEAVE PROVISIONS

- **Paid Sick Leave: April 1, 2020 to December 31, 2020**
- ALL Private employers who have had at least 1 employee for 20 or more weeks, and with fewer than 500 employees (even if your headcount was originally over 500, once you fall below, this applies). Headcount must be taken on day the leave would begin
- Certain non-private employers
- Joint employer test
- Employers who are health care providers or emergency responders may elect to exclude such employees from application of these provisions (SAME DEFINITIONS AS EMERGENCY FMLA)
- Secretary of Labor shall also have the authority to exclude:
  - employer of a health care provider or an emergency responder (but can elect to provide paid leave)
  - Secretary of Labor can exempt small businesses with fewer than 50 employees when paid sick leave could jeopardize the validity of the business as a going concern

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## FAMILY FIRST COVID-19 EMERGENCY BILL SICK LEAVE PROVISIONS

- **Purpose:** Paid sick time for employee who is unable to work (or telework) due to a need for leave because:
  1. Employee is subject to a COVID-19 quarantine or isolation order from local, state or federal government
  2. Employee has been advised by a health care provider to self quarantine due to COVID-19 concerns
  3. Employee is experiencing COVID-19 symptoms and is seeking a diagnosis
  4. Employee is caring for an individual who is subject to a quarantine/isolation order or has been advised to self-quarantine
  5. Employee is caring for a child whose school or place of care has been closed because of COVID-19 precautions
  6. Employee is experiencing any other substantially similar condition specific by the Secretary of Health and Human Services in consultation with the Secretary of Treasury and Labor.

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## FAMILY FIRST COVID-19 EMERGENCY BILL SICK LEAVE PROVISIONS

- **Cap on paid sick leave and amount of pay**
  - \$511/day or \$5,110 in the aggregate for reasons 1-3 of prior slide (employee's own COVID-19 quarantine, isolation, health care provider recommended self-quarantine or COVID-19 symptoms for which employee is seeking a diagnosis.) Pay must be provided at the employee's regular rate of pay or the minimum wage, whichever is greater.
  - \$200/day or \$2,000 in the aggregate for reasons 4-6 of prior slide (employee caring for another person who is in a COVID-19 quarantine, isolation or health care recommended self-quarantine or employee's substantially similar condition specified by govt). Pay must be at 2/3 employee's regular rate of pay or 2/3 minimum wage, whichever is greater.

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## FAMILY FIRST COVID-19 EMERGENCY BILL SICK LEAVE PROVISIONS

- Amount of Paid Sick Leave:
  - Full-time employees: 80 hours, to be used this year
  - Part-time employees: Number of hours equal to the number of hours the employee works on average over a 2-week period. Paid time must be used before the end of the year.
- Paid sick time does not carryover from one year to the next
- Paid sick time is not required to be paid out upon separation from employment
- No Retaliation. Employer may not discharge, discipline or discriminate against an employee who takes COVID-19 paid sick leave or files a complaint under this Act or testifies in a proceeding.

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## FAMILY FIRST COVID-19 EMERGENCY BILL SICK LEAVE PROVISIONS

- When is a person eligible for paid sick leave as a result of self-quarantine?
  - A health care provider believes you have COVID-19 or are particularly vulnerable to COVID-19 and is quarantining you as a result
  - You are ill with COVID-19 symptoms and are seeking a medical diagnosis or a health care provider has told you to self-quarantine
  - IF THE EMPLOYEE IS NOT SEEKING TREATMENT OR A DIAGNOSIS, THEY ARE NOT ELIGIBLE FOR THE LEAVE EVEN IF THEY ARE ILL WITH COVID-19 SYMPTOMS

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## FAMILY FIRST COVID-19 EMERGENCY BILL SICK LEAVE PROVISIONS

- WHEN IS AN EMPLOYEE ELIGIBLE TO TAKE PAID SICK LEAVE TO CARE FOR ANOTHER INDIVIDUAL?
  - The individual is unable to care for him or herself and depends on the employee for care and providing that care prevents the employee from working (or teleworking)
  - The individual genuinely needs the employee's care. This includes an immediate family member, someone who regularly resides in the employee's home or their relationship creates an expectation that employee would care for the person in a quarantine or self-quarantine situation and that person depends on the employee for that care during the quarantine or self-quarantine.
  - An employee CANNOT take paid sick leave to care for someone with whom they have no relationship or for someone who does not expect or depend on your care during their quarantine or self-quarantine.
  - When an individual is self-quarantining on the advice of a health care provider and that person requires the employee to provide care that prevents the employee from working (or teleworking)

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## DOCUMENTATION CLARIFICATION

- According to the DOL, this is the documentation you can seek:
  - The name of the government entity that issued the Order (if that is the basis for the leave)
  - The name of the health care provider who advised the employee to self-quarantine
  - The name of the government entity or health care provider that told an individual whom they are caring for to self-quarantine
  - The name of the child, and the school district/provider name that is closed, as well as a representation that "no other suitable person will be caring for the child during the period" the employee is taking leave
  - You MAY request other documentation in support of the FFCRA tax credits, but the DOL does not indicate what that might be
  - **The DOL confirms the IRS guidance, which states that you do not need to provide leave for employees who won't provide sufficient documentation to support the tax credits**
- **NOTE:** Allows inquiries and provision of information, but falls short of saying they have to provide you with notes from third-parties

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## FAMILY FIRST COVID-19 EMERGENCY BILL SICK LEAVE PROVISIONS

- Intermittent leave can be used IF the employer (and employee) agree.
  - If telework – more generous arrangements – permitted in any increments allowed by the employer. Flexibility is encouraged.
  - If in-office work, intermittent leave only for Emergency FMLA purpose (to care for child whose school or childcare is closed)
  - NOT for Paid sick leave for employee or to care for others because trying to prevent spread of virus and don't want to expose people
- Workplace closures (temporary or permanent), furloughs and employees on leave when a closure takes place means an employee is not eligible for additional paid leave after the closure
- in Place and Business Closure Orders will not qualify as reasons for either emergency paid sick leave or emergency paid FMLA when the business closes due to those orders and work is therefore not available (See Revised FAQ #27 and compare to FAQ 60)

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## FAMILY FIRST COVID-19 EMERGENCY BILL SICK LEAVE PROVISIONS

- Employee may use emergency paid sick time before paid FMLA.
- Employer cannot require the employee to use other paid leave provided by the employer first. This means you cannot prioritize CA paid sick leave, vacation, PTO or other paid leave
- Employer Posting: Employer shall post and keep posted a notice, to be prepared or approved by the Secretary of Labor. Secretary of Labor to issue a model notice within 7 days of passage (DOL Website)
- After the first workday an employee receives paid sick leave, the employer can require employee to provide reasonable notice procedures to continue receiving paid sick time

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## PRACTICAL CONSIDERATIONS OF PAID FMLA/SICK LEAVE

- Determine # of employees, full and part-time, (and if applicable health care and emergency responders) taking into account lay-offs, to determine which sections of the bill will apply to your workplace
- Identify costs of providing and determine whether businesses with <50 employees qualify for an exemption or can take other cost-saving measures to reduce head count
- Prepare accounting processes to track paid sick leave/fmla for tax credit purposes
- Anticipate workforce fluctuations due to employee's taking COVID-19 sick or FMLA leave
- Understand overlapping sick leave, FMLA leave and other time off programs and consider preparing all-encompassing policy or FAQ for use in administering leaves
- Train staff on how to administer/answer questions regarding leaves

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## FAMILY FIRST COVID-19 EMERGENCY BILL SMALL BUSINESS HARDSHIP EXEMPTION

- A small business hardship exemption is available for an employer, including a religious or non-profit organization with 50 or fewer employees when providing paid sick leave or paid FMLA would jeopardize the viability of the business as a going concern. The exemption may be claimed when:
  - Payment of paid sick/FMLA leave would result in the expenses and liabilities exceeding available business revenues and cause the small business to cease operating at a minimal capacity;
  - The absence of employee(s) requesting paid leave would entail a substantial risk to the financial health or operational capabilities of the small business because of their specialized skills, knowledge of the business or responsibilities; or
  - There are not sufficient workers who are able, willing and qualified, and who will be available at the time and place needed, to perform the labor or services provided by the employee(s) requesting paid leave and these labor services are needed for the small business to operate at minimal capacity

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## FAMILY FIRST COVID-19 EMERGENCY BILL SMALL BUSINESS HARDSHIP EXEMPTION

- How to determine if your small business is exempt from providing paid leave:
  - You have <50 employees
  - FMLA leave is requested because the child's school or place of care is closed or the childcare provider is unavailable due to COVID-19 related reasons
  - An authorized officer of the business has determined that at least one of the three conditions described in the prior slide is satisfied
  - Employers are encouraged to collaborate with employee(s) to reach the best solution for maintaining the business and ensuring employee safety
- There is currently no application process – the employer decides. BUT you had better be able to demonstrate it exists
- Best Practice: Case by case determination and analysis over time vs. blanket determination

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## FAMILY FIRST COVID-19 EMERGENCY BILL SMALL BUSINESS HARDSHIP EXEMPTION

### • BEST PRACTICE: DOCUMENT YOUR ANALYSIS JUSTIFYING THE EXEMPTION AND MAINTAIN THOSE RECORDS

- Identify employee skill set(s) and how absence(s) will impact operations and ability to sustain business
- Generate financial models showing expense to income ratio and losses jeopardizing viability of business
- If you can only maintain essential operations or need so many workers per shift, document work flow and numbers needed to identify number of absences that can be absorbed (if any) at any given time
  - Eg., Need 1 delivery driver/stocker for X volume of product. Have 10X volume per shift to move/stock. Need 10 workers per shift and have 12 workers per shift available. Therefore can only have 2 workers out per shift.

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## FAMILY FIRST COVID-19 RELIEF ACT POSTER

- Department of Labor has created a poster for employers to post in their workplace
- The poster must be posted wherever you typically post the workplace notices
- If you have employees working remotely, you should forward the poster to them electronically or in a manner which demonstrates they have been provided with the information

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## DEPARTMENT OF LABOR WEBSITE WWW.DOL.GOV

### Workplace Safety

The Occupational Safety and Health Administration (OSHA) has resources to help employers and workers prepare for and respond to coronavirus in the workplace.

- [OSHA Guidance on Preparing Workplaces for COVID-19](#) - Developed in collaboration with the U.S. Department of Health and Human Services to help employers respond in the event of coronavirus in the workplace.
- [Temporary OSHA Guidance on Respiratory Protection Standard](#) - This guidance provides suggestions and options to help increase the availability of N95 filtering respirator for healthcare providers.
- [COVID-19 Bulletin](#) - Provides infection prevention information specifically for employers and workers.

### Wages, Hours and Leave

The Wage and Hour Division is providing information on common issues employers and workers face when responding to COVID-19, including the effects on wages and hours worked under the Fair Labor Standards Act and job-protected leave under the Family and Medical Leave Act.

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## DOL WEBSITE

### COVID-19 and the American Workplace

**Temporary Rule: Paid Leave under the Families First Coronavirus Response Act**

On April 1, 2020, the U.S. Department of Labor announced new rules regarding how federal, state, and employer will benefit from the provisions and relief offered by the Emergency Paid Sick Leave Act and Emergency Family and Medical Leave Expansion Act, both part of the Families First Coronavirus Response Act (FFCRA). The Department's Wage and Hour Division (WHD) issued a temporary rule having regulations pursuant to the new law, effective April 1, 2020. For more information, see <https://www.dhs.gov/eis-vsi/vsi-2020-0001>.

FFCRA will help the United States combat and defeat COVID-19 by reimbursing American private employers that have fewer than 500 employees with no credits for the cost of providing employees with paid leave taken for specified reasons related to COVID-19. The legislation also ensures that workers are not forced to choose between their paycheck and the public health measures needed to combat the virus, while at the same time reimbursing businesses.

**Fact Sheets**

- [Families First Coronavirus Response Act: Employee Paid Leave Rights \(PDF\)](#)
- [Families First Coronavirus Response Act: Employer Paid Leave Requirements \(PDF\)](#)

**Questions and Answers**

- [Families First Coronavirus Response Act: Questions and Answers](#)
- [COVID-19 and the Fair Labor Standards Act: Questions and Answers](#)
- [COVID-19 and the Family and Medical Leave Act: Questions and Answers](#)

**Posters**

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## DOL WEBSITE WWW.OSHA.GOV

**COVID-19**

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## DOL WEBSITE OSHA LINK INDUSTRY GUIDES

**COVID-19**

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## DEPARTMENT OF LABOR WEBSITE WWW.DOL.GOV

- DOL website contains important information about COVID-19 for employers
  - Announcements re: FFCRA
  - FAQs for employers/employees about the leave laws
  - Federal OSHA guidance for workplace safety
  - Posters to be posted in the workplace

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## FAMILY FIRST COVID-19 EMERGENCY BILL EMPLOYEE RECOURSE

- Employees who are denied emergency FMLA or emergency sick leave are encouraged to contact their employer first
- DOL Wage & Hour Dept (WHD) will enforce. Ways to report violations:
  - 1-866-4US-WAGE (1-866-487-9243) or [www.dol.gov/agencies/whd](http://www.dol.gov/agencies/whd)
- WHD will accept complaints and investigate them
- Can also file a lawsuit against employer directly

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## PRACTICAL CONCERNS: REAL IN THE FIELD SITUATIONS

- How do I integrate the Emergency Paid Sick Leave and Emergency Paid FMLA provisions with other forms of paid Sick Leave and regular FMLA?
  - Assume COVID-19 Sick Leave is in addition to any program currently in place. FMLA, whether regular or emergency FMLA is capped at 12 weeks
  - Cannot require employee to use existing sick leave, vacation, PTO or other leave benefits first
  - Restrictions applicable to unlimited PTO programs should be communicated immediately
  - Employee can opt to use Emergency Sick Leave before Emergency FMLA

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## PRACTICAL CONCERNS: REAL IN THE FIELD SITUATIONS

- Can you ask an employee if they are sick when they are in the office?
  - Yes, if they have symptoms or tell you they were in contact with someone who has COVID-19
  - No, if they do not have symptoms
- Can you ask them what their symptoms are?
  - No, you cannot ask them a general question due to medical privacy or ask them a question such as if they have a respiratory disease or are at risk
  - But if they are showing symptoms, you can ask them if they have a fever, shortness of breath, cough, aches, fatigue or other symptoms of the virus
- **You must have these conversations in a private place where your conversation cannot be overheard**

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## PRACTICAL CONCERNS: REAL IN THE FIELD CONCERNS

- An Employee calls in sick....
  - Can you ask them what their symptoms are?
    - You can ask them if they are experiencing specific coronavirus symptoms such as a fever, shortness of breath, cough, aches or fatigue
    - You cannot ask them about any other symptoms
    - You can ask them if they are calling in for their own or a family member's serious health condition
    - You can ask them vague questions that elicit whether FMLA leave status may apply
    - You must have this conversation in a private place where your conversation cannot be overheard

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## PRACTICAL CONCERNS: REAL IN THE FIELD SITUATIONS

- Can you conduct a health exam of an employee?
  - Generally, no, you cannot take an employee's temperature or examine the employee (or have someone else on-site to examine the employee) unless a pandemic has been declared in your area by the Center for Disease Control or a state or local authority has proclaimed a pandemic in your specific area
  - BUT, guidance from the EEOC and many states allows temperature checks. Comply with your local jurisdiction
- DO NOT share information an employee tells you with other employees
- DO NOT share information that would enable others to identify an employee whom you are concerned about or who has shared they have been exposed to or are positive for the Coronavirus

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## PRACTICAL CONCERNS: REAL IN THE FIELD SITUATIONS

- My business is an essential business. I have an employee who is not eligible for leave (because the employee is not sick or caring for someone else who is sick and doesn't have a child whose school/daycare is closed). The employee does not want to work. What are my options?
  - (Assume they do not have a medical condition that needs to be accommodated under the ADA):
  - You can schedule the employee to work and expect them to show up
  - Failure to work with no excused absence can be addressed as usual
  - Be consistent. Allowing one employee not to work but requiring a different employee to be present may lead to problems (legal and morale)
    - May be able to justify differential treatment based on critical nature of certain operations

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## FURLOUGHING EMPLOYEES

- How does a furlough differ from a lay-off?
  - Layoff = employee is terminated from employment
  - Furlough – employee remains employed but is off work due to closure or unavailability of work
    - Employee still receives employment benefits (although if extended period of time, COBRA notification may be necessary)
    - Retain talent and bring workforce back up to speed quickly when need for furlough ends
  - Furloughs can be for days/weeks at a time. May involve rotating employees in and out of the workplace
  - You should notify employees in writing of their status
  - Do NOT promise a return to work date if you do not know when it will occur
  - DO provide periodic updates to employees of their status and anticipated return to work

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## PRACTICAL CONCERNS: REAL IN THE FIELD SITUATIONS

- What impact do the Emergency COVID-19 Requirements have on furloughed employees?
  - If an employee is still on the payroll, they have the right to take the leave if they meet the minimum qualifications
  - Employee will only get paid for the hours they would have been scheduled to work if they did not take the leave. So if it was a workweek they are scheduled to be off, they don't get paid.

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## COMMON MISTAKES FURLOUGH ISSUES

- My company has furloughed workers while we have reduced work available. We've never done furloughs before. What should I look out for?
  - In California, if the furlough will last more than 1 week/pay period, you have to pay out all accrued, unused vacation (CA Labor Commissioner opinion)
  - If you have any H1B visa employees, you have to continue to pay them pursuant to the work contract signed in connection with their visa
  - If you have exempt employees, make sure they are furloughed for the entire workweek.
  - If an exempt employee is taking intermittent emergency FMLA, you can pay them in accordance with the emergency FFCRA bill (BUT make sure they still make the minimum salary for the year)

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## UNEMPLOYMENT INSURANCE ADDITIONAL BENEFIT

- CARES Act provides for additional \$600 per week for eligible employees
  - Only applies to individuals who are no longer working through no fault of their own AND they must be able and available to work
    - Quitting without good cause = ineligible
    - Anyone who quits without good cause and obtains benefits through fraud will be ineligible for any additional benefit payments, must make restitution, and will be subject to criminal prosecution
  - Benefits available as of April 4 or 5, depending on the state you are in
  - All payments will end by July 31, 2020 unless extended by Congress
  - Anyone receiving \$1 is eligible for the additional \$600/week
  - States cannot charge employer for FPUC benefits paid to employees and the payments cannot impact an employer's experience rating
  - The \$600/week is taxable income

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## UNEMPLOYMENT INSURANCE BENEFIT FOR TRADITIONALLY INELIGIBLE

Traditionally the following are ineligible for unemployment:

- Independent contractors, self-employed
- Those who have exhausted their unemployment entitlement, and those with limited work history

CARES Act provides unemployment benefits for these individuals

- Must be unemployed, partially unemployed or unable or unavailable to work due to one of several COVID-19 related reasons
- Eligible for amount equivalent to what they would have received under state UI program, plus the \$600/week under the federal program

Application is made to the State Unemployment Agency (in CA, the EDD)

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## UNEMPLOYMENT INSURANCE BENEFIT FOR TRADITIONALLY INELIGIBLE

COVID-19 reasons that qualify traditionally ineligible:

- Individual has been diagnosed with COVID-19 or is experiencing symptoms of COVID-19 and seeking a medical diagnosis
  - **Diagnosis is insufficient** – individual must be unable to continue work activities, such as through teleworking
    - Must have covid-19 and had to quit because of need to self-quarantine (because could not work remotely) OR
    - Must have been in direct contact with someone with COVID-19 and told by medical provider to quit in order to quarantine
- Member of the person's household has been diagnosed with COVID-19 and individual is unable to work as a result
  - No explanation as to what it means to be unable to work
  - Likely means they are unable to telework and/or they are required to care for that person or have to quarantine because of exposure
- Cannot work or telework because the individual is needed to care for a child whose school or place of care is closed

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## UNEMPLOYMENT INSURANCE BENEFIT FOR TRADITIONALLY INELIGIBLE

- Individual is unable to reach their place of employment because of a quarantine imposed as a direct result of COVID-19 public health emergency
  - Means person can't travel to work because it would violate a local or state emergency order
- Individual who has been advised to quarantine by a medical provider because they may be particularly vulnerable to COVID-19 because of a prior health issue, such as a compromised immune system
- Person was scheduled to start work but can't because the place closed due to covid-19 or the offer was revoked as a result of covid-19
- Person has become the major support/breadwinner for a household because the head of household died as a result of COVID-19
- The individual's regular place of work closed as a direct result of the covid-19 emergency (e.g., non-essential business or social distancing protocols)
- Other reasons as determined by DOL

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## OSHA ENFORCEMENT POLICIES RE RESPIRATOR USAGE

- Federal OSHA has issued enforcement policies regarding respirator shortage
  - Permits limited use and reuse of N95 respirators and expired N95 respirators
  - Employers are advised to manage their respiratory protection programs in accordance with OSHA respirator standard
  - Employers are urged to reassess engineering controls, work practice and administrative controls to identify changes they can make to decrease need for N95 respirators. May need to suspend certain non-essential operations
  - If respiratory protection must be used, employers should look to use other respirators that provide equal or greater protection compared to an N95 respirator
  - If n95 or other equivalent respirators are unavailable, employers may consider use or reuse of n/5 respirators or out of date n95 respirators
- Review full guidance carefully with counsel and safety officer to ensure compliance

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## OSHA ENFORCEMENT POLICIES RE RESPIRATOR USAGE

- For n95 respirators that are being reused, the guidance states:
  - Must be used by same employee that used it originally
  - Respirator must maintain its structural and functional integrity
  - Filter material must not be physically damaged, soiled or contaminated
  - Written respiratory protection program must reflect this guidance
  - Employees must be trained on procedures for re-use
- For expired n95 respirators
  - Must be NIOSH certified n95 respirator
  - Must be visually inspected to ensure structural and functional integrity, with components such as straps, nose bridge and nose foam getting particular attention as that can affect the quality of the fit and seal
- **Review full guidance carefully with counsel and safety officer to ensure compliance**

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## OSHA ENFORCEMENT POLICIES RE RESPIRATOR USAGE

### Healthcare Employers

- Expired N95s must not be used for surgical procedures on patients infected or potentially infected with COVID-19 or for procedures which generate aerosols
- Aerosol generating procedures must use unexpired n95s
- To avoid being cited, when an employer does not have a supply of current n95s, they must:
  - Make a good faith effort to obtain alternative respirators, reuse elastomeric respirators or powered, air-purifying respirators appropriate to protect workers
  - Monitor their supply of n95s and prioritize their use according to CDC guidance
  - Provide surgical masks and eye protection as interim measures to protect against drops/splash
  - Implement other feasible measures, such as using partitions, engineering controls, work practices or administrative controls that reduce the need for respirators
- **Review full guidance carefully with counsel and safety officer to ensure compliance**

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## OSHA ENFORCEMENT POLICIES RE RESPIRATOR USAGE

- Use of non-NIOSH approved Respirators
  - Can use other respirators and air-purifying elastomeric respirators that are:
    - Certified under certain standards of other countries or
    - Previously certified under standard of other countries but beyond their recommended shelf life (only when this is the only equipment available)
  - Respirators from Peoples Republic of China are to be used only AFTER the respirators from other countries are sought
- **Review full guidance carefully with counsel and safety officer to ensure compliance**

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## OSHA ENFORCEMENT POLICIES RE RESPIRATOR USAGE

- Order of priority for acquisition and use of respirators:
  1. NIOSH-certified equipment
  2. Equipment certified by other countries except the People's Republic of China, unless the equipment from China is manufactured by a NIOSH certificate holder
  3. Equipment certified by the People's Republic of China from a non-NIOSH certificate holder
  4. Facemasks (e.g., medical masks, procedure masks)
- NIOSH certified equipment, including that which has expired, is the highest priority use
- **Review full guidance carefully with counsel and safety officer to ensure compliance**

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## FEDERAL GOVERNMENT THREE STAGE REOPENING PLAN

- Ability to reopen should be based on:
  - Downward trajectory of covid-19 illnesses over 14-day period (symptoms and positive tests)
  - Robust Testing program
  - Hospital capacity to treat all patients without crisis care
- State should have ability to:
  - Test & Contact Trace quickly and efficiently, including asymptomatic persons
  - Sufficient PPE and critical medical equipment available, with surge ICU capacity
  - Protect health & safety of workers in critical industries, protect those in high-risk facilities (senior care), users of mass transit and be able to advise citizens of expected protocols and social distancing
  - Scale back reopening efforts if second surge or rebound in outbreaks

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## FEDERAL GOVERNMENT THREE STAGE REOPENING PLAN

- Phase One:
  - Continue to encourage Telework whenever feasible
  - Return to work in phases
  - Close Common Areas where personnel will congregate and interact
  - Enforce strict social distancing protocols
  - Minimize non-essential travel and adhere to CDC guidelines regarding isolation following travel
  - Strongly consider special accommodations for personnel who are members of a vulnerable population
- Specific Employers:
  - Schools and organized youth activities that were closed should stay closed
  - Visits to senior living facilities and hospitals should be prohibited
  - Large venues (sit-down dining, movie theaters, public sporting events and places of worship) can operate under strict social distancing protocols
  - Elective surgeries may resume
  - Gyms may reopen under strict protocols
  - Bars to remain closed

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**FEDERAL GOVERNMENT  
THREE STAGE REOPENING PLAN**

Stage Three

- Resume unrestricted staffing of workers
- Free to move about the country (with precautions)

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**STATE & LOCAL GOVERNMENT  
REOPENING PLANS**

- Every state is different and will have their own plans (although some may follow a regional plan agreed to by multiple states)
- County & Local districts may also have their own plans that must be followed.
  - Enforcement will vary by jurisdiction
  - Public resistance to shelter in place and safety protocols varies and has created additional safety concerns for workers
- Check state and local government websites for information about specific requirements
  - May include inspection/certification of readiness to reopen
  - May include application to state to reopen and timing for same
  - May have industry-specific guidance

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**FEDERAL GOVERNMENT  
THREE STAGE REOPENING PLAN**

Phase Two:

- Continue to encourage telework whenever possible
- Close common areas where personnel are likely to congregate and interact or enforce moderate social distancing protocols
- Strongly consider special accommodations for personnel who are members of a vulnerable population
- Bars may operate with diminished standing room occupancy where applicable and appropriate

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## PRACTICAL CONCERNS: REAL IN THE FIELD SITUATIONS

- My business has some cash reserves but cannot afford to be shut down for more than a few weeks. What are my options?
  - Strategic business planning and cost reduction
    - Core business functions
    - Work Sharing
    - Wage Cuts
    - Voluntary time off without pay
    - Mandatory Furloughs
    - Lay-offs (temporary or permanent)
    - Shut-down
  - Infusion of Capital/Control costs
    - Re-negotiate contracts?
    - Business loans/bridge funding – CARES Act
    - Business interruption insurance? (Pandemic may be excluded situation)
    - Conversion to essential supply or service?

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## COVID-19 COMPETING WITH UNEMPLOYMENT

- Massive unemployment
- Frontline/essential workers are often lower paid positions in food and delivery industry
- Difficulty hiring talent
  - Worker fear over exposure to virus or actual illness or vulnerability to illness
  - Inability to leave school-age children due to schools being closed and lack of childcare options
  - Resentment over having to work instead of being let go so they can make more on unemployment
- Employers who laid off workers are having difficulty recalling workers
- Profit margins are shrinking or non-existent and ability to pay bonuses or higher wages is not there for many employers
- States are setting up hotlines to report workers who refuse to return to work in favor of receiving unemployment

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## COVID-19 BIAS IN THE WORKPLACE

- Treating at-risk categories differently
  - Older workers
  - Certain disabilities or medical conditions
  - Mental and physical responses to stress differ and bring judgment and bias from co-workers
  - Persons who have been ill are treated differently
- Medical Screening Questions/temperature checks
  - Assessing risk
  - Can be impacted by industry and geography

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## COVID-19 MOST COMMON QUESTION ASKED

- I have reopened my business (or I am an essential business) and I have an employee who is not eligible for COVID-19 Emergency leave and who does not want to return to work because he/she is concerned about getting the virus and/or has someone in their household who is at risk. The position cannot be done remotely. Can I:
  - Terminate?
  - Switch him/her to another position that can be worked remotely?
  - Can I place them on paid or unpaid leave/furlough?
  - What if I have a bunch of people who feel the same way but who don't have anyone at home that's at risk?
  - Does the ADA provide that I have to accommodate this individual?

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## TO REOPEN NOW OR WAIT.... THAT IS THE QUESTION

- Weigh the Pros/Cons of reopening and whether you are ready and able to do so successfully
- Financial Analysis – Profit/Loss projections
  - Employee Payroll Costs
  - Cleaning Protocols – supplies, costs, etc.
  - Inventory and sales capabilities – do you have what customers want/need and are you able to maintain supplies given supply chain concerns? Are you limited in what services or goods you can provide right now?
  - Cost of additional business equipment – sneeze barriers, contactless payment, masks and PPE
  - Rent and other overhead

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## TO REOPEN NOW OR WAIT.... THAT IS THE QUESTION

- Physical Considerations
  - Access to the store by employees and customers
    - Is it accessible or in a closed building?
    - touchless entry/exit?
  - Layout – does it need to be reconfigured/remodeled/marked for social distancing?
  - Curbside Pickup? Can it be done safely? Are employees accessing customer vehicles? Liability issues?
  - Limited # of people in physical space with social distancing requirements – are you likely to attain the sales volume needed to sustain your business?
  - Monitoring employee and customer health and safety
    - Health questions? Temperature checks?
    - Protocols and Security for issues related to customer resistance to wearing masks or refusing to observe social distancing measures

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## TO REOPEN NOW OR WAIT.... THAT IS THE QUESTION

- Personnel Issues
  - Layoffs v. Furloughs – Do you have a workforce in place?
    - Laid off employees may have found other work
    - Unemployment may pay more than returning to work or workers may simply refuse due to health concerns or fear
    - Workers may be unable to return due to illness or childcare obligations
    - Check whether you have sufficient personnel to reopen and support your business
  - Policy and Training Requirements
    - Mask protocols from CDC and OSHA
    - New safety measures must be documented in safety policies
    - Staff must be trained on new protocols
    - New workplace posters must be added to the workplace

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## TO REOPEN NOW OR WAIT.... THAT IS THE QUESTION

- Manager Training
  - If you have been shut down since March 16, new state and federal laws have been enacted regarding paid leaves of absence, and health and safety
    - Managers need to understand the new rights of employees
      - What they can and cannot ask employees about their health
      - When/how much time employees are able to take off under emergency FFCRA paid leave laws
      - How to obtain information regarding federal emergency leaves and appropriately document the information for the files
      - Payroll system – is it set up to handle the new leaves?
    - Bias training – how NOT to treat someone as disabled
    - Safety training – how to defuse tense situations and avoid conflict

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## REOPENING PHYSICAL SPACES PRACTICAL CONSIDERATIONS

- Has your building/work space been closed for weeks/months?
- Physically inspect your workplace and equipment and make sure all equipment remains in good, safe working order
- Prepare for a thorough cleaning prior to reopening
  - Supplies and personnel to perform?
  - Inspection and standards to meet?
  - Any changes to layout or additions to increase safety and address state and local regs?
- Communication to public of new protocols and limitations on services?
- Communication of hours and reopening?
- Social media presence?
- Announcements? Advertising?

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## REOPENING PHYSICAL SPACES HIDDEN HAZARDS

- Are there hidden hazards that must be addressed?
  - Water system
    - has water been sitting stagnant?
    - Is there an odor/smell/rust?
    - Do you need to flush the system?
  - Physical Space
    - Any unwanted pests such as mice, rats, cockroaches, spiders or bugs?
    - Any physical deterioration from leaky roof, open windows, etc.?
    - Any break-ins or damage?
  - Perishables left to rot?
  - Expired inventory to dispose of?
  - Electrical systems safe and operational?

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## REOPENING PHYSICAL SPACES YOUR NEW NORMAL ?

- Do you need to reconfigure your space?
  - Are cubicles/desks too close to each other?
  - Do you have sufficient hand sanitizer stations and physical barriers to limit contact?
  - Do you need to reconfigure the break room for social distancing?
  - Do you have high contact areas that need to be cleaned more frequently?
  - Is there shared equipment that needs to be cleaned more frequently or after each use?
    - Water fountain
    - Copier
    - Cash Register
    - Break room refrigerator/sink/etc.?

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## REOPENING PHYSICAL SPACES YOUR NEW NORMAL ?

- How are you managing headcount in the workplace and in work areas?
  - continuing remote work?
  - add/rotate shifts and workers?
  - Stagger meal and rest breaks?
- Are you limiting access/travel in the workplace or specific work areas?
  - What do vendor contracts require?
  - If you are non-retail, are you still requiring remote work with business partners and customers?
  - What travel, if any, are you permitting?
  - Do you have limits as to how many people can be in a break room or conference room together?

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## RETURN TO WORK PLANNING

- What functions are essential and are required to be recalled first?
- Who do you recall to work, and in what order?
- Do you have workers rotate telecommuting and in-person work to reduce the number of people in the office at a time?
- Do you need to reassess compensation and benefits?
- Did you lose workers who need to be replaced?
- Will the physical workplace look and work in the same manner?
- How do you prepare your workplace to maintain safe working conditions?
- Do you need to update your policies to reflect new cleaning, social distancing, customer interact, travel or other issues?

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## RETURN TO WORK PLANNING

### • FUNCTIONAL AREAS OF CONCERN

- Employee Physical Safety
  - Are there specific OSHA or other concerns applicable to your industry or workforce?
  - How do you clean your workplace and maintain a clean work environment once you reopen?
  - How do you manage to safely serve the public while under some distancing guidelines?
  - Do you have PPE and safety protocols in place and have you trained workers on them?
  - Will you be able to screen employees and customers for health concerns?
- Employee Mental Well-being
  - Change is stressful
  - Stress and anxiety have increased and will continue to be present
  - Do you have wellness programs or other processes in place to help employees cope with the increased emotional issues of employees?
  - Will you have employees requesting accommodations for mental or physical health issues and is your interactive process up to date with employees trained on recognizing when to initiate a discussion

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## INFORMING EMPLOYEES/CREATING EXPECTATIONS/MANAGING PUBLIC FEAR

- **Leadership during this crisis is essential.**
- Timely notify employees of your efforts to protect them, changes to policies, etc. and how to communicate and to whom during disruptions
- Have a team trained to answer questions and connect employees with resources
- Seeing a calm, measured response and getting information without asking is reassuring
- Timely notify customers and business partners of steps you are taking to protect public health and of changes to business operations
- **DO NOT** panic, spread fear or misinformation or increase anxiety
- Understand that people have various levels of anxiety and fear and **DO NOT** allow employees to bully, abuse, ridicule or chastise others for having a different attitude or response to the crisis.

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# RESOURCES

- CA COVID-19 Consumer Info: [www.covid19.ca.gov](http://www.covid19.ca.gov)
- CA EDD: [www.edd.ca.gov](http://www.edd.ca.gov)
- Cal/OSHA: [www.dir.ca.gov/dosh](http://www.dir.ca.gov/dosh)
- Federal OSHA: [www.osha.gov](http://www.osha.gov)
- CA Department of Labor: [www.dir.ca.gov](http://www.dir.ca.gov)
- US Department of Labor: [www.dol.gov](http://www.dol.gov)
- Fair Employment and Housing Commission: [www.dfeh.ca.gov](http://www.dfeh.ca.gov)
- Equal Employment Opportunity Commission: [www.eeoc.gov](http://www.eeoc.gov)
- Center for Disease Control: [www.cdc.gov](http://www.cdc.gov)
- World Health Organization: [www.who.int](http://www.who.int)
- Health and Human Services Hipaa info: [www.hhs.gov/hipaa](http://www.hhs.gov/hipaa)

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