



YOUR FFCRA QUESTIONS ANSWERED

1. Is a stay-at-home or shelter-at-home order a qualifying reason for emergency paid sick leave (EPSL)?

On April 1, the Department of Labor (DOL) issued a temporary regulation, that addresses this issue. Section 826.20(a)(2) in the regulation explains “that an employee may take paid sick leave only if being subject to one of these orders prevent him or her from working or teleworking. The question is whether the employee would be able to work or telework “but for” being required to comply with a quarantine or isolation order. An employee subject to one of these orders may not take paid sick leave where the employer does not have work for the employee. This is because the employee would be unable to work even if he or she were not required to comply with the quarantine or isolation order.”

The DOL provided an example that is meant to provide clarity on their position regarding paid sick leave eligibility.

“For example, if a coffee shop closes temporarily or indefinitely due to a downturn in business related to COVID 19, it would no longer have any work for its employees. A cashier previously employed at the coffee shop who is subject to a stay-at-home order would not be able work even if he were not required to stay home. As such, he may not take paid sick leave, because his ability to work is not due to his need to comply with the stay-at-home order, but rather due to the closure of employment.”

“This analysis holds even if the closure of the coffee shop was substantially caused by a stay-at-home order. If the coffee shop closed due to its customers being required to stay at home, the reason for the cashier being unable to work would be because those customers were subject to the stay-at-home order, not because the cashier himself was subject to the order. Similarly, if the order forced the coffee shop to close, the reason for the cashier being unable to work would be because the coffee shop was subject to the order, not because the cashier himself was subject to the order.”

The DOL does provide an example as to when an employee could receive paid sick leave while subject to a stay-at-home or shelter-at-home order.

“For example, if a law firm permits its lawyers to work from home, a lawyer would not be prevented from working by a stay-at-home order, and thus may not take paid sick leave as a result of being subject to that order. In this circumstance, the lawyer is able to telework even if she is required to use her own computer instead of her employer’s computer. But, she would not be able to telework in the event of a power outage or similar extenuating circumstance and would therefore be eligible for paid sick leave during the period of the power outage or extenuating circumstances due to the quarantine or isolation order.”

2. What is the difference between a furlough and a lay off?

A furlough is an alternative to layoff. When an employer furloughs its employees, it requires them to work fewer hours or to take a certain amount of unpaid time off. For example, an employer may furlough its nonexempt employees one day a week for the remainder of the year and pay them for only 32 hours instead of their normal 40-hour week. Another method of furlough is to require all employees to take a week or two of unpaid leave sometime during the year. Exempt employees generally must receive their full salary for any week in which work was performed, subject to limited exceptions. A full workweek furlough is allowable without pay since the FLSA states that exempt employees do not have to be paid for any week in which they perform no work.

An employer may require all employees to go on furlough, or it may exclude some employees who provide essential services. Often benefits will remain in place and furloughed employees can utilize accrued paid leave benefits the company provides. Generally, the theory is to have most employees share some hardship as opposed to a few employees losing their jobs completely.

A layoff is a separation of employment. An employee is laid off because there is not enough work. A layoff signifies that conditions could change and individuals could be reinstated when work becomes available. Employees are typically able to collect unemployment benefits while on an unpaid layoff. During this time, insurers have relaxed eligibility requirements to remain on the group benefit plan. Employers who want to extend benefits during a layoff, should confirm what allowances are available with the respective carriers.

3. How should I collect health care premiums from those employees that are furloughed? If they don't pay what can I do?

If employees are still receiving paychecks for time paid in arrears or company-provided paid leave, premiums for health care and other benefits can be deducted. Arrangements can be made to have payments mailed to a company contact or repayment, which is riskier, can be made upon the employee's return to work. If you agree to receive monthly payments and a payment is missed, the employee has a 30-day grace period before coverage can be terminated. Employers have a notice obligation before terminating coverage.

4. If I'm a health care provider do I have to post the DOL notice?

The DOL's FAQs state all employers with fewer than 500 employees must post the notice. Currently there is no information to indicate health care providers or emergency responders do not have to post the notice.

5. Is there a Spanish version of the DOL's model notice?

You are not required to post this notice in multiple languages, but the DOL is working to translate it into other languages. Find more information [here](#).

6. Can employees who qualify for benefits because they are staying home with their school-aged children get another job and work while they are receiving benefits?

No. If the employer allows, leave can be taken intermittently.

7. Can we deduct the normal insurance premiums from an employee's emergency paid leave?

Yes.

8. If an employee just exhausted 12 weeks of standard family and medical leave, is he entitled to an additional 12 weeks of emergency family and medical leave if he meets the criteria?

Generally, no. Traditional FMLA entitles eligible employees up to 12 weeks of unpaid leave in a designated 12-month period. Before deciding on a request for emergency family and medical leave it's important to confirm how you define a 12-month period (e.g., calendar-year or rolling 12 months).

9. If an employee is off two weeks recovering from COVID-19 and received 80 hours of paid sick leave, is she eligible for an additional 80 hours of paid sick leave at two-thirds pay to care for a family member who has to be quarantined?

No. The paid sick leave entitlement is exhausted after 80 hours; it is a one-time use.

10. How do you, or can you, determine who should not return to work?

If someone is sick, they need to stay home. If someone has a temperature they need to stay home.

11. Your company policy states that employees must exhaust all paid leave before taking unpaid leave or family and medical leave. Can you maintain this practice?

No. You cannot demand your employees to use any paid benefits before taking emergency family and medical leave or emergency paid sick leave.

12. Your business is a nonprofit organization and does not participate in unemployment insurance. Do the changes Congress is making to unemployment benefits include nonprofits?

Yes. An employee who is laid off or furloughed should be able to claim unemployment. Each state's eligibility and benefits differ.

13. Is there any guidance on what kind of documentation your business can or cannot ask for to support the types of leave?

Bukaty Companies will provide forms next week that comply with [IRS](#) and [DOL](#) guidance.

14. Is the DOL releasing additional guidance on FFCRA for employers and employees?

Yes. Content is updated regularly. Below are helpful links. Clients are always welcome to contact our HR Concierge Service.

[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](#)