



EMPLOYMENT ISSUES IN THE COVID-19 ENVIRONMENT

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Families First Coronavirus Response Act (FFCRA)

- The law takes effect on April 2nd and expires on December 31, 2020.
- It requires that employers with less than 500 employees (with certain exceptions) do two things:
 - Provide partially paid sick leave to their employees for COVID-19 related reasons for 2 weeks
 - Provide employees with partially paid leave to care for children (under 18 years of age) due to school or daycare closures caused by COVID-19 for as much as 10 weeks (for a total of 12 weeks if used with the 2 weeks of paid time off).
- Employers may recoup the amounts paid out to employees for paid leave through quarterly payroll tax credits. There are also no payroll taxes due from the employer or employee.

PAID SICK LEAVE

All employers with **less than 500** employees must provide **80 hours of paid sick leave (at current rate of pay, subject to caps)** to employees who are unable to work (**or perform telework**) because of one of the following reasons:

1. The employee is subject to a federal, state, or local isolation or quarantine order related to COVID-19;
2. The employee has been advised by a healthcare provider to self-quarantine due to concerns related to COVID-19;
3. The employee is experiencing symptoms consistent with COVID-19 **and** is seeking a medical diagnosis;

PAID SICK LEAVE UNDER FFCRA

4. The employee is caring for an individual who is subject to a federal, state, or local isolation or quarantine order;
5. The employee is caring for a child for whom the school or childcare has been closed or is unavailable due to COVID-19 precautions; or
6. The employee is experiencing a substantially similar condition specified by the Department of Health and Human Services Secretary (unclear as of yet what this means).

Q. How Many Hours of New Federal Paid Sick Leave is Available?

For full-time employees, employers must provide up to **80 hours of paid sick leave**.

This federal paid leave is in addition to any other paid sick leave or PTO that the employee is entitled to take under the employer's existing policies. Employees have the right to use this federal paid leave first before exhausting any of their available PTO.

For part-time employees, employers must provide paid sick leave **in an amount equivalent to the number of hours the employee would work in an average two-week period.**

If the leave is less than 80 hours...

- **Then, paid sick leave ends on the next scheduled shift of that employee after the need for leave ends. For example:**
 - An employee is instructed by a healthcare provider to self-quarantine pending a test for COVID-19.
 - The employee begins paid sick leave.
 - After three days, the employee gets the test results and they are negative.
 - The paid sick leave would end on the fourth day, which is the employee's next regularly scheduled shift.

Q. How much do we have to pay?

Employers must pay the **full regular rate of pay** subject to caps for reasons (1)-(3):

- Total payment is capped at \$511 per day or \$5,111 in the aggregate if the employee is home due to any qualifying reason other than school closure or care for an ill family member under specific circumstances.

Employers must pay the **two-thirds the employee's regular rate of pay** subject to caps for reasons (4)-(6):

- Payment is capped at \$200 per day or \$2,000 in the aggregate if the employee is home caring for a family member with the virus or due to a child's school closure.

Q. Do Health Care Providers Have to Follow This New Law or Are They Exempt?

- ✓ There is an “opt-out” for employers who employ **healthcare providers** or **emergency responders**.
- ✓ Those employers MAY follow the law, but they MAY ELECT TO EXCLUDE health care providers and emergency responders from paid sick leave under this law.
- ✓ Interestingly, it is unclear whether administrative personnel working at health care providers are eligible for “opt out” provision.

Emergency Family & Medical Leave Expansion Act

- The federal Family and Medical Leave Act (FMLA) normally applies to companies with 50 or more employees in a 75 mile radius.
- The new law, which applies for the limited time period of April 2 through December 31, 2020, covers **all employers with less than 500 employees**.
- Eligible employees also include those who have worked for the company for **30 days** (not the 12 months under the old FMLA rules).

SMALL BUSINESS EXEMPTION

- Employers who have 50 or fewer employees may seek an exemption if complying with the Act would **“jeopardize the viability of the business as a going concern.”**
- This is not an automatic exemption, though, and must be applied for with the federal Department of Labor.
- Regulations on this point will likely follow soon.

Basics of FMLA Expansion

- Added a new reason to FMLA qualifying reasons:
 - If employee is unable to work (or telework) due to need to care for employee’s son or daughter under age of 18 if school or place of care has been closed or child care provider is unavailable due to a public health emergency.
- 12 weeks of leave

Payment for Expanded FMLA

- First 10 days may be unpaid. If employees don't want unpaid time, they can elect to use accrued PTO (including new federal paid sick time)
- After initial 10 days, paid leave of at least 2/3 of employee's regular rate of pay
- Not to exceed \$200/day or \$10,000 in the aggregate

Q. Am I required to restore the employee back to his or her position or an equivalent position at the expiration of the leave (as with regular FMLA)?

Generally yes. Same or equivalent position, benefits and pay.

Q. Are there any exceptions?

Yes, there is a **small business exception**:

For employers with less than 25 employees, there is no obligation to return an employee to the same or equivalent position at the expiration of the leave period under certain circumstances.

Small Business Exception to Reinstatement of Employees

No reinstatement is required if:

- The position does not exist at the expiration of the leave because there are changes in operating conditions due to COVID-19;
 - Example: the company eliminated the position held because of business conditions changing.

AND

- The employer makes a reasonable effort to restore the employee to an equivalent position within one year of the employee's leave;

AND

- If reasonable efforts to reinstate the employee fail, the employer makes reasonable efforts to contact the employee if an equivalent position becomes available within a year after his or her leave ended.

Q. Can an employee refuse to work because he or she is afraid of contracting the virus?

A. Potentially, yes.

Under OSHA, an employee is entitled to refuse to work if they believe they are in “imminent danger.”

OSHA defines “imminent danger” to include “any conditions or practices in any place of employment which are such that a danger exists which can reasonably be expected to cause death or serious physical harm immediately or before the imminence of such danger can be eliminated.”

Whether or not certain conditions pose an “imminent danger” would depend upon the facts. Consult counsel if someone makes this claim.

Q. Can an employee refuse to work because he or she is afraid of contracting the virus?

- A. Potentially yes.
- Section 7 of the National Labor Relations Act (NLRA) also protects employees (in union and non-union workplaces) to engage in “protected concerted activity for mutual aid or protection.”
- The NLRB has upheld an employee’s right to participate “in a concerted refusal to work in unsafe conditions.”
- If employees are complaining about working in conditions that are “unsafe because of potential exposure,” address their concerns as reasonably as possible.
- If the employees remain unsatisfied with the employer’s efforts, contact counsel before you discipline employees for refusing to work.

WHAT ABOUT UNEMPLOYMENT BENEFITS?

Q: What if I am forced to shut down my business due to COVID-19 impact? Are my employees eligible for unemployment benefits?

A: If you are forced to temporarily shut down business operations, your employees will likely be eligible for unemployment benefits, assuming they meet all other eligibility criteria, and have a return to work date that occurs before the 10-week maximum. Under this circumstance, unemployment insurance claims made by impacted employees will be charged against the employer’s account.

As of today, H.681 is near passage. It will make changes to the unemployment statute that adds circumstances under which an employer’s experience-rating record will not be charged:

- Employee voluntarily quit to care for a family member diagnosed with COVID-19

- For 4 weeks because:
 - Employer temporarily ceased operation due to stay-home order or because employer ceased operation due to actual exposure of workers
 - The employee has been requested by a medical professional or health official to be isolated or quarantined as a result of COVID-19
- The employer is only eligible for relief of charges if the employee is rehired when the employer resumes operations or upon completion of the individual's period of isolation or quarantine.

What about Unemployment Benefits?

Q: What if I need to temporarily reduce my employees' hours due to slow-down in business as a result of COVID-19? Are my employees eligible for unemployment benefits?

A: If you experience a slow-down in business, causing a reduction in available work hours for employees, your employees may be eligible for partial unemployment benefits. Unemployment insurance claims made by impacted employees will be charged against the employer's account.

Other Unemployment Changes Due to COVID-19

- Worker does not need to show “able and available” to work, and does not need to meet work search requirement
- Expedited payment of benefits: DOL may not wait for employer verification or EFT verification
- Return to work within 10 weeks

Vermont WARN Act

- If an employer closes, or lays off 50 or more employees over a 90-day period, it needs to notify certain State officials 45 days prior to the effective date.
- Must give 30 day notice to local officials, employees, and any bargaining unit.
- Notice requirement does not apply if....(3) the business closing or mass layoff is caused by business circumstances that were not reasonably foreseeable at the time the 45-day notice would have been required; (4) the business closing or mass layoff is due to a disaster beyond the control of the employer.

Helpful References

- For Information regarding the new Expansion of Family and Medical Leave and Paid Time Off, go to:
<https://www.dol.gov/newsroom/releases/osec/osec20200320>
- <https://accd.vermont.gov/about-us/disaster-planning/covid-19-guidance-vermont-businesses>
- <https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html>
- <https://www.osha.gov/SLTC/covid-19/standards.html>.
- <https://www.dol.gov/newsroom/releases/osec/osec20200320>

Additional Helpful Resources:

<https://agriculture.vermont.gov/covid-19-information>

<https://www.fda.gov/food/food-safety-during-emergencies/food-safety-and-coronavirus-disease-2019-covid-19>

<https://labor.vermont.gov/covid19/covid-19-frequently-asked-questions>

<https://accd.vermont.gov/about-us/disaster-planning/covid-19-guidance-vermont-businesses>

<https://www.healthvermont.gov/response/infectious-disease/2019-novel-coronavirus>

KEY TAKE AWAY

- The COVID-19 crisis is rapidly evolving.
- New laws, state and federal, and new regulations, are coming online rapidly.
- Stay tuned and keep in touch.

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SBA Disaster Loans

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SBA Economic Injury Disaster Loans

- As of March 20, entire State of Vermont is eligible
- Up to \$2 million (varies by business)
- Up to 30 year repayment terms
- Rate 3.75% (or 2.75% non-profit)
- Per Vermont SBA Director-apply early
 - “given the unknown duration of the pandemic, a few days from now it may be affecting your business and you will be glad you applied.”
- Use to pay fixed debts, payroll, A/P, other bills

SBA Application Process

- Directly via website (disasterloan.sba.gov/ela/) or call SBA office (800) 659-2955
- 2-3 week process
- Deadline of December 20, 2020
- SBA Form 5

Application Materials to Gather

- ✓ Tax Returns (including affiliated entities)
- ✓ Balance Sheet
- ✓ Personal financial statements (20% owners)
- ✓ Schedule of liabilities
- ✓ P&L

COVID-19 TAX MATTERS

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Federal Income Tax

- The deadline for filing federal income tax returns that are due on April 15, 2020 has been extended to July 15, 2020.
- The deadline for making federal income tax payments that are due on April 15, 2020 has been extended to July 15, 2020.
- Those extensions apply without regard to the amount of federal income tax owed.
- This extension does not apply to returns and taxes due on a day other than April 15, 2020. In particular, income tax returns for most partnerships and S corporations were due in March.
- This extension does not apply to taxes other than federal income tax.

State Income Tax

- In the vast majority of states, the federal extension does not automatically apply to state income tax returns and payments.
- Many states are taking steps to offer extensions that correspond to the federal extensions, but it is possible that not all states have done so yet.
- Vermont has extended the deadline to file the following returns from April 15, 2020 to July 15, 2020:
 - Vermont personal income tax
 - Vermont Homestead Declaration and Property Tax Credit Claims
 - Corporate income tax
 - Fiduciary income tax
- The payment deadline for those taxes has also been extended.

Vermont Sales & Use Tax and Meals & Room Tax

- The website of the Vermont Department of Taxes states that no penalties or interest will be charged to businesses that are unable to meet the March 25 or April 25 filing deadlines for Sales & Use Tax and Meals & Rooms Tax if the filings are made after the applicable deadline.
- There is no indication of how long that grace period will last.
- Businesses that can meet the standard deadlines are advised to do so.
- Businesses are advised that those taxes must still be collected and remitted to the state. Those taxes are not being abated.
- Individuals within a business who are responsible for payment of those taxes to the state can still have personal liability for them.

Federal Payroll Tax Credits for Paid Employee Leave

- Available to all employers with fewer than 500 employees.
- Credit against quarterly payroll taxes
 - Employee Income Tax Withholding
 - Social Security Tax (both employer and employee portions)
 - Medicare Tax (both employer and employee portions)
- Refundable to the extent the credit exceeds the employer's payroll tax obligations
- These credits apply only to leave payments that are required under the Families First Coronavirus Response Act. Payments beyond those that are required are not eligible for these tax credits.
- These credits constitute taxable income for the employer.

Federal Payroll Tax Credits for Paid Employee Leave

- Paid Sick Leave Credit
 - sick leave paid to an employee who is unable to work because of Coronavirus quarantine or self-quarantine or has Coronavirus symptoms and is seeking a medical diagnosis
 - the credit is equal to the sick leave paid to the employee at the employee's regular rate of pay, up to \$511 per day and \$5,110 in the aggregate, for up to 10 days per quarter
 - sick leave paid to an employee who is caring for someone with Coronavirus, or is caring for a child because the child's school or child care facility is closed, or the child care provider is unavailable due to the Coronavirus
 - the credit is equal to two-thirds of the employee's regular rate of pay, up to \$200 per day and \$2,000 in the aggregate, for up to 10 days per quarter
 - there is an additional tax credit for costs to maintain health insurance coverage for the eligible employee during the leave period

Federal Payroll Tax Credits for Paid Employee Leave

- Child Care Leave Credit
 - sick leave paid to an employee who is unable to work because of a need to care for a child whose school or child care facility is closed or whose child care provider is unavailable due to the Coronavirus
 - The credit is equal to two-thirds of the employee's regular rate of pay, up to \$200 per day with a maximum of \$10,000 in the aggregate for all calendar quarters for the year
 - there is an additional tax credit for costs to maintain health insurance coverage for the eligible employee during the leave period

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