



WORLDLY INSIGHT + LOCAL KNOW-HOW

EMPLOYMENT ISSUES IN THE COVID-19 ENVIRONMENT

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Families First Coronavirus Response Act (FFCRA)

- The law took effect on April 1st and expires on December 31, 2020.
- It requires that employers with less than 500 employees (with certain exceptions) do two things:
 - Provide partially or fully paid sick leave to their employees for COVID-19 related reasons for 2 weeks (80 hours)
 - 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.

Application to Municipalities

- FFCRA applies to municipalities that employ 1 or more employees
- Governmental entities including municipalities are NOT eligible for the tax credits.

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).

Quarantine or Isolation Order

Reason #1: The employee is subject to a federal, state, or local isolation or quarantine order related to COVID-19...

This does include a shelter-in-place or stay-at-home order like the one in Vermont, if it causes the employee “to be unable to work even though his or her Employer has work that the Employee could perform but for the order.”

Any employee subject to a quarantine or isolation order may take Paid Sick Leave for the reason described in paragraph (1)(i) of this subsection **only if the employee can show that “but for” being subject to the order, he or she would be able to perform work that is otherwise allowed or permitted by his or her Employer, either at the Employee’s normal workplace or by telework.**

An employee subject to a quarantine or isolation order **may not** take Paid Sick Leave where the Employer does not have work for the Employee as a result of the order or other circumstances.

It likely does include Vermont’s order for people coming from out of state to self-quarantine for 14 days.

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.

Paid Leave

Paid sick leave can only be taken where the employer has work for the employee, but the employee is unable to perform it because of one of the listed reasons.

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.
- **The remainder of the 80 hours would be available for future use.**

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. Are Emergency Responders Entitled to Use Paid Time Provided by FFCRA?

- ✓ 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** employees from paid sick leave under this law.

Who Is an Emergency Responder?

- “Anyone necessary for the provision of transport, care, healthcare, comfort and nutrition of such patients, or others needed for the response to COVID-19.”
- Includes: military or national guard, **law enforcement officers**, correctional institution personnel, **fire fighters**, **emergency medical services personnel**, physicians, nurses, **public health personnel**, **emergency medical technicians**, **paramedics**, **emergency management personnel**, 911 operators, child welfare workers and service providers, **public works personnel**, and persons with skills or training in operating specialized equipment or other skills needed to provide aid in a declared emergency.

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. And all municipalities.
- The new law, which applies for the limited time period of April 1 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 – not applicable to municipalities at this time

- 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.”**
- To be entitled to this exemption, an authorized officer of the business has to determine that:
 - (i) the requested leave would result in expenses exceeding revenues and cause the business to cease operating at a minimal capacity;
 - (ii) absence of employees requesting leave would entail a substantial risk to the business because of specialized skills, knowledge of the business, or responsibilities; or
 - (iii) there are not sufficient workers able, willing, qualified and available to perform the services, and the services are needed for the business to operate at a minimal capacity.

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.
- Total of 12 weeks of leave in the employer's measuring period of 12 months.
- Paid at 2/3 regular rate and subject to the cap of \$200 per day or \$12,000 in the aggregate.

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.

Intermittent Leave – Paid Sick Leave and EFMLEA

- An employee can take either type of leave intermittently if the **employer and the employee both agree.**
- If employee reports to worksite: intermittent leave only available for the child care reason. Other reasons require leave to be taken consecutively until there is no longer a reason to take leave.
- If employee is teleworking: employer and employee can agree to intermittent leave in any agreed increment of time for any qualifying reason.

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**. It appears that this exception is not applicable to municipalities.

Exceptions to reinstatement requirements under FMLA still apply – if employee would have been terminated anyway (e.g. position eliminated or layoffs occurred). Also key employees.

Small Business Exception to Reinstatement of Employees – *not applicable to municipalities at this time*

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.

Some Frequently Asked Questions

Q. Can my employer ask for documentation of my need for FFCRA leave?

A. Yes, but it is more limited than normal FMLA documentation. You can require: (1) the employee's name; (2) the dates for which leave is requested; (3) the qualifying reason for the leave; and (4) oral or written statement that the employee is unable to work because of the qualified reason for leave.

Depending on the reason, you can also ask for: the name of the government entity that issued the quarantine/isolation order; the name of the health care provider who advised the employee or the individual being cared for to self-isolate; the name of the child being cared for, the name of the school/child care provider that has closed; and a representation that no other suitable person will be caring for the child during the leave time.

Q. What does it mean to be “unable to work,” so that I can be eligible for FFCRA leave and paid time off?

A. You are unable to work if your employer has work for you and one of the reasons set forth in the Act PREVENTS YOU FROM BEING ABLE TO WORK OR TELEWORK.

This does not apply if you and your employer agree that you can work from home, even if you are working a different schedule.

Q. What does it mean to be subject to a quarantine or an isolation order for the purposes of Reason 1 of the FFCRA eligibility requirements.

A. The DOL looks at this Reason 1 in a very NARROW way. “The question is whether the employee would be able to work or telework “but for” being required to comply with a quarantine order.

Example: If a coffee shop was closed because fewer customers show up because of an order of the Governor to stay home, Reason 1 would NOT apply. The reason the cashier lost her job was business loss, not that she is subject to an order.

Q. If the employer closes the worksite before an employee goes out on leave, can the employee get paid sick leave?

A. No. If your employer closes after April 1, you will not get paid sick leave or expanded sick leave, but you may be eligible for unemployment insurance benefits.

This is true “whether your employer closes your worksite for lack of business or because it was required to close pursuant to a federal, state or local order or directive.”

Q. If my employer closes my worksite while I am on paid sick leave or expanded FMLA, what happens? See Questions 24-30 of DOL 3/30/2020 guidance.

A. Your employer must pay for any paid sick leave or medical leave you used BEFORE the employer closed.

As of the date they close – you are no longer entitled to this paid leave or expanded FMLA. You may be eligible for unemployment insurance.

**Q. If my employer reduces my scheduled work hours, can I use paid sick leave or expanded FMLA for the hours I am not longer working?
See Questions 24-30 of DOL 3/30/2020 guidance.**

A. No. If your employer reduces your work hours because it does not have work for you to perform you are not covered. This is because “you are not prevented from working those hours due to a COVID19 qualifying reason, even if your reduction in hours was somehow related to COVID19.” (Question 28).

Q. May I take my paid sick leave or expanded FMLA Intermittently?

A. Yes. If the employer and the employee both agree. For example: if you are teleworking or working at the job site, but also need some time to go home and relief your spouse or partner or to take care of your child, you may take the leave intermittently

Q. May I use my own accrued CTO to supplement my pay if I am taking time off for qualifying reasons?

A. Yes. You may use your own accrued time off to supplement your paid leave, but your employer cannot force you to do so. And in some states, you may be allowed to specifically save your accrued paid time off for FMLA reasons.

Note: tax credits are only available for employer payment of FFCRA leave.

Q. Who is an “individual” for the purposes of Reason 4 of the FFCRA eligibility standards?

A. According to new regulations, published April 1st, this term means someone with whom the employee has a personal relationship. Examples – immediate family member, roommate, person with whom you have a relationship that creates an expectation that the employee would care for that person if they needed it.

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 Union Contracts During COVID 19

- If your workplace is unionized, do not forget to follow your contract as best you can.
- You cannot unilaterally change terms and conditions (even for the better) without potentially committing a ULP.
- Depending upon what you propose to change, you will want to contact the union for consent, or enter into a Memorandum of Understanding for this situation only.

What About Unemployment Benefits?

Q. What if I am forced to shut down certain functions due to COVID-19 impact? Are those employees eligible for unemployment benefits?

A. Likely, yes. If you are forced to temporarily shut down certain operations, your employees will likely be eligible for unemployment benefits. Under this circumstance, unemployment insurance claims made by impacted employees will be charged against the employer's account.

What About Unemployment Benefits?

Q. What if I need to temporarily reduce my employees' hours due to slow-down in work 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.

Will my UI experience rating be charged?

Experience rating is not charged if:

- The employee quit in order to self-isolate or quarantine (or to care for a family member who is isolating) at the recommendation of a health care provider or pursuant to a specific recommendation, directive or order by public health authority with jurisdiction, the Governor, or the President for one of the following reasons:
 - Individual has been diagnosed with COVID-19;
 - Individual is experiencing symptoms of COVID-19;
 - Individual has been exposed to COVID-19; or
 - Individual belongs to a specific class or group of person identified as being at high-risk.

Will my UI experience rating be charged?

Experience rating is not charged if:

- The employee quit (or is caring for a family member who quit) because of an unreasonable risk that the individual could be exposed to or become infected with COVID-19 at place of employment;
- The employee quit to care for a child under 18 y.o. because school or child care has been closed.
- Unreasonable risk: workplace is out of compliance with OSHA/CDC/VDOH guidance.

Will my UI experience rating be charged?

Experience rating is not charged for benefits paid for up to 8 weeks because:

- Employer partially or completely ceased operation in response to a request from public health authority that employer cease operations because of COVID-19, in response to order by Governor or President related to COVID-19, or because employer voluntarily ceased operations due to the actual exposure of workers at workplace;
- The individual becomes unemployed as a direct result of a state of emergency or directive issues by Governor or President in relation to COVID-19; or

Will my UI experience rating be charged?

- The individual has been recommended or requested by a medical professional or a public health authority to be isolated or quarantined as a result of COVID-19.

For each of these reasons, employer is only eligible for relief of charges if employer rehires or offers to rehire individual within a reasonable period of time after operations resume, or upon completion of individual's period of isolation or quarantine.

Other Unemployment Changes Due to COVID-19

- The Vermont Department of Labor has issued a directive to address certain situations in this crisis:
- Workers who are laid off due to COVID-19 business impacts do 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

Interaction between FFCRA and UI

Q. If my employer closes my worksite on or after April 1, 2020 (the effective date of the FFCRA), but before I go out on leave, can I still get paid sick leave and/or expanded family and medical leave?

A. No. If your employer closes after the FFCRA's effective date (even if you requested leave prior to the closure), you will not get paid sick leave or expanded family and medical leave but you may be eligible for unemployment insurance benefits. This is true whether your employer closes your worksite for lack of business or because it was required to close pursuant to a Federal, State or local directive. You should contact your State workforce agency or State unemployment insurance office for specific questions about your eligibility.

**For additional information, please refer to
<https://www.careeronestop.org/LocalHelp/service-locator.aspx>.**

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>.
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- <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.

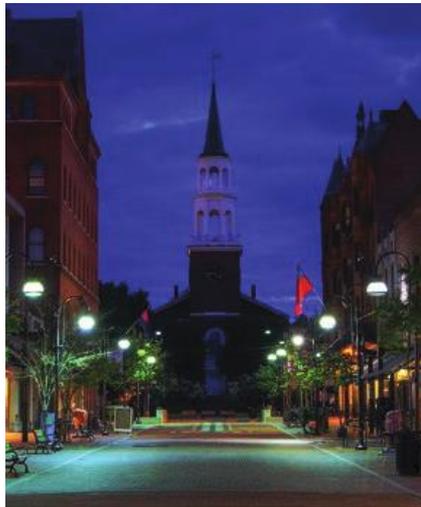
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