



COVID-19 HR Solutions Updates & FAQ

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This information has been provided as an informational resource for NFP clients and business partners and is not intended to and does not constitute legal advice. Its purpose is to provide general guidance, and the materials presented are not intended to address specific risk scenarios. Issues related to Coronavirus are changing at a rapid pace. The materials presented today may be outdated in the near term. Please consult your legal counsel for advice on your particular facts and circumstances.

Agenda

- I. Furloughs, Pay/Hour Reduction and Reduction in Force (RIF)/Layoffs
- II. Wage and Hour – Paying Employees during the COVID-19 Crisis
- III. New Leave Legislation and Employer Policies
- IV. HIPAA
- V. Workplace Safety
- VI. Q&A



Furloughs, Pay/Hour Reduction & Reductions in Force

Definitions and Considerations.

Furloughs, Pay/Hour Reduction and Reductions in Force

What is the difference between a furlough, pay/hours reduction and a reduction in force (RIF)?

What is a Furlough?

- A furlough is when an employer requires employees to work fewer hours or take a certain amount of unpaid time off.
- Furlough can be for a specified number of days, at certain intervals or an entire week or more, depending on the employer's budgetary constraints.
- Exempt employees subject to a furlough must remain above the salary threshold under the Fair Labor Standards Act (FLSA) to maintain their exempt status:
 - Exempt employees may not perform any work (including checking emails or participating in conference calls, during the furlough period). Otherwise, they are entitled to be paid for the **entire work week**.
 - In addition, in some states, furloughed employees may be entitled to unemployment benefits during their period of furlough, and thus having employees perform any work during the furlough period could also jeopardize their ability to receive unemployment benefits.
- An employer may require all employees to go on furlough, or it may exclude some employees who provide essential services. Generally, the theory is to have the majority of employees share some hardship as opposed to a few employees losing their jobs completely.

Furloughs, Pay/Hour Reduction and Reductions in Force

Furlough Considerations:

What do our benefit plan provisions say about “unpaid” leave?

- Employers should check with all carriers to see what the terms are for employees on unpaid leave.
- Some carriers have limitations to the amount of time an employee can be on an unpaid leave and still be covered under the benefit plans.
- Those who self-insure will want to check with their stop loss carrier.
- Employers will also want to check their SPD’s language to see what is permitted.

Does the company want to continue benefit coverage during the furlough?

- If the carrier permits benefit continuation, employers will need to decide:
 - Will we continue the coverage as it is currently being administered? (Cost sharing/or should employer pick up the cost?)
- If employees continue to pay their share of the premium:
 - How will employers collect those premiums? (On a monthly basis or will the employer make deductions when the employee returns to work?)
 - The employer may also need to amend plan document language to reflect the relaxed eligibility criteria.

Are we permitted to put employees on COBRA during the furlough period?

- Employers should check on the provisions of their plan, if an employee is furloughed and the employer continues coverage – there is no COBRA event. However, if the employer does not continue coverage, and there is a reduction in hours usually constitutes a qualifying event under COBRA.
- As stated above, there may be a period of unpaid leave in which the employee continues to be covered under the plan – consult your plan documents. In some instances, COBRA would be offered after the designated period of unpaid leave (i.e. after 30 days of unpaid leave as stipulated in your plan document).

Furloughs, Pay/Hour Reduction and Reductions in Force

Furlough Considerations:

Are we permitted to put employees on COBRA during the furlough period? (cont.)

- Under the ACA, employers have to offer benefit coverage to those working 30 hours/week (FT employees).
- For most employees in a furlough/layoff situation, they won't have enough hours to be considered FT (and therefore don't have to be offered coverage).

How does the ACA measurement period effect COBRA benefits?

- If the monthly measurement method to determine full time status is used, and that method allows the employer to treat the employee as part time for a month if they don't have 30 hours/week during that month, then they will not qualify for benefits – no COBRA needs to be offered.
- However, if the employer is using the look-back measurement method (measurement and stability periods), and the employee is locked in as full time for a stability period, and the furlough/layoff/reduction in hours comes during that stability period, the employer is required to provide coverage. If the employer is not continuing coverage during the furlough period, it will need to offer COBRA to these employees.

Should we update our Plan Documents?

- Employers should put a written policy in place to outline the provisions of the furlough.
- It will be important to ensure that the plan documents, SPD and written policy all have the same provisions.

Furloughs, Pay/Hour Reduction and Reductions in Force

What are the benefits of Pay Cuts and Hours Reduction?

- By cutting pay or reducing hours worked by employees, an employer is able to lower costs associated with payroll while still continuing key operations.
- Keeps employees employed and engaged and maintains employees' eligibility for government subsidies associated with leaves.
- Employer would not be required to pay out an employee's accrued but unused vacation or paid time off, which would be triggered if an employee is laid off.

What are some things to consider when employers implement Pay Cuts and/or a Reduction in Hours?

- Cutting pay and/or reducing hours may trigger federal or state WARN provisions, depending on the number of hours reduced.
- Employers must monitor whether the reduction in pay or hours would trigger a need to convert exempt employees to non-exempt employees should their salary fall below the FLSA threshold.
- Employers should also be mindful that reducing hours may impact an employee's eligibility for benefits under a health care plan.

Furloughs, Pay/Hour Reduction and Reductions in Force

What is a Reduction in Force (RIF) or Layoff and what should employers consider?

- A reduction in force (RIF) or Layoff occurs when employees' employment is terminated.
- While a RIF or Layoff will reduce costs associated with payroll, it will trigger payments associated with accrued but unused vacation or paid time off.
- Employees will be able to seek unemployment benefits.
- During this time of crisis it is worthwhile for an employer to consider potential negative press associated with a RIF or layoffs when considering whether this option is appropriate.



Wage & Hour

Paying Employees during the COVID-19 Crisis.



Wage and Hour

If an employee is exhibiting symptoms of COVID-19 and is unable to work, does the employer still need to pay the employee?

- Generally, employers are not obligated to pay non-exempt employees for hours they do not work. To the extent an exempt employee performs any work during a work week, they are entitled to their full compensation for that work week.
- Under the FFCRA, employees may be eligible for emergency paid family leave and/or emergency paid leave, in addition to any paid leave provided by the employer (i.e. vacation or PTO) or sick leave, depending on the jurisdiction.
- Short-term disability plans may also provide paid leave for medically related absences.
- An employer should use its discretion to ensure that its people are safe and continue to be engaged as employees, while balancing business risks and realities. Employers should also keep in mind the public relations aspect of not paying wages during this time, as it may be damaging to employer reputation and employee morale.



New Leave Legislation and Employer Policies

Coordination of leave policies.

New Leave Legislation

Is COVID-19 covered under the FMLA?

Yes, under certain circumstances.

The Family Medical and Leave Act (FMLA) provides generally for unpaid, job-protected leave for:

- the birth of child
- for the employee's own serious health condition
- or to care for an immediately family member with a serious health condition.

Accordingly, the FMLA may apply for an employee's serious health condition or the serious health condition of a family member.

FMLA would not apply for an employee who is concerned about working because of COVID-19.

New Leave Legislation

What is the Families First Coronavirus Response Act?

A federal piece of legislation that was enacted on 3/18/2020 to provide relief for those effected by COVID-19.

Provisions of the “FFCRA” become effective as of 4/1/2020 & sunsets on 12/31/2020

- 1) Emergency Paid Family Leave provisions (FMLA)
- 2) Emergency Paid Sick Leave provisions
- 3) Tax Credits for Paid Sick and Paid Family and Medical Leave
- 4) Emergency Unemployment Insurance Stabilization and Access Act
- 5) Health Care (Applicable to Private Health Plans)

New Leave Legislation and Employer Policies

How does Families First Coronavirus Response Act (FFCRA) effect FMLA?

- The FFCRA expands the reasons for FMLA leave - It provides emergency paid family leave for eligible employees who are unable to work (or telework) as a result of a lack of child care, such as the closure of a child's school or the unavailability of a child care provider.
- The FFCRA only applies to employers with fewer than 500 employees.
- The FFCRA's provision are for employees who have been employed for at least 30 days.
- The FFCRA provides for 12 weeks of leave, with the first 10 days of the leave as **unpaid**. However, during the first ten (10) days, the employee may elect to use accrued vacation, sick, or paid time off (as well as sick leave under the FFCRA as addressed below). Leave taken under the FFCRA counts toward an employee's annual 12 week FMLA allotment.
- Thereafter, the employee will be paid 2/3rds of their regular rate of pay (which includes all salary, hourly pay, and all other non-discretionary compensation, such as commissions and incentive and performance bonuses) for the remainder of the leave up to \$200 per day and \$10,000 in the aggregate.
- Generally, employees must be reinstated to the same or a reasonably equivalent position upon availability to return to work at the end of the leave period (except that reinstatement rights for employees of employers with less than 25 employee are subject to certain additional conditions).

New Leave Legislation and Employer Policies

What is covered under the Emergency Paid Sick Leave Act portion of the FFCRA?

- This Act applies to employers with fewer than 500 employees.
- Employees are covered immediately and do not need to have worked for their employer for any amount of time to qualify for this benefit.
- The Emergency Paid Sick Leave provision provides eligible employees who cannot work as a result of one of the following qualifying reasons with 10 days (80 hours) of paid sick leave at their regular rate of pay (pro-rated for part time employees), capped as follows:

\$511 per day or \$5,110 in the aggregated if used because:

1. The employee is subject to a Federal, State, or local quarantine or isolation order related to COVID-19.
2. The employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19.
3. The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis.

\$200 per day and \$2,000 in the aggregate because:

1. The employee is caring for an individual subject to a government order to quarantine or a recommendation by a health care provider to self-quarantine.
2. The employee is caring for a child whose school or place of care is closed or whose regular child care provider is not available due to a public health emergency because of COVID-19*.

New Leave Legislation and Employer Policies

What is covered under the Emergency Paid Sick Leave Act portion of the FFCRA? Cont.

3. The employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services.

*Notably, employees may use the emergency paid sick leave during the initial ten (10) days of unpaid leave under the “Emergency Paid Leave” described above, to the extent it was not exhausted earlier.

What are the Tax Credits for Paid Sick and Paid Family and Medical Leave Provisions?

- Under the FFCRA, employers with fewer than 500 employees are eligible to receive a tax credit for both “qualified family leave wages” (i.e. any wages paid pursuant to the terms of the Emergency Paid Leave Benefits as described above) and “qualified sick leave wages” (i.e. any wages paid pursuant to the terms of the Emergency Paid Sick Leave as described above) Tax credits for COVID-19 related pay sunset on December 31, 2020.

What are the provisions under the Emergency Unemployment Insurance Stabilization and Access Act?

- The FFCRA provides additional Federal funding to states to cover costs associated with processing and paying unemployment insurance (UI) benefits related to COVID-19 and to cover costs of certain expanded benefits up to 26 additional weeks of UI pay caused by COVID-19. Notably, the FFCRA does not expand the availability of unemployment insurance benefits or have an impact on payroll taxes.

New Leave Legislation and Employer Policies

What are the Health Care Provisions of the plan (Applicable to Private Health Plans)?

- All employer-sponsored group health plans are required to provide coverage, without co-pay, cost-sharing or authorization requirements, for the testing of COVID-19.
- Including: Coverage for the cost of testing for COVID-19, administration of testing and items and services provided to a plan participant related to an evaluation of a health care provider, including urgent care center or emergency room visit in order to receive testing.

How should Employers manage their existing leave policies in relation to these new federal leave provisions?

- First determine whether or not you are a covered employer under the FFCRA (fewer than 500 employees).
- If you need to comply with FFCRA, apply the provisions of the act **prior** to your existing policies. For example, do not require employees to use PTO for any sick time benefits that they may qualify for under the new FFCRA provisions.
- Check with your STD carrier to see how they are handling COVID-19 related illnesses. In most cases we are seeing that the provisions of existing STD plans are not being altered, however the carrier will need to advise you as to how they are managing the timing of STD claim filing and paid portions of the Emergency Paid Sick Leave Act.
- Employers should also check state legislation changes. We are seeing a number of states expand or add leave provisions due to COVID-19 related issues. The following states have enacted new legislation, or in the process of passing new legislation regarding leave and compensation: California, Hawaii, Minnesota, Massachusetts, Maine, Mississippi, New Jersey, New York and Washington.



HIPAA

Managing Employee Privacy during a Pandemic.



HIPAA

During the COVID-19 pandemic, what types of health disclosures are allowed under HIPAA?

- A recent bulletin from the US Department of Health and Human Services (HHS) provided some clarity on the application of the Health Insurance Portability and Accountability Act (HIPAA) privacy rules as they pertain to COVID-19. Under HIPAA, protected health information (PHI) may be used and disclosed "when necessary to treat a patient, to protect the nation's public health, and for other critical purposes."
- According to the bulletin, PHI may be disclosed for the purpose of preventing or controlling disease, injury or disability, as well as at the direction of a public health authority or to individuals at risk if authorized by law. ***However, it is important to note that it is not necessary to disclose the name of the individual if your workforce needs to be notified that an employee has tested positive for COVID-19.***
- HIPAA also permits disclosures to family, friends and others identified by the patient as involved in the patient's care and "as necessary to identify, locate, and notify family members, guardians, or anyone else responsible for the patient's care, of the patient's location, general condition, or death." The bulletin notes, "This may include, where necessary to notify family members and others, the police, the press, or the public at large."
- Otherwise, written authorization remains a requirement for "affirmative reporting to the media or the public at large about an identifiable patient, or the disclosure to the public or media of specific information about treatment of an identifiable patient." PHI that is disclosed must be limited to the minimum necessary. However, covered entities may rely on public health authorities or public officials that requested information is the minimum necessary for the purpose when such reliance is reasonable under the circumstances.



Workplace Safety

OSHA.



Workplace Safety

What steps can an employer and employees take to reduce the risk of exposure to and transmission of a COVID-19?

To the extent employees are unable to work from home and are still permitted to work from the company's typical physical location pursuant to state laws and regulations recently implemented, employers should take the following steps and advise employees to implement measures, including but limited to:

- Practicing social distancing and maintaining at least a 6ft distance from others, to the extent possible;
- Maintaining basic hand hygiene (e.g., frequently washing hands with soap and water; using an alcohol-based hand sanitizer);
- Maintaining basic respiratory hygiene (e.g., coughing and sneezing into a tissue or an elbow; immediately throwing away used tissues and washing hands);
- Refraining from touching eyes, nose and mouth;
- Instituting additional daily cleaning measures within the office, especially with respect to surfaces frequently touched;
- Regularly cleaning and disinfecting frequently touched items and surfaces in one's own workspace;
- Implement business-related travel restrictions.

Does the Occupational Safety and Health Administration (OSHA) consider COVID-19 a recordable illness?

- If an employee has a confirmed case of COVID-19, a determination must be made, initially, whether the case was "work-related" (i.e. work conditions caused or contributed to the illness).
- If the employee contracted COVID-19 and the case is considered work-related, it will likely be a recordable illness under OSHA. State-plan states may have additional requirements.

Workplace Safety

- What safety guidance has OSHA provided that employers be following?
- OSHA has published Guidance on Preparing Workforces for COVID-19. For information on this guidance, see OSHA Issues Coronavirus Guidance for Workplaces.
- Employers with a current influenza pandemic plan in place may need to update it to address exposure sources and risks specific to COVID-19.
- Employers without a current plan for pandemic events are advised to prepare a business continuity plan.



Q&A

