



LOOKING AHEAD: COVID-19 EMPLOYMENT DECISIONS THROUGH DOWNSIZING, FURLOUGHS, AND RETURN TO WORK

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After weeks of adjustment to the sudden spread of COVID-19, including dramatic business slowdowns, government shutdown orders, and financial rescue measures for employees and employers, businesses are adapting to the “new normal” while looking ahead to a gradual return to business operations.

This article is intended to be strategic and forward-looking in responding to COVID-19. The article summarizes recent legal requirements and regulatory guidance, with links to Payne & Fears COVID-19 alerts, to help your business work safely through current conditions and the safe resumption of business activity at the appropriate time, including:

- layoffs and furloughs;
- discrimination and privacy issues related to current employee health and safety;
- work from home issues, including compensation and reimbursement;
- sick pay and family leave;
- rehiring under the CARES Act for SBA loans; and
- COVID-19 issues during rehiring and return to work

This guidance is current as of April 13, 2020, and should not be considered legal advice. As federal and state legislation and regulatory guidance continue to change, we recommend contacting your Payne & Fears attorney for updates and specific guidance for your business, and continuing to monitor our [COVID-19 RESOURCE CENTER](#).

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I. Layoffs, Furloughs, and Reduction of Hours

Reducing your payroll to address the COVID-19 business slowdown can take several forms. It's important to understand the implications of recent legislation and regulatory guidance for each option.

A. Options for Reducing Payroll Costs

Layoffs: A layoff is a loss of employment on a temporary or permanent basis. Laid off employees are no longer protected by federal or state employment laws, but may require WARN Act notice (see below, I.B. When to Give Notice). Laid off employees may be entitled to a payout of accrued vacation and/or PTO, depending on state law and company policy, which may be a consideration for companies seeking to limit expenses.

Furloughs:

Furloughs: A furlough is generally understood as a temporary reduction in hours due to economic or operational conditions, during which the employee is not usually paid but may retain company benefits such as health insurance (depending on the company's plan or policy). Furloughs may be effective for a specified period or on a rolling, periodic basis. Employees may receive unemployment benefits during a furlough, depending on their state's rules, which can be reviewed at [CareerOneStop Unemployment Benefits Finder](#). Exempt employees must be paid their full salary for weeks in which they perform any work, but they may be furloughed for a full week without losing their exempt status.

Employers may give employees on furlough the option to use accrued vacation and/or PTO to supplement wages. In some states (like California), an extended furlough without a return to work date can be considered a termination event. This can trigger the duty to pay out accrued vacation and/or paid time off, similar to a layoff.

Furloughed employees generally count toward statutory eligibility thresholds, but according to the U.S. Department of Labor ("DOL") [temporary rule](#), they are not counted toward employee totals for Families First Coronavirus Response Act ("FFCRA") eligibility. They may also trigger notice requirements (see below I.B. When to Give Notice).

Reducing Pay or Work Hours: An employer may generally reduce an employee's pay without reducing their work hours, subject to certain exceptions such as WARN Act notice (see below I.B. When to Give Notice); this may also affect their eligibility for unemployment insurance. Non-exempt employees' pay cannot be reduced below minimum wage. An exempt employee's pay cannot be reduced due to lack of work, but an employer can prospectively reduce an exempt employee's salary level as long as it meets the current statutory minimum (\$684 per week for most employees as of 2020). If an exempt employee's pay is reduced to below the current statutory minimum, the exempt employee can potentially be converted to non-exempt and paid only for the hours they work, provided the change is bona fide and not used as a device to evade the salary basis requirements. For more information, please see [U.S. Department of Labor Fact Sheet #70](#).

Please keep in mind that although an exempt employee may potentially be reclassified in connection with a reduction in pay for a bona fide reason, the DOL [temporary rule](#) states “nothing in this Act [FFCRA] should be construed as impacting an employee's exempt status under the FLSA. For example, an employee's use of intermittent leave combined with either paid sick leave or expanded family and medical leave should not be construed as undermining the employee's salary basis for purposes of 29 U.S.C. 213 and 29 CFR part 541.”

B. When to Give Notice

The federal WARN Act and California’s WARN Act normally require 60 days’ notice or equivalent payment when a covered employer takes a qualifying employment action, see chart

	Federal WARN Act	California WARN Act
Covered Employers	Applies to employers with 100 or more full-time employees who are employed for at least 6 months of the 12 months preceding the date of required notice. (29 USC 2101 and 20 CFR 639.3)	Applies to a “covered establishment” that employs or has employed in the preceding 12 months, 75 or more full- and part-time employees. Must have been employed for at least 6 months of the 12 months preceding the date of required notice in order to be counted. (California Labor Code Section 1400 (a) and (h))
Plant Closing or Layoff Requiring Notice	<p>Plant closings involving 50 or more full-time employees at a single site of employment during 30-day period.</p> <p>Layoffs within a 30-day period involving 500 or more employees or 50 to 499 full-time employees constituting at least 33% of the full-time workforce at a single site (29 USC 2101 and 20 CFR 639.3)</p> <p>Reductions of two or more groups at a single site of employment within any 90-day period, each of which is less than the minimum number of employees but in the aggregate exceed that minimum number.</p>	<p>Plant closure, defined as the cessation or substantial cessation of industrial or commercial operations at a covered establishment, affecting any number of employees.</p> <p>Layoff of 50 or more employees at a covered establishment within a 30-day period, regardless of the percentage of the workforce affected.</p> <p>Relocation, consisting of “removal of all or substantially all of the industrial or commercial operations in a covered establishment to a different location 100 miles or more away.” (California Labor Code Section 1400 (d)-(f))</p>

C. What to Count Toward Plant Closures and Layoffs

Federal WARN Act: Employment loss means “(1) an employment termination, other than a discharge for cause, voluntary departure, or retirement, (2) a layoff exceeding 6 months, or (3) a reduction in hours of work of individual employees of more than 50% during each month of any 6–month period.” 20 C.F.R. § 639.3(f)(1); 29 U.S.C. § 2101(a)(6). Layoffs that are originally planned to be less than six months, but later extend beyond six months, are subject to WARN. The employer can avoid liability if the extension beyond six months is caused by business circumstances not reasonably foreseeable at the time of the initial layoff and notice is given at the time it becomes reasonably foreseeable that the extension beyond six months will be required. [For more information, please see [29 U.S.C. § 2012\(c\)](#).]

California WARN Act: The definition of employment loss does not include a temporal requirement; specifically, the California WARN Act omitted any requirement that the layoff exceed “6 months.” For this reason, a covered loss in California includes a temporary layoff or furlough. As explained in *The International Brotherhood of Boilermakers, etc. v. NASSCO Holdings Inc.*, while distinguishing the Federal and California WARN Act, when a brief unforeseeable layoff was the result of “lack of funds or lack of work” under California Labor Code section 1400(c) and the layoff would not come within the de minimis doctrine or a statutory exception, the employer would need to pay the employees their wages. 17 Cal. App. 5th 1105, 1128 226 Cal. Rptr. 3d 206, 220 (Ct. App. 2017). Please note that the court did not provide guidance on what would be considered “de minimis.”

No such rule applies for employees who have their hours worked reduced; thus, a reduction in hours does not count as a covered loss.

D. Are Employment Losses by COVID-19 Exempt?

Federal WARN Act: Two possible exceptions.

- *Natural Disaster Exception*: Applies to “Floods, earthquakes, droughts, storms, tidal waves or tsunamis and similar effects of nature are natural disasters under this provision.” 20 CFR 639.9(c). While a strong argument exists for applying the “natural disaster” exception to widespread health emergencies or pandemics, the exception has not yet been applied and cannot be relied upon.
- *Unforeseeable Business Circumstances Exception*: Applies if a plant closing or mass layoff is caused by “sudden, dramatic, and unexpected” business circumstances not reasonably foreseeable and outside the employer’s control. Whether a circumstance is reasonably foreseeable depends on the employer’s “business judgment,” and requires that “[t]he employer must exercise such commercially reasonable business judgment as would a similarly situated employer in predicting the demands of its particular market.” The regulations reference a government-ordered closing of an employment site without prior notice as an example. However, the DOL has not issued guidance related to the application of the exception to the COVID-19 pandemic. The exception does not eliminate the requirement to send out WARN notices, but allows shortened notice.

California WARN Act: Does not include an unforeseeable business circumstances exception. However, California Governor Gavin Newsom signed Executive Order March 17, 2020, effective until the end of the declared State of Emergency, which states the following:

- COVID-19 is an *unforeseeable business circumstance*.
- COVID-19 mass layoffs and/or shutdowns do NOT trigger 60-day paid notice.
- Employers are NOT categorically exempt and must establish a causal connection.
- Employers must still give notice to employees.

For more information about Governor Newsom's order, please see our previous article: [California's WARN Act Modified for Employment Actions Taken in Response to COVID-19](#).

II. Current Employee Relations and Discrimination Law

To the extent that your business is able to operate during current government lockdown orders, and as your employees begin to return to work, difficult questions arise regarding individual employee discrimination and privacy, and broader questions regarding the safety of all employees in the workplace.

A. Employee and Doctor's Notes

The DOL [temporary rule](#) provides information on the notice an employee is required to provide their employer when they request paid leave. Employers are prohibited from asking for the employee's notice to include documentation beyond what an employee is required to provide.

- ***General Documentation Required Under the FFCRA:*** An employee must provide his or her employer documentation in support of paid sick leave or expanded family and medical leave. Such documentation must include a signed statement from the employee containing the following information: (1) The employee's name; (2) the date(s) for which leave is requested; (3) the COVID-19 qualifying reason for leave; and (4) a statement representing that the employee is unable to work or telework because of the COVID-19 qualifying reason.
- ***Additional Documentation Required Under the FFCRA:*** An employee must provide additional documentation depending on the COVID-19 qualifying reason for leave. For example, an employee requesting paid sick leave due to a medical order requiring self-quarantine under § 826.20(a)(1)(ii) must provide the name of the health care provider who advised him or her to self-quarantine for COVID-19-related reasons. For a list of additional documents required, please see the DOL temporary rule: J. Documentation of Need for Leave
- ***Documentation Required for FMLA Leave:*** For leave taken "under FMLA for an employee's own serious health condition related to COVID-19, or to care for the employee's spouse, son, daughter, or parent with a serious health condition related to COVID-19, the normal FMLA certification requirements still apply." [For more information, please see 29 CFR 825.306.]

Employers cannot require doctor's notes from employees who requested paid leave.

- *DOL temporary rule*: When an employee requests paid leave under the FFCRA or FMLA, employers cannot ask for doctor's notes. The guidance explains that when an employee requests paid leave under the FFCRA, an employee "must [when applicable] provide the name of the health care provider." In addition, when an employee takes leave "under FMLA for an employee's own serious health condition related to COVID-19, or to care for the employee's spouse, son, daughter, or parent with a serious health condition related to COVID-19, the normal FMLA certification requirements still apply," an employee must provide only "the name, address, telephone number, and fax number of the health care provider and type of medical practice/specialization." Because an employer may not ask for more information than an employee is required to provide, an employer may not ask an employee for a doctor's note when they request leave.
- *Individual States and Localities*: Some individual states and localities have also released laws providing additional leave, and preventing an employer from requiring an employee to provide a positive COVID-19 test result to qualify for such leave. For example, San Francisco updated its [Paid Sick Leave Ordinance](#) to state: "Employers may not require a doctor's note or other documentation for the use of paid sick leave taken pursuant to the Paid Sick Leave Ordinance during the duration of the Local Health Emergency regarding Novel Coronavirus Disease 2019."
- *Note Regarding FFCRA Payment*: According to the DOL's guidance, [Families First Coronavirus Response Act: Questions and Answers](#), an employee who does not seek a medical diagnosis or has not been told by a health care provider to self-quarantine would not be eligible for paid sick leave under the FFCRA.

Employers may require a doctor's note from employees who request to return to work after leaving for COVID-19-related reasons. The Equal Employment Opportunity Commission released guidance, [What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws](#) stating the following:

- "When employees return to work, does the ADA allow employers to require a doctor's note certifying fitness for duty?"

Yes. Such inquiries are permitted under the ADA either because they would not be disability-related or, if the pandemic influenza were truly severe, they would be justified under the ADA standards for disability-related inquiries of employees. As a practical matter, however, doctors and other health care professionals may be too busy during and immediately after a pandemic outbreak to provide fitness-for-duty documentation. Therefore, new approaches may be necessary, such as reliance on local clinics to provide a form, a stamp, or an e-mail to certify that an individual does not have the pandemic virus."

There is very little guidance regarding whether or not an employer, who requires a doctor's note for employees to return to work, must pay an employee who is ready to return to work but unable to produce a doctor's note.

B. Treatment of Symptoms and Taking Temperatures

COVID-19 is a “Direct Threat”: Based on EEOC guidance, [What You Should Know About the ADA, the Rehabilitation Act, and COVID-19](#) and its recently updated [Pandemic Preparedness in the Workplace and the Americans with Disabilities Act](#), if an individual with a disability poses a “direct threat” despite reasonable accommodation, he or she is not protected by the nondiscrimination provisions of the Americans with Disabilities Act (“ADA”). A “direct threat” is “a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation.” 29 CFR § 1630.2(r).

The Centers for Disease Control and Prevention (“CDC”), the EEOC, and public health authorities have acknowledged that the COVID-19 pandemic meets the “direct threat” standard, finding significant risk of substantial harm would be posed by having someone with COVID-19, or symptoms of it, present in the workplace at the current time.

Employees May Make Reasonable Inquiries: Employers are therefore allowed to seek information that will allow them to determine whether the employee poses a “direct threat.” However, such inquiries must be based on objective, factual information, “not on subjective perceptions . . . [or] irrational fears” about a specific disability or disabilities.

How much information may an employer request from an employee who calls in sick, in order to protect the rest of its workforce during the COVID-19 pandemic?

During a pandemic, ADA-covered employers may ask such employees if they are experiencing symptoms of the virus. For COVID-19, these include symptoms such as fever, chills, cough, shortness of breath, or a sore throat. Employers must maintain all information about employee illness as a confidential medical record in compliance with the ADA.

When may an ADA-covered employer take the body temperature of employees during the COVID-19 pandemic?

Generally, measuring an employee's body temperature is a medical examination. Because CDC and state/local health authorities have acknowledged community spread of COVID-19 and issued attendant precautions, employers may measure employees' body temperature. However, employers should be aware that some people with COVID-19 do not have a fever. If employers plan to begin taking the temperatures of employees, it would be best to first provide a notice to the workforce. In addition, the fact that an employee had a fever or other symptoms would be subject to ADA confidentiality requirements.

Does the ADA allow employers to require employees to stay home if they have symptoms of the COVID-19?

Yes. The CDC states that employees who become ill with symptoms of COVID-19 should leave the workplace. The ADA does not interfere with employers following this advice.

C. Employee Safety, Privacy, and Individual Discrimination

In addition to addressing individual discrimination and privacy issues, the Occupational Safety and Health Administration (“OSHA”) issued [Guidance on Preparing Workplaces for COVID-19](#).

Within its guidance, OSHA has provided a rubric for classifying the risk of employee occupational exposure, which should be adjusted to fit local government orders. Worker risk of occupational exposure to COVID-19 may vary from very high, to high, medium, or lower risk. Level of risk depends, in part, on the industry type, need for contact within six feet of people known to be, or suspected of being, infected with SARS-CoV-2 (the coronavirus causing COVID-19), or requirement for repeated or extended contact with persons known to be, or suspected of being, infected with SARS-CoV-2.

COVID-19 is considered a reportable illness under OSHA requirements; employers should check the DOL's recent memo and website for ongoing guidance [here](#).

The CDC has also issued an [Interim Guidance for Businesses and Employers](#), explaining ways to reduce the level of exposure in the workplace for employees who are able to report to a physical worksite. An abbreviated outline follows; the full CDC guidance on each element should be reviewed carefully and compared to local health department guidance and government orders. For example, in Los Angeles, employers of employees at essential businesses “must provide, at their expense, non-medical grade face coverings for their employees.” [For more information, please see our previous article: [Mayor Garcetti Signs Emergency Orders Increasing Worker Protections and Mandating Supplemental Paid Sick Leave](#).]

Reduce Transmission Among Employees

- Actively encourage sick employees to stay home
- Identify where and how workers might be exposed to COVID-19 at work
- Separate sick employees
- Educate employees about how they can reduce the spread of COVID-19

Maintain Healthy Business Operations

- Assign a Workplace Coordinator: Identify a workplace coordinator who will be responsible for COVID-19 issues and their impact at the workplace. Employers with more than one business location are encouraged to provide local managers with the authority to take appropriate actions outlined in their COVID-19 response plan based on local conditions.
- Implement Flexible Sick Leave and Supportive Policies and Practices:
 - Ensure that sick leave policies are flexible and consistent with public health guidance and that employees are aware of and understand these policies. [Note: As many employees are working from home, existing and updated policies should be disseminated electronically to ensure employee awareness and compliance.]
 - Maintain flexible policies that permit employees to stay home to care for a sick family member or take care of children due to school and childcare closures. Additional flexibilities might include giving advances on future sick leave and allowing employees to donate sick leave to each other.
 - Employers that do not currently offer sick leave to some or all of their employees may want to draft non-punitive “emergency sick leave” policies. [Note: Such policies may exceed the time required under the FFCRA's emergency leave provisions, but tax credits are not available for such additional time].

- Employers should ensure that they are in compliance with federal emergency paid leave.[For more information, please see our previous article: [President Trump Signs Into Law Families First Coronavirus Response Act.](#)]
- Employers should ensure that they are in compliance with individual states' and localities' supplemental paid leave requirements. For example, Los Angeles Mayor Eric Garcetti released an emergency order providing paid sick leave for businesses with more than 500 employees. [For more information, please see our article [Mayor Garcetti Signs Emergency Orders Increasing Worker Protections and Mandating Supplemental Paid Sick Leave.](#)]
- **Update Policies:** Review human resources policies to make sure that policies and practices are consistent with public health recommendations and are consistent with existing state and federal workplace laws [For more information, please see EEOC's guidance [Coronavirus and COVID-19](#) and the DOL's guidance [Families First Coronavirus Response Act: Questions and Answers.](#)]
- **Provide Additional Resources:** Employers should provide additional resources to employees, if available, and community resources as needed. Employees may need additional social, behavioral, and other services, for example, to cope with the death of a loved one.
- **Be Proactive:** Assess your essential functions and the reliance that others and the community have on your services or products:
 - Be prepared to change your business practices if needed to maintain critical operations (e.g., identify alternative suppliers, prioritize existing customers, or temporarily suspend some of your operations if needed).
 - Talk with companies that provide your business with contract or temporary employees about the importance of sick employees staying home and encourage them to develop non-punitive leave policies.
- **Prepare for Absenteeism:** Determine how you will operate if absenteeism spikes from increases in sick employees, those who stay home to care for sick family members, and those who must stay home to watch their children if dismissed from childcare programs and K-12 schools.
 - Cross-train employees to perform essential functions so the workplace can operate even if key employees are absent.
- **Social Distance:** Consider establishing policies and practices for social distancing. Social distancing should be implemented if recommended by state and local health authorities. Strategies that your business could use include:
 - Implementing flexible worksites (e.g., telework)
 - Implementing flexible work hours (e.g., staggered shifts)
 - Increasing physical space between employees at the worksite
 - Increasing physical space between employees and customers (e.g., drive through, partitions)
 - Implementing flexible meeting and travel options (e.g., postpone non-essential meetings or events)
 - Downsizing operations
 - Delivering services remotely (e.g., phone, video, or web)
 - Delivering products through curbside pick-up or delivery

- Arrange meetings through video chat or phone; if individuals must see one another face to face, all individuals should remain six feet apart.

Maintain a Healthy Work Environment

- Encourage Good Hygiene: Support respiratory etiquette and hand hygiene for employees, customers, and worksite visitors:
 - Provide tissues and no-touch disposal receptacles.
 - Provide soap and water in the workplace. If soap and water are not readily available, use alcohol-based hand sanitizer that is at least 60% alcohol. If hands are visibly dirty, soap and water should be chosen over hand sanitizer. Ensure that adequate supplies are maintained.
 - Place hand sanitizers in multiple locations to encourage hand hygiene.
 - Place posters that encourage hand hygiene to help stop the spread at the entrance to your workplace and in other workplace areas where they are likely to be seen.
 - Discourage handshaking – encourage the use of other noncontact methods of greeting.
 - Direct employees to visit CDC’s guidance, [How to Protect Yourself & Others](#) and
- Routinely Clean: Perform routine environmental cleaning and disinfection:
 - Routinely clean and disinfect all frequently touched surfaces, such as workstations, keyboards, telephones, handrails, and doorknobs.
 - Discourage workers from using other workers’ phones, desks, offices, or other work tools and equipment, when possible. If necessary, clean and disinfect them before and after use.
 - Provide disposable wipes so that commonly used surfaces (e.g., doorknobs, keyboards, remote controls, desks, other work tools and equipment) can be wiped down by employees before each use. To disinfect, use products that meet the U.S. Environmental Protection Agency’s criteria for use against SARS-Cov-2, the cause of COVID-19, and are appropriate for the surface. For a list of approved products, please see [Disinfectants for Use Against SARS-CoV-2](#).
- Cleaning After Suspected or Confirmed Case of COVID-19: Perform enhanced cleaning and disinfection after persons suspected or confirmed to have COVID-19 have been in the facility.
 - If a sick employee is suspected or confirmed to have COVID-19, follow the CDC’s [Interim Recommendations for U.S. Community Facilities with Suspected/Confirmed Coronavirus Disease 2019 \(COVID-19\)](#).

III. Guidance on Work from Home and Telework Issues

Employers authorizing or directing employees to work from home should carefully consider discrimination, payment, and return-to-work safety issues.

A. Creating or Modifying Work from Home and Telework Policies

Employers should ensure that they have in place a written remote work policy, which has been updated to reflect the COVID-19 situation. The policy should make clear that it is temporary and that the company will provide status updates on a weekly basis. The policy should address:

- exemptions for workers who cannot work remotely;
- timekeeping procedures;
- whether remote workers are expected to be available during all usual work hours;
- whether employees are prohibited from meeting with other employees/clients/vendors in person;
- protocol for scheduling remote meetings; and
- clear policy on where remote work can and cannot be performed (e.g., on public WI-FI networks), which devices employees can use to perform work.

The policy must be neutral, and cannot single out employees to either telework or continue reporting to the workplace on the basis of any protected category or characteristic, including age, familial status, or disability. COVID-19 itself is not a disability, but related conditions exacerbated by COVID-19 might be.

B. How to Pay Employees for Remote Work

Employees working remotely must be paid regular wages because they are working. For employees who cannot work remotely but are told to stay home, payment depends on the classification of the employee.

- *Non-Exempt Employees:* Generally, non-exempt employees who cannot work from home but are told not to work due to concerns about potential exposure do not need to be compensated. Such employees are paid only for hours worked. However, employees who are directed to stay home and cannot work remotely should be allowed to use any available paid time off. Some employees may also be eligible for unemployment benefits.
- *Exempt Employees:* With limited exceptions, exempt employees must receive their full salary for any week in which they work, regardless of the number of days or hours worked. You need not, however, pay an exempt employee for any workweek in which no work is performed. As with non-exempt employees, employers would be entitled to deduct accrued paid time for absences that qualify under a bona fide vacation, paid time off, or sick leave policy.

For more information, please see our previous article: [Remote Work Issues to Consider in Light of COVID-19](#).

C. Families First Coronavirus Response Act Benefits During Remote Work

The DOL has issued regulations clarifying the application of the FFCRA to remote working arrangements in their guidance, [Families First Coronavirus Response Act: Questions and Answers](#). In regards to intermittent leave while teleworking, the DOL provides the following advice:

- “Question: May I take my paid sick leave or expanded family and medical leave intermittently while working?”

Yes, if your employer allows it and if you are unable to telework your normal schedule of hours due to one of the qualifying reasons in the Emergency Paid Sick Leave Act. In that situation, you and your employer may agree that you may take paid sick leave intermittently while teleworking. Similarly, if you are prevented from teleworking your normal schedule of hours because you need to care for your child whose school or place of care is closed, or child care provider is unavailable, because of COVID-19-related reasons, you and your employer may agree that you can take expanded family medical leave intermittently while teleworking.

You may take intermittent leave in any increment, provided that you and your employer agree. For example, if you agree on a 90-minute increment, you could telework from 1:00 PM to 2:30 PM, take leave from 2:30 PM to 4:00 PM, and then return to teleworking.

The Department encourages employers and employees to collaborate to achieve flexibility and meet mutual needs, and the Department is supportive of such voluntary arrangements that combine telework and intermittent leave.”

D. Reimbursement for Items Used While Working at Home

Employees working from home may incur additional costs such as an internet connection, a desktop computer, or an office chair. The question arises, are employers responsible for any or all of these costs?

DOL Guideline: The DOL recently released short guidance entitled, [COVID-19 and the Fair Labor Standards Act Questions and Answers](#). The guidance explains that “employers may not require employees who are covered by the FLSA to pay or reimburse the employer for such items that are business expenses of the employer if doing so reduces the employee's earnings below the required minimum wage or overtime compensation.” In other words, an employer cannot require non-exempt employees to buy items or acquire services that would bring their salary below minimum wage.

California Law: If your business is in California, more specific guidance is available on this issue. [Section 2802 of the California Labor Code](#) requires that “[a]n employer shall indemnify his or her employee for all necessary expenditures.” The purpose of this statute is “to prevent employers from passing their operating expenses on to their employees.” *Gattuso v. Harte- Shoppers, Inc.*, 42 Cal. 4th 554, 562 (2007) (internal citation omitted). Employers must pay employees for business costs incurred even if the employees were otherwise incurring the expense for other uses. See *Herrera v. Zumiez, Inc.*, -- F.3d -- (9th Cir. 2020). The court held that “[i]f the use of the personal cell phone is mandatory, then reimbursement is always required, regardless of whether the employee would have incurred cell phone expenses absent the job.” The court explained that, in accordance with section 2802, such expenses must be reasonable. For example, an employer is not required to purchase an employee the latest iPhone or Android. As a practical matter, when it comes to cell phones, many employers opt to pay for the cell phone service, or portion of family plan, while the employee pays for the device.

Are Flat Stipends a Good Idea?: One potential safeguard against lawsuits is to implement a flat stipend based on a fair and accurate estimate of business costs that are “reasonable” and “necessary,” *with a mechanism for employees to submit additional costs incurred*. These costs would be based on a number of factors dependent on an employer’s business needs (e.g., Is a printer necessary for your business?); generally, an employer should consider phone, internet, and home office costs.

Please note that employers may not require employees to cover such expenses when the telework arrangement is being offered as an ADA accommodation.

IV. The Families First Coronavirus Response Act

A. General Eligibility

Eligibility: The FFCRA applies to companies with fewer than 500 employees. The Emergency Paid Sick Leave Act in the FFCRA applies to all employees on an employer's payroll. The Emergency Family and Medical Leave Expansion Act in the FFCRA applies to all employees who have worked at least 30 calendar days for their employer.

How to Count Employees: According to the DOL's [temporary rule](#), in determining who counts as an employee for the 500-employee threshold, "the employer should include full-time and part-time employees, employees on leave, temporary employees who are jointly employed by the employer and another employer, and day laborers supplied by a temporary placement agency. Independent contractors that provide services for an employer do not count towards the 500-employee threshold. Nor do employees count who have been laid off or furloughed and have not subsequently been reemployed. Furthermore, employees must be employed within the United States. For example, if an employer employs 1,000 employees in North America, but only 250 are employed in a U.S. state, the District of Columbia, or a territory or possession of the United States, that employer will be considered to have 250 employees and is thus subject to the FFCRA."

For companies with related entities, please see our previous article: [Families First Coronavirus Response Act: How to Measure the 500-Employee Threshold With More Than One Potential Employer](#).

How to Count Employees During Changes in Headcount: According to the DOL's [temporary rule](#), the 500-employee threshold is counted "at the time an employee would take leave. For example, if an employer has 450 employees on April 20, 2020, and an employee is unable to work starting on that date because a health care provider has advised that employee to self-quarantine because of concerns related to COVID-19, the employer must provide paid sick leave to that employee. If, however, the employer hires 75 new employees between April 21, 2020, and August 3, 2020, such that the employer employs 525 employees as of August 3, 2020, the employer would not be required to provide paid sick leave to a different employee who is unable to work for the same reason beginning on August 3, 2020." A reduction in hours does not reduce the employee count.

Small Business Exception: Employers with fewer than 50 employees may be exempt from providing EPSLA or EFMLEA paid leave due to school or place of care closures, or child care provider unavailability for COVID-19-related reasons. As this test is also applied at the time an employee seeks leave, changes in an employer's headcount may affect eligibility. To be eligible, a business must determine that at least one of the following is met:

- Providing paid sick leave or expanded family and medical leave would cause the business's expenses and financial obligations to exceed available business revenues and cause the business to cease operating at a minimal capacity;

- Absence of employee or employees requesting paid sick leave or expanded family and medical leave would entail a substantial risk to the financial health or operational capabilities of the 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 or employees requesting paid sick leave or expanded family and medical leave, and these labor or services are needed for the small business to operate at a minimal capacity.

For more information on meeting the small business exception, please see our previous article: [Small Businesses – Are You Exempt from the Families First Coronavirus Response Act?](#)

B. Worksite Closures, Downsizing, Reduction in Hours, and Eligibility.

The DOL guidance regarding the FFRCA, [Families First Coronavirus Response Act: Questions and Answers](#), has been updated to address several employee eligibility issues under the Emergency Paid Sick Leave Act and Emergency Family and Medical Leave Expansion Act provisions.

Worksite Closures

- If an employer closes its worksite after April 1, 2020, employees who later go on leave cannot receive paid sick leave and/or expanded family and medical leave, whether closure results from lack of business or pursuant to a federal, state or local directive.
- If an employer closes a worksite while an employee is on paid sick leave or expanded family and medical leave, the employer must pay for any paid sick leave or expanded family and medical leave used before the employer closed. As of the closure date, the employee is no longer entitled to paid sick leave or expanded family and medical leave.
- If an employer closes a worksite on or after April 1, 2020 (the effective date of the FFCRA), but tells an employee that it will reopen at some time in the future, the worksite is closed, whether for lack of business or because it was required to close pursuant to a federal, state, or local directive. If the employer reopens and the employee resumes work, the employee would then be eligible for paid sick leave or expanded medical leave as warranted.

Shelter in Place Orders

- The DOL's [temporary rule](#) states that “shelter in place orders” are within the umbrella of quarantine or isolation orders that may give rise to sick leave obligations – provided an employer has work available for an employee who is otherwise being ordered to shelter in place.

- “An employee subject to one of these [quarantine or isolation] 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. 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 to work even if he were not required to stay at home. As such, he may not take paid sick leave because his inability to work is not due to his need to comply with the stay-at-home order, but rather due to the closure of his place of employment. That said, he may be eligible for state unemployment insurance ...”
- The analysis of the reasons behind an employee’s inability to report to work will be fact-specific; employers are encouraged to consult legal counsel in determining the FFCRA obligations.

For more information, please see our previous article: [DOL Issues Clarification on the Interplay Between Emergency Paid Leave, Shelter in Place Orders, Worksite Closures, and Furloughed Employees](#).

Furloughed Employees

- If an employer is open, but furloughs an employee after April 1, 2020 (the effective date of the FFCRA) because it does not have enough work, the employee cannot receive paid sick leave or expanded family and medical leave.

Reduced Hours

- If an employer reduces an employee’s scheduled work hours because it does not have work for the employee to do, the employee cannot use paid sick leave or expanded family and medical leave for the hours they are no longer scheduled to work, because the employee is not prevented from working those hours due to COVID-19. But the employee may take paid sick leave or expanded family and medical leave if a COVID-19 qualifying reason prevents them from working their full schedule. If so, the amount of leave is computed based on the employee’s work schedule before it was reduced.

C. Employee’s Right to Return to Work

Return to Work

- Generally, an employee has a right to return to work if they are taking paid sick leave or expanded family and medical leave under the Emergency Paid sick Leave Act or the Emergency Family and Medical Leave Expansion Act. The DOL has clarified that, in most instances, the Act requires employers to provide the same (or nearly equivalent) job to an employee who returns to work following leave, with the exception of a “key employee” as defined under the FMLA.
- An employer can lay off an employee for legitimate business reasons, such as the closure of the worksite, that would have affected the employee regardless of whether the leave was taken. The employer must be able to demonstrate that the employee would have been laid off even if the or she had not taken leave.

This provision tracks the existing provision under the FMLA in 29 CFR 825.216 The employer has the same burden of proof to show that an employee would not otherwise have been employed at the time reinstatement is requested in order to deny restoration to employment.

- **EXCEPTION:** The mandatory return to work provision does not apply to an employer who has fewer than twenty-five employees if all four of the following conditions are met:
 - The employee took leave to care for his or her son or daughter whose school or place of care was closed or whose child care provider was unavailable;
 - The employee's position no longer exists due to economic or operating conditions that (i) affect employment and (ii) are caused by a public health emergency (i.e., due to COVID-19-related reasons) during the period of the employee's leave;
 - The employer made reasonable efforts to restore the employee to the same or an equivalent position; and
 - If the employer's reasonable efforts to restore the employee fail, the employer makes reasonable efforts for a period of time to contact the employee if an equivalent position becomes available. The period of time is specified to be one year beginning either on the date the leave related to COVID-19 reasons concludes or the date twelve weeks after the employee's leave began, whichever is earlier.

For more information about the FFCRA, please see our previous article: [President Trump Signs Into Law Families First Coronavirus Response act.](#)

The CARES Act provides an exception to the forgiveness penalty if the business rehires employees or eliminates the reduction in salaries by June 30, 2020.

For more information, please see our previous article: [Coronavirus Aid, Relief, and Economic Security Act \(The CARES Act\) - SBA Loans for Business.](#)

A. The CARES Act: Rehired Employees Eligible for Leave

Under recent DOL Guidance in the CARES Act, rehired employees who (1) were laid off since March 1, 2020 and (2) worked at least 30 of 60 days before they were laid off are now eligible for Emergency Family and Medical Leave Expansion Act benefits under the FFCRA.

V. The CARES Act: Financial Incentive to Hire, Rehire, and Restore from Furlough

A. Rehire Employees by June 30, 2020 to Preserve Loan Forgiveness

Under the Coronavirus Aid, Relief, and Economic Security Act (the “CARES Act”), forgivable loans are available to cover payroll and other allowable costs. The amounts forgiven are reduced by any reduction in employees, and by reduction in pay of any employee beyond 25% of their compensation for the prior year.

The CARES Act provides an exception to the forgiveness penalty if the business rehires employees or eliminates the reduction in salaries by June 30, 2020.

For more information, please see our previous article: [Coronavirus Aid, Relief, and Economic Security Act \(The CARES Act\) - SBA Loans for Business](#).

VI. Hiring and Rehiring

A. The CARES Act: Rehired Employees Eligible for Leave

Under recent DOL Guidance in the CARES Act, rehired employees who (1) were laid off since March 1, 2020 and (2) worked at least 30 of 60 days before they were laid off are now eligible for Emergency Family and Medical Leave Expansion Act benefits under the FFCRA.

For more information, please see our previous article: [The CARES Act Affects Emergency Paid Leave, Unemployment Insurance, and ERISA.](#)

B. EEOC Guidance: Hiring, Rehiring, and Disability Discrimination

As your business begins the process of rehiring or hiring new employees, it will need to carefully consider the new COVID-19 health environment on a case-by-case basis in order to protect applicants from discrimination while protecting the health of existing employees. The EEOC has also provided guidance in this area, which should be monitored as conditions change.

If an employer is hiring, may it screen applicants for symptoms of COVID-19?

Yes. An employer may screen job applicants for symptoms of COVID-19 after making a conditional job offer, as long as it does so for all entering employees in the same type of job. This ADA rule applies whether or not the applicant has a disability.

May an employer take an applicant's temperature as part of a post-offer, pre-employment medical exam?

Yes. Any medical exams are permitted after an employer has made a conditional offer of employment. However, employers should be aware that some people with COVID-19 do not have a fever.

May an employer delay the start date of an applicant who has COVID-19 or symptoms associated with it?

Yes. According to current CDC guidance, an individual who has COVID-19 or symptoms associated with it should not be in the workplace.

May an employer withdraw a job offer when it needs the applicant to start immediately, but the individual has COVID-19 or symptoms of it?

Based on current CDC guidance, this individual cannot safely enter the workplace, and therefore the employer may withdraw the job offer.

For more information, please see EEOC's guidance: [What You Should Know About the ADA, the Rehabilitation Act, and COVID-19.](#)

COVID-19 RESOURCE CENTER

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