

## Home Care Industry Coronavirus (COVID-19) Employer Frequently Asked Questions

The spread of the novel coronavirus (COVID-19) across the globe remains a significant concern in the workplace and every one of our communities. Home care employers are confronting difficult questions regarding how to handle labor/management relations, leave and accommodation, safety and health, and other employment issues. The following Frequently Asked Questions (FAQs) are designed to provide general advice to help address some of the more common questions that home care employers currently face. Developments related to the COVID-19 pandemic are evolving on a daily basis and, as such, the advice provided is subject to change. We will continue to update these FAQs as more information becomes available. Please note the questions and answers on this FAQ are current as of the “Last Updated” date located at the top of this document. Toolkit subscribers will automatically receive the most recent version of the FAQs within their Toolkit, as updates are made available. If you are not a Toolkit Subscriber, we will distribute the updated version of the FAQ to your company’s COVID-19 Policy Package Main Contact periodically via email. Home care employers are also encouraged to consult relevant FAQs put forth by the [Centers for Disease Control](#) (CDC) and the [Equal Employment Opportunity Commission](#) (EEOC). Please keep in mind that different or additional facts can impact how the situation should be handled. For information specific to your business needs, please contact your Littler attorney.

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### Overall:

**Q: What are the essential documents an employer in the home care industry should have to respond to the COVID-19 pandemic?**

*For more information on obtaining the COVID-19 Policy Package, please contact Melissa Mann at [mmann@littler.com](mailto:mmann@littler.com).*

A: At a minimum, home care agencies should use the following documents:

- **Notice to Employees Regarding the COVID-19 Plan** – Tells employees what you will expect of them regarding the COVID-19 Plan (such as that you will require them to certify each time they go into a home that they do not have symptoms, etc.).
- **Notice to Clients Regarding the COVID-19 Plan** – Tells clients what to expect regarding the COVID-19 Plan (such as that you won’t care for someone who tests positive for COVID-19 and that you will require caregivers to certify each time they go into a home that they do not have symptoms, etc.).
- **Employee Certification of Lack of Exposure** – Creates a record showing that your caregivers do not have symptoms and have not been to “hot spots.” This may help you defend an allegation that a client contracted COVID-19 from your caregiver.
- **Client Certification of Lack of Exposure** - Creates a record showing that your clients do not have symptoms and have not been to “hot spots.” This will help you determine how (if at all) to staff a case and keep your caregivers safe.

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- **Caregiver Notice of COVID-19 Risk for Caring for a COVID-19 Client**
- **Visitor Declaration Form** – This will help you determine if someone coming to your office should not be allowed in.
- **Communicable Disease Policy** – Addresses policies and procedures for your agency in dealing with issues arising from communicable diseases like COVID-19. Some states require such policies by regulation; therefore, you may not need this policy if you have something like it already in place.
- **Telework Program Policy** – Even if you don't need it yet in your area, a telework policy is a good thing to have. It doesn't mean that all of your office employees get to work from home. Rather, it explains when they might and the criteria used to determine if that is an option for them.
- **Fitness for Duty Form** – This is a good document that will be useful even outside the COVID-19 application. You complete the first page and the employee's healthcare provider completes the rest. When completed, you can rely upon it to allow your employee to return to work. Please note that under the current circumstances, the caregiver may not be able to get his or her provider to complete it. In that case, rely on your local or state health department guidelines to determine when the caregiver can return to work.
- **Notice Regarding Confirmed Communicable Disease** – This is a form you can provide your employees and clients when/if an employee is confirmed to have been infected with COVID-19.
- **Arbitration Agreement** – An arbitration agreement ensures that individual claims are handled individually and not on a class action basis. They also provide both the employer and employee with a faster, more certain resolution to a given claim. Template arbitration agreements are available on the Home Care Toolkit under Resources, then Policy and Document Library.
- **FFCRA Paid Leave Policies** – The FFCRA currently applies to most if not all of your caregivers. Having the proper policies in place will help you explain to your employees (caregiver and office staff alike) the situations where paid leave is available.
- **FFCRA Forms** – To help your compliance with the FFCRA and make sure you are in the best situation to claim a tax credit, you should use forms that have been drafted by knowledgeable counsel.

An optional document you might want to use is the Client Waiver. Because community-wide transmission of COVID-19 is occurring, anyone letting someone into their home may be putting themselves at risk for contracting the disease. But many of your clients have retained your services because they cannot live without them. This form memorializes that the clients are accepting some risk and agreeing to retain your services nonetheless. It also purports to waive their right to sue you if they contract COVID-19. We cannot guarantee that this waiver of liability will be enforceable in every case and this waiver cannot be used to alleviate an agency's responsibility to take necessary precautions to protect their clients and patients. You may not want to use this form at all, as it may unnecessarily heighten the hysteria surrounding the outbreak. However, it is an optional additional measure that some agencies may elect.

An alternative to the Client Waiver is a Client Notice of COVID-19 Risk. This document has been available on the Home Care Industry COVID-19 Response Package since April 15, 2020, and offers the same information about the risks of COVID-19 and steps the agency is taking to protect the client. However, it does not require the waiver of rights. It may be a better document for some agencies to use, or for agencies to use with some clients.

Another optional set of documents an agency may consider implementing are caregiver waivers. The Home Care Industry COVID-19 Response Package includes two such waivers. They were added on April 20, 2020. One waiver is geared toward caregivers generally and provides that in exchange for the agency cooperating and not disputing a workers' compensation claim based on COVID-19, the caregiver agrees to the exclusive remedy of workers' compensation. This waiver is premised on the agency not acting in an intentional or grossly negligent manner. We cannot guarantee that this waiver of liability will be enforceable in every case and this waiver cannot be used to alleviate an agency's responsibility to take necessary precautions to protect their employees. The other waiver is geared toward caregivers who are caring for COVID-19 clients (those suspected to have, diagnosed

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with, or under quarantine due to, and exposure to COVID-19). The Home Care Industry COVID-19 Response Package also includes Caregiver notices (updated May 13, 2020 to add certain language addressing potential Genetic Information Nondiscrimination Act of 2008 concerns and to break up the notices to address agencies accepting COVID-19 clients and those that are not), which are similar to the above, but do not require a waiver or rights or the promise to not challenge a workers' compensation claim.

## Client/Patient

### **Q: Should a non-medical home care agency care for a person who is symptomatic and has tested positive for COVID-19, is asymptomatic but quarantined, or a person under investigation for having contracted COVID-19?**

A: The answer to this question will depend on several legal and business factors. First, you should look to your existing policies, such as a communicable disease policy to see if your policy or governing board has already answered this question. You should also look to any regulations that govern your agency to see if this issue is addressed. If there is no prohibition, you should then determine whether you have sufficient personal protective equipment (PPE) for a caregiver to treat the client. You should also determine whether the caregiver has the proper training to use the PPE correctly. You should also examine your workers' compensation policy to determine if sending a caregiver to care for a client with a respiratory communicable disease would be excluded from coverage if the caregiver were to contract COVID-19. Finally, you should determine whether any of your caregivers would be willing to care for such a client.

If, after running this gauntlet, you think that you would be able to care competently for such a patient, you should also consider whether you would assign the caregiver to care for any other non-COVID-19 clients, which is not recommended. For clients who are diagnosed with COVID-19, if the proper PPE is not used correctly, or the caregiver comes into direct contact with infectious secretions or excretions of the client, then the caregiver would have to be quarantined for 14 days following the last contact with the client (or until the caregiver receives a fitness for duty release). Note: the caregiver's quarantine would not be necessary if the client was just under quarantine or has a negative COVID-19 test after becoming symptomatic. If the caregiver tests positive for COVID-19, then any other client the caregiver cared for would also have to be quarantined for 14 days following the last contact with the caregiver. Many of our non-medical home care agency clients are electing to opt-out of caring for COVID-19 positive clients and referring these clients to home health agencies due to the concern of inadequate training of many non-medical caregivers in treating clients with communicable diseases.

### **Q: Can we have a waiver of liability form related to infectious disease outbreak (COVID-19) signed as part of providing services to in-home care clients?**

A: Yes, a template client waiver form is available in the Home Care Industry COVID-19 Response Package. Please note that it is unclear whether such a waiver will be enforceable in every jurisdiction every time. You should consult counsel if you have questions. It is unlikely that this waiver will exempt an agency from negligent or unlawful conduct that results in the unnecessary risk to the client/patient.

### **Q: What should we do if someone in a caregiver's household is diagnosed with COVID-19? Should we notify the client?**

A: The caregiver should not be allowed to return to work for 14 days following the diagnosis of the person in the caregiver's home (assuming the caregiver can isolate away from the diagnosed person). If the caregiver cannot isolate, then the caregiver should not return to work while the family member is contagious (which is 10 days for most cases) plus 14 days after the family member is no longer contagious (*i.e.*, 24 days after the family member first began developing symptoms, assuming the caregiver does not develop COVID-19 during that period). Requirements to notify are state-specific. You should check your state and local health departments for more information. We are not aware of any states where an agency would be required to notify the client that the caregiver had been exposed to COVID-19 and is now under quarantine. Indeed, the CDC guidance available [here](#), [here](#) and [here](#) suggests the client is not at a materially increased risk if the caregiver was asymptomatic while caring for the client. But the client will wonder why the caregiver isn't working, and you may have a perception of transparency issue if the client later learns that the caregiver had been exposed to COVID-19.

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**Q: If I have a caregiver caring for a COVID-19-positive client, can s/he also care for another client who has not tested positive and/or is not showing signs of COVID-19?**

A: As long as a caregiver is healthy (meaning not showing any signs of COVID-19) and has been appropriately using the recommended PPE (according to the CDC and your local health department) when caring for a COVID-19-positive client, s/he would not be considered as exposed to COVID-19, and therefore can care for clients who are not COVID-19-positive. We recommend that your caregivers monitor their personal health daily for COVID-19 symptoms and certify at the beginning of each shift before making contact with the client that the caregiver is not experiencing symptoms.

Another option is to have a designated group of caregivers who have been specifically trained on standard and transmission-based precautions and caring for COVID-19 clients and using that group of caregivers exclusively for caring for COVID-19-positive clients while the client is in their isolation/recovery period.

**Q: What PPE should caregiver wear for asymptomatic clients?**

A: If you have no information about the client being infected with COVID-19, there is no known hazard in treating an asymptomatic client. Accordingly, there is no legal requirement for the caregiver to wear any certain PPE. However, the CDC issued guidance that everyone in a public area where social distancing may not be maintained should wear a cloth face covering. Based on this guidance, caregivers should wear at least a cloth face mask when within six feet of a client. The client also should wear a cloth face covering when the caregiver is within 6 feet, provided the client can tolerate the face covering. Good practices may also dictate that a caregiver wear gloves, gown, eye protection and practice good hygiene when caring for a client, particularly if the caregiver (or someone living in the caregiver's home) is at higher risk of severe illness from COVID-19.

**Q: Should all caregivers and clients wear a face mask?**

A: CDC issued guidance that everyone in a public area where social distancing may not be maintained should wear a face mask. Based on this guidance, caregivers and clients should wear at least a loose fitting face mask when they are within six feet of each other as source control that prevents any fluid coming from either person's nose or mouth from reaching the other person. Moreover, caregivers in long-term care facilities are recommended to wear PPE (gown, gloves, eye protection, N95 respirator or, if not available, a face mask) for the care of all residents, regardless of presence of symptoms.

**Q: Can we use homemade face masks?**

A: Certain materials filter better than others and the fit of a mask determines how protective it is. Any face covering is better than nothing, but a medical grade or at least proper dust mask is likely to be superior to using a bandana or other homemade face mask.

**Q: What PPE should a caregiver wear for a symptomatic or infected client?**

A: Before caring for a symptomatic or infected client, please make sure you have considered the guidance in the first answer provided in this section. CDC recommends that anyone treating a symptomatic or infected person protect themselves from contracting the virus by wearing a tight-fitting respirator mask such as an N95 or one offering the same or better protection, along with gloves, gown and eye protection. Note: an employer must have a respiratory program pursuant to OSHA's respiratory standard at 29 CFR 1910.134 to **require** an employee to wear an N95, which requires a written respiratory program and that each employee who will wear the respirator pass a medical evaluation to ensure wearing the mask does not pose a hazard, be properly fit tested to ensure the employee has a proper mask that will prevent the virus from entering around the mask, and training.

OSHA's guidance does not permit surgical masks be used in lieu of required respiratory protection. Surgical masks are not considered respirators by OSHA and, as such, are not covered by 29 CFR 1910.134. They are fluid resistant, disposable, and loose-fitting protection that create a physical barrier between the mouth and nose of the wearer and potential contaminants in the immediate environment. They are commonly used in health care settings for the protection of the patient and they are also often used to prevent splashes from contacting the face of the wearer. However, surgical masks do not seal tightly to the wearer's face, nor do they provide a reliable level of protection from inhaling smaller airborne particles.

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## **Q: Can we require our caregivers to wear a mask or a respirator?**

A: You can require your employee to wear a loose fitting face mask, as there is no legal requirements related to wearing that type of mask. OSHA does not consider surgical masks to be a respirator. On the other hand, you may not require an employee to wear a tight fitting respirator mask like an N95 without having a written respiratory program that complies with OSHA's respiratory standard. 29 CFR 1910.134.

## **Q: Can an employee voluntarily choose to wear an N95 or similar respirator?**

A: Yes, if you follow two requirements. It is possible to provide N95 or similar respirators to employees or allow them to wear their own only if you make sure that wearing the mask is safe for that particular employee, and you provide them a copy of a one-page document, Appendix D of the OSHA standard, which you can find [here](#). The OSHA standard that permits this is 29 CFR 1910.134(c)(2).

## **Q: How do I ensure an employee can safely wear an N95 or similar tight-fitting respirator?**

A: The employee should complete the medical evaluation that is part of the OSHA respiratory standard, which you can find [here](#), as the best way to ensure the employee can wear the respirator safely. At a minimum, the employee would need to confirm that s/he has none of the underlying conditions or problems identified in questions 2 through 9 of the form, and be told that if s/he experiences any problem breathing while wearing the mask that it should be removed until a medical evaluation can be completed, which can be done through on-line services with most follow-up consults being done by phone. A licensed nurse employed by you may also be competent to handle the evaluation and certify that the worker can safely wear the mask.

## **Q: Why does an employee need a medical evaluation, fit testing and training to wear an N95 respirator?**

A: The medical evaluation is to ensure the employee does not have a condition that may result in harm to the employee by wearing a respirator. Whereas, the fit test and training are required to ensure that the respirator fully protects the employee from the exterior hazard (*i.e.* COVID-19). The OSHA standard requires employers to provide employees more than one type or brand of respirator as they all fit differently and no one mask will fit all your employees, which means to ensure a proper seal between employee and mask there must be a variety of respirators for the employee to try. Given difficulty in sourcing respirators, an employer can provide employees what the employer has to offer and determine if there is a proper fit understanding that if there is only one type of respirator offered there will be employees who cannot use it, as it will not fit properly.

## **Q: Isn't a poor fitting N95 better than a loose fitting mask?**

A: Littler asked OSHA to consider this and allow less stringent requirements for the fit testing. To date OSHA has chosen not to lighten the restriction.

## **Q: Can a face mask be used instead of an N95 or similar respirator if the employee is not authorized to wear a respirator or respirators are not available?**

A: Not without exposing your employee and your business to some risk for which you may be found liable. Respirators like an N95 or better are the required standard of care to protect employees. The [CDC notes](#) that, "while respirators confer a higher level of protection than face masks, and are recommended when caring for patients with COVID-19, face masks still confer some level of protection." The CDC also [notes](#) that caregivers "who enter the room of a patient with known or suspected COVID-19 should adhere to Standard Precautions and use a respirator or face mask, gown, gloves, and eye protection. When available, respirators (instead of face masks) are preferred." As of March 10, 2020, the CDC [reported](#) that "based on local and regional situational analysis of PPE supplies, face masks are an acceptable alternative when the supply chain of respirators cannot meet the demand" along with eye protection, gown and gloves. The CDC places the risk of transmission as "Low" for a health care provider who uses a loose fitting face mask, instead of an N95 or similar respirator, with a face shield, gown and gloves. Exposures with this level of PPE does not require any sort of self-quarantine or other action by the caregiver. Nevertheless, [CDC says](#) there is a "low" risk as opposed to no risk when using an N95 type respirator.

On April 3, 2020, [OSHA reconfirmed](#) that employers are required to comply with its respiratory standard requiring a written respiratory program, ensure employees have medical evaluations before using a respirator, be fit tested and trained. However,

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When an employer has not fully complied with the standard due to a lack of availability of respirators, the guidance directs OSHA investigators to consider all other measures an employer has done to try and comply with OSHA's respiratory standard in mitigation of a citation. Those other measures would include using a face mask with face shield, gloves, gown, and having policies that keep a caregiver six feet away except when absolutely necessary and, then, limiting the time of each exposure (*i.e.* when a caregiver has to be within six feet). Where an employer does not take all feasible measures, OSHA reiterated that it will issue serious citations for violations of its respiratory standard that continues to require N95 or better respirators be used in caring for symptomatic or infected clients.

## **Q: Is any N95 acceptable?**

A: There are many counterfeit masks on the market. The only acceptable N95 is one that is approved by the National Institute for Occupational Safety and Health (NIOSH). A manufacturer can be validated [here](#). Some NIOSH N95 masks are also FDA approved, but that is only required during surgery or where aspiration will occur. KN95 masks are made in China and are not NIOSH approved. Masks also have expiration dates, but you are permitted to use expired masks as described [here](#). Other types of respirators can be used instead of an N95 if they can be obtained such as NIOSH-approved, non-disposable, elastomeric respirators or powered, air-purifying respirators (PAPRs) and other filtering face piece respirators such as N99, N100, R95, R99, R100, P95, P99, and P100.

## **Q: What is a KN95 mask and can it be used?**

A: KN95 masks are China's equivalent to the N95 mask and should generally be treated as such. On April 3, 2020, the FDA issued an Emergency Use Authorization (EUA) for non-NIOSH approved N95 respirators made in China, which makes KN95 respirators eligible for authorization if certain criteria are met, including evidence demonstrating that the respirator meets certain standards. The FDA has also issued guidance that explains, for the duration of the pandemic, when FDA-cleared or NIOSH-approved respirators are not available, it generally would not object to the importation and use of respirators without an EUA (including KN95s) and encourages importers to take appropriate steps to verify the product's authenticity prior to importing. See above questions for additional information.

## **Q: Can we care for symptomatic or infected clients without having a full respiratory program that complies with OSHA's burdensome requirements?**

A: As described above, there remains a risk of exposure that CDC says is low. OSHA may use discretion to not cite an employer if it has done everything it can to comply with the standard, but has not fully complied. So, to minimize risk for an employer who chooses to have an employee care for a symptomatic or COVID-19 infected client, the employer should, at a minimum, require a face mask for both caregiver and client when they are within six feet of each other, in addition to requiring caregiver to use a face shield, gloves, and possibly additional eye protection. Policies must also be established to minimize contact between caregiver and client and ensure that they can remain six feet apart except where absolutely necessary to be in close contact (within six feet), and to institute procedures that will allow tasks that require close contact to be performed as quickly as possible to minimize the close contact. There must also be strict guidelines to ensure enhanced hygiene including frequent hand washing and sanitizing, proper sneeze and cough etiquette, etc. Note: certain anti-retaliation provisions protect caregivers from adverse action because they refuse or otherwise complain about caring for a symptomatic or infected client without an N95 or equivalent respirator.

## **Q: What if a caregiver takes a client to a health care facility and a client is diagnosed with COVID-19?**

A: If a client was symptomatic then the caregiver should have PPE sufficient to handle the infected client. It would be extremely unusual for someone to be able to get a test, and get the results immediately, especially if not symptomatic. But, if that happened, the agency should already have decided whether to treat symptomatic and infected clients and what PPE will be used for doing so. If an agency has decided not to treat such clients, then the agency should arrange for the client to be admitted or transported and cared for by an appropriate health care provider or family members who are not required to use the same level of PPE as is required for an employee.

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## **Q: Can a symptomatic or infected client remain in a group home setting?**

A: The CDC provides Interim Guidance for Implementing Home Care for People Not Requiring Hospitalization [here](#). In this guidance, the CDC says that people with confirmed or suspected COVID-19 infection, including persons under investigation, are eligible for home care if the residential setting is appropriate. This guidance covers patients evaluated in an outpatient setting who do not require hospitalization (*i.e.*, patients who are medically stable and can receive care at home) or patients who are discharged home following a hospitalization with confirmed COVID-19 infection. In general, the CDC says, people should adhere to home isolation until the risk of secondary transmission is thought to be low. A key consideration the CDC recommends a healthcare professional consider when assessing the viability of home care is whether the patient can recover in a separate bedroom without sharing immediate space with others. Additionally, the patient and other household members should have access to appropriate, recommended personal protective equipment (at a minimum, gloves and face mask) and are capable of adhering to precautions recommended as part of home care or isolation (*e.g.*, respiratory hygiene, and cough etiquette, and hand hygiene). Finally, home care is not recommended where there are household members who may be at increased risk of complications from COVID-19 infection (*e.g.*, people >65 years old, young children, pregnant women, people who are immunocompromised or who have chronic heart, lung, or kidney conditions).

## **Q: What should an acute care facility include in its COVID-19 policy for healthcare workers who work for more than one facility? For context, a hospital will not generally send every healthcare worker home who is called on to care for a COVID-19 patient. Would / Should they allow staff who cared for such a patient at their other job to come to work?**

A: The CDC guidance available [here](#) should help you evaluate whether this person poses a significant risk of exposing your patients to communicable diseases, including COVID-19. Many state health departments also have a tool to assist with risk management, monitoring and work restriction decisions for healthcare personnel with potential exposure to COVID-19 in the healthcare setting. You also may ask the employee if he or s/he is experiencing any of the symptoms of COVID-19 (such as, fever above 100.4 °F, cough or shortness of breath), and if the employee has been in close contact (within six feet for 15 minutes or more) of anyone diagnosed with the /COVID-19 or another communicable disease, or had unprotected direct contact with infectious secretions or excretions of the patient (*e.g.*, being coughed on, touching used tissues with a bare hand) in the past 14 days without appropriate protection.

## **Q: What defines “exposure” to the virus? Is working with full PPE considered an “exposure”? What if it is CDC-acceptable PPE versus preferred?**

A: The CDC has explained that one is at risk of contracting COVID-19 if one has been in close contact for a prolonged period with someone who has been diagnosed with COVID-19, or comes into direct contact (*i.e.*, is sneezed or coughed upon) with such a person. Additionally, the CDC has advised that a health care worker who is wearing all required PPE (N95, eye protection, gloves and gown) is not considered to have been exposed. The chart available [here](#) provides a good description of the circumstances the CDC says would create a low exposure risk, and those that are higher and therefore would require exclusion from the workplace for 14 days.

## **Privacy/HIPAA**

### **Q: If one of our employees is quarantined, what information can we share with our employees? Who can we share it with?**

A: If an employee is confirmed to have COVID-19, employers should inform fellow employees of their possible exposure to COVID-19 in the workplace but maintain confidentiality as required by the Americans with Disabilities Act (ADA). Employees exposed to a co-worker with confirmed COVID-19 should refer to [this CDC guidance](#) for how to conduct a risk assessment of their potential exposure.

### **Q: What privacy concerns do we need to be aware of when we are asking for health information of our employees in order to evaluate whether they need to be quarantined?**

A: Employers may ask employees if they are experiencing COVID-19 symptoms such as fever, sore throat, cough, and shortness of breath. Federal or state law may require the employer to handle the employee’s response as a confidential medical record.

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To help mitigate this risk, employers should maintain the information in a separate, confidential medical file and limit access to those with a business need to know. A template Employee Certification Regarding Lack of Exposure is available on the Home Care Industry COVID-19 Response Package. Please reference the Employee Certification Regarding Lack of Exposure document that is part of your COVID-19 Policy Package.

**Q: Can a doctor provide the names of workers with COVID-19 to the employer without the employee's consent?**

A: In all likelihood, yes, HIPAA would allow a doctor to disclose a COVID-19 diagnosis to an employer because the disease is a pandemic and communicable. But even if that were to happen, an employer would need to keep this diagnosis confidential unless the employee authorizes disclosure due to FMLA, ADA and/or state law confidentiality obligations. For more information on what to do if an employer learns that an employee has been diagnosed with COVID-19, see the answer above on this topic.

**Q: Does HIPAA protect information provided to the employer by the employee's doctor to support a leave claim?**

A: No, HIPAA is not the source of the employer's confidentiality requirement. Instead, the FMLA, ADA and/or state law have their own confidentiality provisions. That confidentiality requirement would apply to protect the information.

**Q: Can an employer disclose to its clients where the company's employees have traveled or where they plan to travel?**

A: Yes.

**Q: Are there any privacy issues if the employer singles out a sick employee and sends the employee home? Is the employer somehow disclosing Personally Identifiable Information about a medical condition (since other employees may notice) when they send the employee home?**

A: Merely sending an employee home does not trigger any privacy issues. But the employer should instruct employees to maintain the confidentiality of health information regarding any such employee.

**Q: May an employer require new entering employees to have a post-offer medical examination to determine their general health status?**

A: Yes, if all entering employees in the same job category are required to undergo the medical examination and if the information obtained regarding the medical condition or history of the applicant is collected and maintained on separate forms and in separate medical files and is treated as a confidential medical record.

**FFCRA [Updated]** Following the August 3, 2020 Federal Court Opinion Striking Down Portions of the DOL's Final Rule on the FFCRA, the DOL issued revised regulations for the FFCRA, which took effect September 16, 2020.

**Q. Does this decision apply to me? [Updated]**

A: On August 3, 2020, a federal district court judge sitting on the Southern District of New York (SDNY) issued the decision in *State of New York v. U.S. Dep't of Labor, et al.*, 20-CV-3020 (JPO) vacating certain provisions in the US Department of Labor's FFCRA regulations. While neither the court's opinion and order, nor the DOL in its revised regulations, explicitly address whether the court decision applies nationwide, the DOL acknowledged that it viewed the decision as applying nationwide in its new guidance. Therefore, home care companies outside the SDNY should consider operating as if the decision applied to them from August 3 to September 15, 2020 and the revised DOL regulations apply from September 16 (the effective date of the revised regulations) to December 31, 2020 (when the FFCRA paid leave benefits expire).

**Q: When does an employer count its workforce for purposes of FFCRA coverage?**

A: At the time the leave is taken.

**Q: Which employees count towards the 500-employee threshold for FFCRA paid leave requirements?**

A: (1) Full and part-time employees within the U.S. and U.S. territories or possessions;

(2) Employees on leave;

(3) Temporary employees jointly employed by the company and another company (regardless of whose payroll the employee is on); and

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(4) Day laborers supplied by a temporary agency.

The law uses the FLSA “employee” definition. Properly classified independent contractors are excluded from this count.

## **Q: When does the small business exception apply to FFCRA leave requirements?**

A: It only applies to small businesses with fewer than 50 employees and only for leave related to school/place of care closures or child care provider unavailability for COVID-19 related reasons when providing leave would jeopardize the viability of the small business as a going concern. An authorized officer of the business must determine that:

- (1) The provision of paid leave would result in the small business’s expenses and financial obligations exceeding available business revenues and cause the small business to cease operating at a minimal capacity;
- (2) The absence of the employee or employees requesting paid leave would entail a substantial risk to the financial health or operational capabilities of the small business because of their specialized skills, knowledge of the business, or responsibilities; or
- (3) 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 leave, and these labor or services are needed for the small business to operate at a minimal capacity.

## **Q: How do I take advantage of the small business (less than 50 employees) exemption?**

A: Document why your business meets the criteria, retain this documentation for your file, but do not submit materials to the DOL when seeking exemption.

## **Q: How do you define COVID-19 related sick pay?**

A: Under the FFCRA, an employee qualifies for paid sick time if the employee is unable to work (or to telework) due to a need for leave because the employee:

- (1) is subject to a Federal, State, or local quarantine or isolation order related to COVID-19;
- (2) has been advised by a health care provider to self-quarantine related to COVID-19;
- (3) is experiencing COVID-19 symptoms and is seeking a medical diagnosis;
- (4) is caring for an individual subject to an order described in (1) or self-quarantine as described in (2);
- (5) is caring for a child whose school or place of care is closed (or child care provider is unavailable) for reasons related to COVID-19; or
- (6) is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services, in consultation with the Secretaries of Labor and Treasury.

## **Q: What if an employee is showing all the symptoms of COVID-19 but the health department will not administer a test? Does that employee still qualify for sick leave?**

A: Yes, as long as the employee is seeking a medical diagnosis.

## **Q: Can an employee who is experiencing COVID-19 symptoms decide to self-quarantine and qualify for paid sick leave?**

A: An employee who unilaterally decides to self-quarantine is not eligible for paid sick leave. Paid sick leave is only available when an employee seeks a medical diagnosis or if a health care provider otherwise advises the employee to self-quarantine for COVID-19 related reasons. In addition, the employee must not be able to work or telework during the self-quarantine.

## **Q: Can an employee take paid sick leave to care for any individual subject to a quarantine or isolation order or who has been advised to self-quarantine?**

A: No. Paid sick leave may only be taken in conjunction with caring for (1) an immediate family member; (2) someone who regularly resides in the employee’s home; or (3) where the employee’s relationship to an individual creates an expectation that the employee will care for the individual and that individual depends on the employee for care during the quarantine or self-quarantine period. An employee cannot take paid sick leave to care for someone with whom he or she has no relationship or

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who does not depend on the employee's care during his or her quarantine or self-quarantine.

**Q: Who qualifies as a “child care provider”?**

A: A child care provider is someone who cares for an employee's child. This includes individuals paid to provide child care (e.g., babysitters) or individuals who provide child care at no cost and without a license on a regular basis (e.g., grandparents, aunts/uncles, or neighbors).

**Q: If a child's school or place of care has moved to online instruction or another model in which children are expected or required to complete assignments at home, is it “closed” for purposes of qualifying for FFCRA paid leave?**

A: Yes, if the physical location where the child receives instruction or care is now closed, the school or place of care is “closed” for purposes of paid FFCRA leave. This is true even if some or all instruction is being provided online or whether, through another format such as “distance learning,” your child is still expected or required to complete assignments.

**Q: Under the FFCRA, if a caregiver says s/he cannot work due to childcare issues, what are you obligated to do? If the caregiver applies for unemployment, will s/he get it, and if successful, will it be charged against the employer?**

A: Lacking childcare as a result of COVID-19 is a qualifying event to pay the emergency sick leave and emergency FMLA leave. That said, it is also a qualifying reason for an employee to resign and collect unemployment. However, the employee cannot collect unemployment if he or s/he is receiving paid leave benefits. Determination of whether unemployment will be charged against your experience rating is made on a state-by-state basis.

**Q: What if you have work to offer at hours other than 9 a.m. to 3 p.m. when kids would have been in school? [\[Updated\]](#)**

A: You may offer alternate hours, but that might not work for the caregiver. As many childcare options are closed or limited, offering work outside of traditional school hours may not alleviate the employee's childcare needs. As long as the employee meets one of the criteria for the FFCRA, that employee can use that paid sick leave or FMLA leave for all hours. The DOL's revised regulations, effective September 16, 2020, address administration of FFCRA leave when an employee's child participates in hybrid learning in which schools operate on adjusted or alternating schedules. Here, each day of school closure “constitutes a separate reason for FFCRA leave that ends when the school opens the next day.” As a result, intermittent leave is not necessary on these occasions because the “school literally closes . . . and opens repeatedly.” In other words, a full single day of leave is not considered intermittent, and an employee does not need employer consent to take off Monday, Wednesday and Friday due to their child's school closure, because Monday, Wednesday and Friday are separate school closures, each entitling the employee to FFCRA leave.

However, under the DOL's revised regulations, consent or agreement between the employer and the employee remains required for the employee for the use of intermittent leave where it otherwise applies.

**Q: Has the U.S. Department of Health and Human Services identified any “substantially similar condition” that would qualify for FFCRA paid sick leave?**

A: No. If such a condition is identified, the DOL will issue guidance on when paid sick leave may be taken on that basis.

**Q: Can paid sick leave be taken for two weeks for one reason and two weeks for another reason?**

A: No, the total number of paid sick leave is capped at 80 hours (full-time) or the average of hours worked for a two-week period (part-time) for any combination of qualifying reasons.

**Q: How do paid sick leave and paid expanded FMLA leave interact where the employee is home with a child because of a school/place of care closure or unavailability of a child care provider?**

A: An employee is eligible for both types of leave, but only to a maximum of 12 weeks.

**Q: How long is the federal unemployment being offered? If it is for childcare due to school closure, will it stop when the typical school year would have ended? [\[Updated\]](#)**

A: The federal unemployment program under the CARES Act, which provided \$600 per week to eligible individuals, expired on July 31, 2020 (negotiations between Congress and the White House have broken down and future extensions or amendments remain uncertain; however, as described further below, the Lost Wages Assistance program was created by

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executive order to provide additional relief, but at reduced levels). To be eligible for unemployment due to child care issues, the employee must show “a child or other person in the household for which the individual has primary caregiving responsibility is unable to attend school or another facility that is closed as a direct result of the COVID-19 public health emergency and such school or facility care is required for the individual to work.” In an April 5, 2020 Unemployment Insurance Program Letter, the U.S. Department of Labor stated, “A school is not closed as a direct result of the COVID-19 public health emergency . . . after the date the school year was originally scheduled to end.” In addition, eligible individuals may also receive unemployment benefits up to a maximum of 39 weeks, despite state caps limiting eligibility to fewer weeks. However, the extended benefits are only available through December 31, 2020, and are not payable for any week of unemployment ending after December 31, 2020.

In late August, President Trump signed an executive order creating the Lost Wages Assistance (LWA) program which pays an additional \$300 per week from the Disaster Relief Fund to qualifying individuals in qualifying states. All states, except South Dakota, applied and were accepted into the program. As the program extends for six weeks, most Americans will receive a maximum of \$1,800 from the LWA program. Residents in four states – Kentucky, Montana, Vermont, and West Virginia – could receive an additional \$600, on top of the \$1,800, as those states opted to pay an extra \$100 a week in benefits. However, unemployed workers in Florida will receive a maximum of \$1,200, per that state’s unemployment program.

**Q: Can I deny paid sick leave if I gave the employee leave for one of the qualifying reasons prior to April 1, 2020?**

A: No. The FFCRA imposes a new leave requirement effective April 1, 2020.

**Q: How do I count hours worked by a part-time employee or PRN caregiver for purposes of paid sick leave or paid expanded FMLA leave?**

A: (1) Use normally scheduled hours:

- (2) If normal hours scheduled is unknown or the employee’s hours vary, use a six-month average;
- (3) If that average cannot be calculated, use the number of hours that you and employee agreed that the employee would work upon hiring;
- (4) If no such agreement, use average hours per day employee was scheduled over the entire term of employment.

**Q: How do I calculate hours worked by employees with varying schedules (like my caregivers) for purposes of paid sick leave or paid expanded FMLA leave?**

A: You use the same method as for part-time employees.

**Q: We frequently have employees who work part-time for our agency and part-time for one or more other agencies. Is there any consideration given to this with the FFCRA or PPP in the “headcount” numbers? How are employees with multiple employers accounted for?**

A: The 500-employee headcount is not dependent on FTEs or the part-time status of employees. However, PPP loan forgiveness does refer to FTEs. The SBA has yet to provide guidance on the method used to calculate the number of FTEs. However, the current recommended approach is to count each exempt employee or employee working 30 or more hours as one FTE and divide the total number of weekly hours paid to nonexempt employees working less than 30 hours by 30, to determine the number of additional FTEs.

**Q: Do overtime hours have to be included when calculating paid leave due to employees?**

A: Yes. For paid expanded FMLA leave, you must include hours that the employee would normally have been scheduled for, even if it is more than 40 hours per week. For paid sick leave, there is a cap of 80 hours over a two-week period. Thus, if an employee regularly works 50 hours a week, you would provide 50 hours of sick pay in week one and 30 hours of sick pay in week two.

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**Q: Do I have to pay overtime premiums for paid leave if it exceeds 40 hours?**

A: No.

**Q: How is the regular rate calculated for the FFCRA?**

A: The average of the regular rate over a period of up to six months prior to the date on which leave is taken. If the employee has worked less than six months, use the average of the regular rate for each week worked.

**Q: Is all leave under the FMLA now paid leave?**

A: No. The only paid FMLA leave is expanded FMLA leave related to children with school/place of care closures or child care provider unavailability.

**Q: How is the “at least 30 calendar days” standard evaluated for purposes of qualifying for paid expanded FMLA leave?**

A: An employee is considered employed for 30 calendar days if he or she was on the company’s payroll for the 30 calendar days immediately prior to the day the leave would begin. Any days previously worked as a temporary employee may count towards the 30-day eligibility period.

**Q: Can an employee take paid FFCRA leave if the employee is receiving workers’ compensation or temporary disability benefits through an employer or state-provided plan?**

A: No, unless the employee is able to return to light duty before taking leave and a qualifying reason prevents the employee from working (or teleworking).

**Q: Can an employee take paid FFCRA leave if the employee is on an employer-approved leave of absence? [\[Updated\]](#)**

A: If the leave of absence is voluntary, the employee may end the leave and begin taking paid FFCRA leave if a qualifying reason prevents the employee from working (or teleworking). If the leave of absence is mandatory, then the employee may not take FFCRA leave. While on August 3, 2020, a federal court struck down “the work availability requirement,” the revised DOL regulations clarified and reaffirmed that FFCRA leave may be taken only if the employer has work available from which and employee can take leave.

**Q: Can we force an employee to take sick time if they are showing symptoms of COVID-19? Do we have to pay for the testing for the caregiver if we are mandating they take time off?**

A: An employer can send an employee home if they are showing symptoms of COVID-19. While the employer can “encourage” an employee to voluntarily use any available sick leave, an employer generally speaking cannot mandate such use. See, e.g., Cal. Labor Code section 246 (k) (“An employee may determine how much paid sick leave he or she needs to use”). Thus, the employer could certainly advise employees regarding their available sick leave and remind them that it provides paid time off that could be applied to their circumstances, but it cannot force them to use it.

An employer also can “encourage” employees to be evaluated by their doctors, but we generally do not recommend an employer “force” an employee who is sick to go to the doctor. However, it is permissible under federal and California law to require a medical examination of a current employee when it is: (1) job related and consistent with business necessity; or (2) there is a reasonable belief that the employee may pose a direct threat. Note, an employee likely would not be deemed to pose a “direct threat” due to COVID-19, unless the employee is known to have contracted the virus, has traveled to a high risk area within the last 14 days, has come into close contact with someone known or likely to have the virus in the last 14 days, or is exhibiting symptoms that may be associated with the virus (fever, cough and/or shortness of breath).

If an employer does require an employee to see a doctor for a fitness for duty exam or to obtain a release to return to work, the examination should be narrowly tailored and based on an objectively reasonable assessment that the employee would otherwise present a direct threat to a vulnerable patient population. In addition, the employer would be obligated to pay for the examination if it sent the employee to a health care provider of its choosing. However, if the employee voluntarily goes to the doctor or goes to a doctor of the employee’s own choosing, the employee would be responsible for paying for the visit.

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**Q: Under the FFCRA, what happens with EPSL pay when someone originally thought s/he was COVID-19 positive (had symptoms, told to quarantine by healthcare provider, etc.) but later found out s/he was COVID-19 negative? For example, what if someone is out 10 days and for the first five days s/he was believed to have COVID-19 and were ordered to self-isolate, then the next five days they were still sick but were confirmed COVID-19 negative? Should we pay the first five days under EPSL (because at the time they were ordered to self-isolate) and not pay the next five days because they were confirmed COVID-19 negative?**

A: If the caregiver meets the requirements of the FFCRA (here, for example, s/he sought a medical diagnosis), then that period (here, five days) is covered by the FFCRA. However, after the diagnosis was returned as negative for COVID-19, then the employer's normal sick time policies apply and should be referred to for guidance unless the caregiver is advised by a health care provider to self-quarantine for a longer period of time. In most instances, this means using PTO, unless a state or local law requires paid leave under these circumstances.

**Q: What documents do employees need to give me to get paid sick leave or expanded family and medical leave? [\[Updated\]](#)**

A: The FFCRA does not specify what documents, if any, an employer may request from an employee seeking leave. However, the DOL has stated employees must provide to their employer documentation in support of paid sick leave requests as specified in applicable IRS forms, instructions, and information. IRS guidance, however, does not provide details as to what documentation is appropriate and, instead, focuses on information needed to support paid sick leave. While a federal court struck down the requirement that employees submit documentation prior to taking FFCRA leave, the revised DOL regulations clarify that any documentation required under Section 826.100 need not be provided before leave begins, but rather may be given "as soon as practicable, which in most cases will be when the employee provides notice" of the need for FFCRA leave.

The DOL has recommended that employers document the following:

- The name of your employee requesting leave;
- The date(s) for which leave is requested;
- The reason for leave; and
- A statement from the employee that he or she is unable to work because of the reason.

The DOL has also recommended that "if your employee requests leave because he or she is subject to a quarantine or isolation order or to care for an individual subject to such an order, you should additionally document the name of the government entity that issued the order. If your employee requests leave to self-quarantine based on the advice of a health care provider or to care for an individual who is self-quarantining based on such advice, you should additionally document the name of the health care provider who gave advice."

If your employee requests leave to care for his or her child whose school or place of care is closed, or child care provider is unavailable, the DOL recommends documenting:

- The name of the child being cared for;
- The name of the school, place of care, or child care provider that has closed or become unavailable; and
- A statement from the employee that no other suitable person is available to care for the child.

Please also note that all existing certification requirements under the FMLA remain in effect if the employee is taking leave for one of the existing qualifying reasons under the FMLA. For example, if the employee is taking leave beyond the two weeks of emergency paid sick leave because the employee's medical condition for COVID-19-related reasons rises to the level of a serious health condition, the employee must continue to provide medical certifications under the FMLA if required by the employer.

Neither the IRS nor the DOL temporary rules specifically address what documentation is appropriate to support paid sick leave and, instead, only focus on specific information needed from employees. As a result, we anticipate further guidance and clarification on documentation issues.

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The DOL has advised that “you should consult Internal Revenue Service (IRS) applicable forms, instructions, and information for the procedures that must be followed to claim a tax credit, including any needed substantiation to be retained to support the credit. You are not required to provide leave if materials sufficient to support the applicable tax credit have not been provided.”

**Note:** Sample forms are available as part of the Home Care Industry COVID-19 Response Package. You may customize these forms yourself or retain a Littler subject matter expert to do so at an hourly rate.

## **Q: What records must I keep when an employee takes FFCRA leave? [\[Updated\]](#)**

A: If you intend to claim a tax credit under the FFCRA, you should retain appropriate documentation and consult IRS forms, applications, and information for the procedures to follow to claim the tax credit. While a federal court struck down any requirement that employees submit documentation prior to taking FFCRA leave, DOL’s revised regulations amended the existing regulations to clarify that any documentation required under Section 826.100 need not be provided before leave begins, but rather may be given “as soon as practicable, which in most cases will be when the employee provides notice” of the need for FFCRA leave. If care of a child due to school/place of care closure or child care provider unavailability is claimed by an employee, the DOL provides that you may request any additional documentation, such as a posted or published notice of closure or an email from a relevant employee or official of the school, place of care, or child care provider. Neither the IRS nor the DOL temporary rules specifically address what documentation is appropriate to support paid sick leave and, instead, only focus on specific information needed from employees. As a result, we anticipate further guidance and clarification on documentation issues.

**Note:** Sample forms are available as part of the Home Care Industry COVID-19 Response Package. You may customize these forms yourself or retain a law firm, such as Littler, to do so at an hourly rate.

**Note:** The IRS has provided additional guidance regarding tax credits associated with paid leave; this information can be found at: <https://www.irs.gov/new-sroom/covid-19-related-tax-credits-for-required-paid-leave-provided-by-small-and-midsize-businesses-faq>

## **Q: When can an employee telework?**

A: Only when the employer permits or allows it.

## **Q: Do I have to pay a teleworker from their first activity until their last activity?**

A: Not under federal law, but you should consult your state’s laws (particularly in California) to determine if and how your state’s law differs on this issue. Under federal law, you are required to pay a teleworker for all hours worked. Such employees must record all time worked if non-exempt. You are not required to pay for unreported hours unless you knew or should have known about such work. If an employee works from 7-9 a.m., 12:30-3 p.m., and 7-9 p.m. on a single day, you must pay only for 6.5 hours.

## **Q: What does it mean to be unable to work or telework for COVID-19 related reasons?**

A: The employer has work and one of the qualifying reasons prevent the employee from being able to perform the work under normal circumstances at the normal worksite or by teleworking. If the employer and employee agree to work the normal hours outside the normal schedule, the employee is able to work unless a qualifying reason prevents the employee from working that schedule.

## **Q: May FFCRA leave be taken intermittently while teleworking? [\[Updated\]](#)**

A: Yes, if the employee is unable to telework his or her normal schedule due to a qualifying reason. The leave may be taken in any increment if the reason for the leave permits intermittent leave. Despite a federal court order holding that consent or agreement between the employee and the employer is not a requirement for the use of intermittent leave under the FFCRA, the revised DOL regulations reinstate the consent requirement and provided additional rationale for this requirement (the court had struck it down finding insufficient reasoning for the requirement).

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## **Q: May FCCRA leave be taken intermittently at an employee's usual worksite? [\[Updated\]](#)**

A: It depends on why you are taking paid sick leave and whether your employer agrees. Unless you are teleworking, paid sick leave for qualifying reasons related to COVID-19 must be taken in full-day increments. It cannot be taken intermittently if the leave is being taken because:

- You are subject to a Federal, State, or local quarantine or isolation order related to COVID-19;
- You have been advised by a health care provider to self-quarantine due to concerns related to COVID-19;
- You are experiencing symptoms of COVID-19 and seeking a medical diagnosis;
- You are caring for an individual who either is subject to a quarantine or isolation order related to COVID-19 or has been advised by a health care provider to self-quarantine due to concerns related to COVID-19; or
- You are experiencing any other substantially similar condition specified by the Secretary of Health and Human Services.

Unless you are teleworking, once you begin taking paid sick leave for one or more of these qualifying reasons, you must continue to take paid sick leave each day until you either (1) use the full amount of paid sick leave or (2) no longer have a qualifying reason for taking paid sick leave. This limit is imposed because if you are sick or possibly sick with COVID-19, or caring for an individual who is sick or possibly sick with COVID-19, the intent of FFCRA is to provide such paid sick leave as necessary to keep you from spreading the virus to others.

If you no longer have a qualifying reason for taking paid sick leave before you exhaust your paid sick leave, you may take any remaining paid sick leave at a later time, until December 31, 2020, if another qualifying reason occurs.

In contrast, if you and your employer agree, you may take paid sick leave intermittently if you are taking paid sick leave to care for your child whose school or place of care is closed, or whose child care provider is unavailable, because of COVID-19 related reasons. For example, if your child's school or place of care is closed, or child care provider is unavailable, for an entire week due to COVID-19 related reasons and your employer and you agree, you may take expanded family and medical leave intermittently on Monday, Wednesday, and Friday, but work Tuesday and Thursday, while another family member watches your child.

The Department notes that if your child's school, place of care, or child care provider were closed or unavailable on only Monday, Wednesday, and Friday, as opposed to the entire week, then you would not need to take intermittent leave if working on the schedule in the example above. This is because each day of closure or unavailability is a separate reason for leave, and thus you would not need to take leave for a single reason intermittently. As such, you would not need employer permission to take leave on just the days of closure or unavailability.

The DOL encourages employers and employees to collaborate to achieve maximum flexibility. Therefore, if employers and employees agree to intermittent leave on less than a full work day for employees taking paid sick leave to care for their child whose school or place of care is closed, or child care provider is unavailable, because of COVID-19-related reasons, the DOL is supportive of such voluntary arrangements.

## **Q: May FCCRA paid leave be taken if the employer closes the worksite (and there is no work for the employee)? [\[Updated\]](#)**

A: No. If, prior to the FFCRA's effective date, an employer sent an employee home and stopped paying the employee due to lack of work, the employee will not get paid sick leave or expanded family and medical leave but may be eligible for unemployment insurance benefits. This is true whether an employer closes the employee's worksite for lack of business or because it is required to close pursuant to a Federal, State, or local directive.

## **Q: Do I have to give FFCRA paid sick leave if there is a "shelter-in-place or "stay-at-home" order issued by a Federal, State, or local authority that causes the employee to be unable to work (or to telework)? [\[Updated\]](#)**

A: Under these circumstances, the employee may qualify for paid sick leave unless the employer has no work for the employee to do.

## **Q: If I reduce an employee's scheduled hours, may the employee take FCCRA paid leave for the hours no longer scheduled to be worked?**

A: No, because the employee is not prevented from working those hours by a qualifying reason, even if the reduction is related to COVID-19. The employee, however, may be entitled to unemployment benefits.

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**Q: May an employee collect unemployment insurance benefits for time in which the employee receives FFCRA paid sick leave or paid expanded family leave?**

A: No. However, depending on State eligibility rules, partial unemployment benefits may be available where a worker's hours or pay has been reduced.

**Q: Can employees double-up? Meaning, can they utilize the FFCRA 12-week leave, then file for unemployment and get another 39 weeks? [\[Updated\]](#)**

A: Employees can request and receive FFCRA benefits, quit, and then collect unemployment if they qualify for that state's unemployment. However, they cannot collect unemployment while receiving paid leave under the FFCRA. Unless later extended by Congress, the \$600 federal supplement to unemployment recipients expired on July 31, 2020. Thus, if an employee received 12 weeks of paid FFCRA leave beginning April 1, the paid leave benefits would expire June 23 and the CARES Act \$600 supplement would have lasted about six weeks longer.

In addition to the CARES Act funding, in late August, President Trump signed an executive order creating the Lost Wages Assistance (LWA) program which pays an additional \$300 per week from the Disaster Relief Fund to qualifying individuals in qualifying states. All states, except South Dakota, applied and were accepted into the program. As the program extends for six weeks, most Americans will receive a maximum of \$1,800 from the LWA program. Residents in four states – Kentucky, Montana, Vermont, and West Virginia – could receive an additional \$600, on top of the \$1,800, as those states opted to pay an extra \$100 a week in benefits. However, unemployed workers in Florida will receive a maximum of \$1,200, per that state's unemployment program.

**Q: Do I have to continue health coverage while an employee is FFCRA paid sick leave or paid expanded FMLA leave?**

A: Yes, if the employer provides group health coverage and the employee has elected coverage, the employer must continue group coverage (including family coverage) on the same terms as if the employee had continued to work. Employees must generally continue making normal contributions to the cost of their health coverage.

**Q: Can an employee use preexisting leave and FFCRA paid sick leave or paid expanded FMLA leave concurrently for the same hours?**

A: No. Employees must choose one type of leave unless the employer agrees to allow the employee to supplement the amount received under FFCRA paid leave up to the employee's normal earnings with preexisting leave. For example, where FFCRA paid leave provides two-thirds of an employee's normal earnings, the employer may agree to allow the employee to use preexisting employer-provided paid leave to get the additional one-third of normal earnings.

**Q: Can I require an employee to use preexisting paid leave benefits to supplement or adjust the pay mandated under the FFCRA?**

A: No, only the employee may decide to use preexisting paid leave benefits to supplement the amount the employee receives under FFCRA.

**Q: Can I pay employees more than they are entitled under the FFCRA?**

A: Yes, but you cannot claim and will not receive tax credit for the amount in excess of the statutory limit.

**Q: If state law required 40 hours prior to COVID-19, then when you follow FFCRA for 80 hours of sick pay, do you give employees a total of 120 hours or 80 hours sick pay?**

A: In this scenario, you would pay the 80 hours of FFCRA sick pay and an additional 40 hours of state sick pay. One does not supersede the other. Also, you would only be entitled to the tax credit for the 80 hours of FFCRA sick pay.

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## **Q: What are the statutory dollar limits on FFCRA paid sick leave and paid expanded FMLA leave?**

A: For paid sick leave related to (1) quarantine or isolation order; (2) self-quarantine on advice of a health care provider; or (3) COVID-19 symptoms for which a medical diagnosis is being sought, the cap is \$511 per day and \$5,110 in aggregate over a two-week period. For related to care of an individual subject to reasons (1) or (2) or the experiencing of “any other substantially-similar condition” (a catch-all provision), the cap is \$200 per day and \$2,000 in aggregate over a two-week period. For paid sick leave or expanded FMLA leave related to care of a child due to school/place of care closure or child care unavailability, the cap is \$200 per day and \$12,000 in aggregate over a 12-week period.

## **Q: May an employee take paid FMLA leave to care for a child other than the employee’s child?**

A: Expanded paid FMLA leave is only available to care for an employee’s own “son or daughter” (see below for definition).

## **Q: Who is a son or daughter for purposes of the FFCRA?**

A: An employee’s own child (biological, adopted, or foster child), stepchild, legal ward, or child for whom the employee is standing in loco parentis (*i.e.*, day-to-day responsibilities to care for or financially support). This includes (as defined in the FMLA) adult sons or daughters (18 years or older), who (1) have a mental or physical disability; and (2) are incapable of self-care because of that disability.

## **Q: Is there an employee right to return to work following FFCRA leave?**

A: Generally, yes. Employers must provide the same (or a nearly equivalent) job to an employee who returns to work following leave. Employees are not protected from employment actions, such as layoffs, that would have affected the employees regardless of whether they took leave.

The employer may also refuse to return an employee to work in the same position if:

- (1) he or she is a highly compensated “key employee” as defined in the FMLA; or
- (2) the employer has less than 25 employees and the employee took leave due to school/child care closure or child care provider unavailability; and four specific hardship conditions all exist.

Those conditions include:

- (1) the position no longer exists due to economic or operating conditions that affect employment and due to COVID-19 related reasons during the period of leave;
- (2) the employer made reasonable efforts to restore the employee to the same or equivalent position;
- (3) the employer makes reasonable efforts to contact the employee if an equivalent position becomes available; and
- (4) the employer continues to make reasonable efforts to contact the employee for one year beginning either on the date of the leave related to COVID-19 reasons concludes or the date 12 weeks after the employee’s leave began, whichever is earlier.

## **Q: Does an employer have to provide the full amount of FFCRA paid expanded FMLA leave if the employee has already taken unpaid FMLA leave within the relevant 12-month period?**

A: No, an employee is only entitled to take a total of 12 weeks for FMLA or FFCRA expanded FMLA reasons in the current 12-month period.

## **Q: Does FFCRA expanded paid leave count against future unpaid FMLA leave requests?**

A: Yes, an employee may take only a total of 12 weeks for FMLA or FFCRA expanded FMLA leave in the relevant 12-month period. Thus, if an employee has not used an FMLA leave yet and takes four weeks of paid expanded FMLA leave, the employee may only take eight more weeks of unpaid FMLA leave.

## **Q: Is there a deadline for using FFCRA paid expanded FMLA leave?**

A: Yes, all such leave must be used by December 31, 2020.

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**Q: Who is a “health care provider” for purposes of determining individuals whose advice to self-quarantine due to COVID-19 concerns can be relied upon as a qualifying reason for FFCRA paid sick leave? [\[Updated\]](#)**

A: In this context, “health care provider” generally means a licensed doctor of medicine, nurse practitioner, or other health care providers permitted to issue a certification for purposes of the FMLA.

**Q: Who is a “health care provider” who may be excluded by an employer from FFCRA leave? [\[Updated\]](#)**

A: The FFCRA permits employers to, at their option, exclude “health care providers” from paid leave benefits. The DOL’s initial regulations issued in April 2020 defined “health care providers” as employees of a broadly defined group of employers, including, in part, anyone employed at “any doctor’s office, hospital, health care center, clinic, post-secondary educational institution offering health care instruction, medical school, local health department or agency, nursing facility, retirement facility, nursing home, home health care provider, any facility that performs laboratory or medical testing, pharmacy, or any similar institutions, Employer, or entity.”

The state of New York challenged this exception on the grounds that it exceeded DOL’s authority and, by focusing on employers rather than employees, swept too broadly. On August 3, 2020, the district court vacated the DOL’s definition of “health care provider” for purposes of the FFCRA exemption. While neither the court’s opinion and order, nor the DOL in its revised regulations, explicitly address whether the court decision applies nationwide, the DOL acknowledged that it viewed the decision as applying nationwide in its new guidance.

The district court left open the option for the DOL to interpret “health care provider” differently in the context of the FFCRA exemption than it does for the rest of the FMLA (which was amended by the FFCRA). As a result, the DOL issued revised regulations, which took effect on September 16, 2020, and provided a more expansive definition of “health care provider” under the FFCRA than as the term is used in the context of the FMLA. However, the revised definition remains scaled back relative to the expansive definition struck down by the federal court.

Under the revised regulations, for the purposes of defining the set of employees who may be excluded from taking paid sick leave or expanded family and medical leave by their employer under the FFCRA, a health care provider includes two groups.

This first group is generally anyone who is a licensed doctor of medicine, nurse practitioner, or other health care provider permitted to issue a certification for purposes of the FMLA.

The second group is any other person who is employed to provide diagnostic services, preventive services, treatment services, or other services that are integrated with and necessary to the provision of patient care and, if not provided, would adversely impact patient care. This group includes

- (1) employees who provide direct diagnostic, preventive, treatment, or other patient care services, such as nurses, nurse assistants, and medical technicians;
- (2) employees who directly assist or are supervised by a direct provider of diagnostic, preventive, treatment, or other patient care services; and
- (3) employees who do not provide direct health care services to a patient but are otherwise integrated into and necessary to the provision those services—for example, a laboratory technician who processes medical test results to aid in the diagnosis and treatment of a health condition—are health care providers.

A person is not a health care provider merely because the employer provides health care services or because the employee provides a service that affects the provision of health care services. For example, IT professionals, building maintenance staff, human resources personnel, cooks, food services workers, records managers, consultants, and billers are not health care providers, even if they work at a hospital of a similar health care facility.

To minimize the spread of the virus associated with COVID-19, the Department encourages employers to be judicious when using this definition to exempt health care providers from the provisions of the FFCRA. For example, an employer may decide to exempt these employees from leave for caring for a family member, but choose to provide them paid sick leave in the case of their own COVID-19 illness.

Finally, employers should also check state and local laws that may impact their interest in excluding health care providers. For example, in California, the state law requires the employers to offer paid leave to health care providers, even if under 500 employees and excluded from coverage by the FFCRA.

You should consult counsel before excluding certain employees from the ability to take paid leave under the FFCRA.

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**Q: If my business is in fact deemed exempt from the FFCRA does that include all my employees, e.g., office employees, or just our caregivers? [\[Updated\]](#)**

A: No. Under a recent federal court decision and revised DOL regulations, the FFCRA exemption only applies to a narrower definition of “health care provider” and does not apply to entire businesses or institutions. Thus, not all of your home care workers will likely fall within the “health care provider” exemption. You should consult counsel before excluding certain employees from the ability to take paid leave under the FFCRA.

**Q: Can I exempt employees from one type of paid leave but not the other?**

A: Yes, but only to the extent that an employee falls within the narrow definition of “health care provider” for purposes of the exemption. You should consult counsel before excluding certain employees from the ability to take paid leave under the FFCRA.

**Q: May I exclude employees under the “health care provider” exemption on a case-by-case basis? [\[Updated\]](#)**

A: Yes. Keep in mind that the exemption for “health care providers” is construed much more narrowly following a federal court decision striking down the DOL’s Final Rule, which provided a much broader definition and allowed for its application on an to those employees in companies affiliated with providing health care, and the revised DOL regulations which went into effect on September 16, 2020. The DOL’s revised regulatory definition of “health care provider” includes only employees who: (1) meet the definition of that term under the existing FMLA regulations; or (2) are “employed to provide diagnostic services, preventive services, treatment services or other services that are integrated with and necessary to the provision of patient care and, if not provided, would adversely impact patient care.” You should consult counsel before excluding certain employees from the ability to take paid leave under the FFCRA.

**Q: Would it be considered discriminatory to provide paid sick leave only to caregivers that either have been diagnosed with COVID-19 or have provided services to a client that has been diagnosed?**

A: The DOL has not specifically addressed this issue. Also, note in most cases, all caregivers will be eligible for leave. It is our present understanding that as long as you treat similarly situated employees the same, this would be permissible. If you seek to obtain a tax credit for such paid leave, you may only do so if the reason for leave is one of the qualifying reasons for FFCRA paid sick leave. In other words, merely having provided services to a COVID-19 infected patient does not qualify for FFCRA paid sick leave.

**Q: If an employer exercises its discretion to provide FFCRA paid leave benefits to some health care providers, but not others, would it still be eligible for the corresponding tax credit? [\[Updated\]](#)**

A: Yes. However, the exemption for “health care providers” is construed much more narrowly following an August 3, 2020 federal court order striking down the DOL’s Final Rule, which provided a much broader definition and allowed for its application on an to those employees in companies affiliated with providing health care. The DOL’s revised regulatory definition of “health care provider” includes only employees who: (1) meet the definition of that term under the existing FMLA regulations; or (2) are “employed to provide diagnostic services, preventive services, treatment services or other services that are integrated with and necessary to the provision of patient care and, if not provided, would adversely impact patient care.” You should consult counsel before excluding certain employees from the ability to take paid leave under the FFCRA.

**Q: When will the DOL begin enforcing the FFCRA?**

A: The DOL is currently enforcing the FFCRA.

**Q: If we are using the FFCRA Act, do we have to email the federal notifications out to all employees, or can we just post it in the office?**

A: The DOL has provided this specific guidance regarding the options available for complying with the notice requirement: “Each covered employer must post a notice of the Families First Coronavirus Response Act (FFCRA) requirements in a conspicuous place on its premises. An employer may satisfy this requirement by emailing or direct mailing this notice to employees, or posting this notice on an employee information internal or external website.” It makes more sense to use the FFCRA notices we have prepared on the toolkit that are customized for home care providers if you intend to communicate directly with your employees.

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You should post the DOL required notice in your office or follow one of the alternate methods identified by the DOL, even if you have some employees who might qualify under the narrowed scope of the “health care provider” exemption.

**CARES Act (Including PPP):** Note: The SBA issued new a FAQ in early August. They are available [here](#).

**Q: Should we be applying for any of the loan programs created by the CARES Act or the Small Business Administration?**

A: Littler cannot provide advice on whether you should apply, the process for applying, and repayment options or obligations. You should consult your accountant, financial or tax advisor, outside counsel or other trusted advisor.

**Q: What is the Paycheck Protection Program (“PPP”)?**

A: It is a new forgivable loan program to help small employers pay their expenses and hold on to their workers during the COVID-19 crisis. The PPP was amended by the Paycheck Protection Program Flexibly Act, which was signed into law on June 5, 2020. Littler cannot provide advice on whether you should apply the process for applying, and repayment options or obligations. You should consult your accountant, financial or tax advisor, outside counsel or other trusted advisor. Please note, the Small Business Administration has issued rules, applications and FAQs on the PPP, some of which are being updated given the changes provided in the Flexibility Act. Those documents are available here (<https://www.sba.gov/funding-programs/loans/coronavirus-relief-options/paycheck-protection-program>)

**Q: What is the purpose of the PPP loan program?**

A: The PPP, as amended by the PPP Flexibility Act, is aimed at helping small businesses maintain cash flow for up to 24 weeks (or until the end of 2020, whichever is earlier) by providing 100% federally guaranteed loans that may be converted into partial or full grants in certain circumstances.

**Q: Which employers qualify as a small employer for the PPP?**

A: Generally, a qualifying employer must employ fewer than 500 workers, although some types of employers have different rules. The Treasury Department has published an interim final rule regarding application of the SBA’s affiliate rules, which may be downloaded here (<https://home.treasury.gov/system/files/136/SBA%20IFR%202.pdf>).

**Q: How are employees counted for the employee limit?**

A: If a borrower has an “affiliate” as defined by the Small Business Administration (“SBA”), the relevant calculation is aggregated across all of the relevant affiliate companies. An affiliation exists when one business controls or has the power to control another or when a third party (or parties) controls or has the power to control both businesses. Control may arise through (1) ownership; (2) management; or (3) other relationships between the parties. Of possible relevance to you, the normal SBA affiliation rules do not apply to franchises. The Treasury Department has published an interim final rule regarding application of the SBA’s affiliate rules, which may be downloaded here (<https://home.treasury.gov/system/files/136/SBA%20IFR%202.pdf>).

**Q: How do we calculate full time equivalents (FTEs) for the caregivers to determine the actual headcount on the PPP loan application?**

A: The loan application asks for current headcount (not FTEs). See next Q&A regarding FTE calculations.

**Q: Can I assume that “FTE” is considered 30 hours per week, so for headcount for SBA PPP loans, we should only use FTEs, not the full headcount?**

A: While the CARES Act did not define “full-time equivalent,” which is part of the forgiveness formula, the SBA’s loan forgiveness application provides that for purposes of FTE calculation, full time is 40 hours (1.0 FTE). To determine the FTE for part time employees, you first determine the average number of hours worked per week and divide by 40 (in no case does an individual’s FTE exceed 1.0). Alternatively, you can use 0.5 FTE for each part time employee. You will need to do the math under each alternative to see which method benefits you most. Note, if you do not track hours for some or all of your non-exempt employees, the SBA has indicated you should use the 1.0/0.5 method to calculate FTEs for all employees.

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## **Q: How big of a loan can you get from the PPP? How big of a loan should I get?**

A: The maximum loan is the lesser of \$10 million or 2.5 times a qualifying employer's average monthly payroll costs (excluding any amounts paid to an employee, independent contractor, or sole proprietor in excess of \$100,000) plus any outstanding amount of an Economic Injury Disaster Loan ("EIDL") made between January 31, 2020, and April 3, 2020, or \$10 million. Littler cannot provide advice on whether you should apply the process for applying, and repayment options or obligations. The Treasury Department has published an interim final rule regarding PPP loans, which may be downloaded here (<https://www.sba.gov/document/policy-guidance--ppp-interim-final-rule>) and the updates to the interim final rule reflecting changes made by the PPP Flexibility Act may be downloaded here (<https://home.treasury.gov/system/files/136/PPP-IFR-Revisions-to-First-Interim-Final-Rule.pdf>).

## **Q: The CARES Act excludes from the definition of payroll costs any employee compensation in excess of an annual salary of \$100,000. Does that exclusion apply to all employee benefits of monetary value?**

A: No. The SBA recently issued guidance that "the exclusion of compensation in excess of \$100,000 annually applies only to cash compensation, not to non-cash benefits, including: [1] employer contributions to defined-benefit or defined-contribution retirement plans; [2] payment for the provision of employee benefits consisting of group health care coverage, including insurance premiums; and [3] payment of state and local taxes assessed on compensation of employees."

## **Q: What may PPP loans be used for?**

A: The loan may be used for compensation to employees (except for salary amounts in excess of \$100,000), group health benefits, rent, utilities, and other specified expenses. The loan may not be used for other COVID-19 related benefits such as FFCRA paid leave (which is reimbursed through a dollar-for-dollar tax credit). The Treasury Department has published an interim final rule regarding PPP loans, which may be downloaded here (<https://www.sba.gov/document/policy-guidance--ppp-interim-final-rule>) and the updates to the interim final rule reflecting changes made by the PPP Flexibility Act may be downloaded here (<https://home.treasury.gov/system/files/136/PPP-IFR-Revisions-to-First-Interim-Final-Rule.pdf>).

## **Q: If you use 75% of a loan on payroll, and only 15% on utilities/miscellaneous, will you have to pay back the 10% remainder of the loan?**

A: The PPP Flexibility Act, signed into law on June 5, 2020, provides that borrowers may now spend up to 40% of the loan amount on allowable non-payroll costs. This is an increase over the original 25% limit. Accordingly, now only 60% of the loan amount must be spent on payroll costs for the full loan amount to be eligible for loan forgiveness. If you use the proceeds for a non-approved purpose, then it simply becomes a loan that. Note, payments can be deferred until the amount of forgiveness is remitted to the lender by the SBA or until at least ten months after the last day of the borrower's Covered Period if the borrower has not yet applied for loan forgiveness. For loans made before June 5, 2020, the maturity is two years; however, borrowers and lenders may mutually agree to extend the maturity of such loans to five years. For loans made on or after June 5, the maturity is five years.

## **Q: Are we better served using PPP loan funds for payroll, which are presumably forgivable, rather than FFCRA tax credits through our payroll companies?**

A: You can do both. You can use PPP funds to pay employees working, then use the FFCRA tax credits for those you are paying emergency sick leave or FMLA leave. You cannot use PPP funds to pay FFCRA sick time and also receive the tax credits. While borrowers must spend at least 60% of their loans on payroll costs to qualify for loan forgiveness, part of the loan can also be used to pay most mortgage interest, rent and utility costs. Given the need for additional guidance on PPP loan forgiveness, we recommend utilizing the FFCRA tax credits first where possible and utilizing PPP funds as a secondary option.

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## **Q: What qualifies as a “utility” under the PPP?**

A: The CARES Act defines “covered utility payment” as “payment for a service for the distribution of electricity, gas, water, transportation, telephone, or internet access for which service began before February 15, 2020,” as expenses which qualify for loan forgiveness (CARES Act § 1106(a)(4)). The SBA has clarified that transportation costs are those “for the distribution of transportation refers to transportation utility fees assessed by state and local governments. Payment of these fees by the borrower is eligible for loan forgiveness.”<sup>1</sup>

## **Q: Where do I apply for a PPP loan?**

A: Loans and loan applications may be obtained through any SBA-approved lender.

## **Q: Is the PPP application available yet?**

A: Yes. A copy may be obtained here (<https://home.treasury.gov/system/files/136/Paycheck-Protection-Program-Application-3-30-2020-v3.pdf>) or directly from your lender.

## **Q: When may loan applications be filed?**

A: Lenders may begin processing loans for small businesses and sole proprietorships on April 3, 2020.

## **Q: Are PPP loans first-come, first-serve?**

A: Yes.

## **Q: What is the interest rate on PPP loans?**

A: The Treasury Department has announced the interest rate will be 1%.

## **Q: What will be the term of the PPP loan?**

A: Under the recently passed PPP Flexibility Act, loans made after June 5, 2020 have a minimal maturity of five years, but also allows lenders and borrowers to mutually agree to modify the maturity terms. There are no prepayment penalties or fees.

## **Q: Do you recommend putting your PPP money in a separate account for easier transparency?**

A: This has been mentioned as a best practice across the SBA community. This will allow for cleaner accounting and documentation at the end of the eight-week period.

## **Q: How am I supposed to make interest payments when my business is struggling?**

A: You will not have to make any payments for six months following disbursement of the loan.

## **Q: What does a “forgivable” loan mean? Are there any strings attached to a PPP loan?**

A: A PPP loan is fully forgiven if the employer maintains its workforce for the period February 15, 2020, to December 31, 2020. If the employer reduces its workforce during that period, as compared to the selected reference period or reduces the salary or wages paid to an employee by more than 25%, the loan forgiveness will drop by the same percentage. The PPP provides a Safe Harbor that allows borrowers an extended time to restore full-time equivalent (FTE) employees and salary or wages that were reduced between February 15, 2020 and April 26, 2020, while still obtaining loan forgiveness. The PPP Flexibility Act extends this Safe Harbor from June 30, 2020 until December 31, 2020. This addresses difficulties employers are having related to rehiring workers, finding replacement workers, and continued delays in reopening. Prior to the passage of the PPP Flexibility Act, the Treasury Department published an interim final rule regarding PPP loans, which may be downloaded here (<https://www.sba.gov/document/policy-guidance--ppp-interim-final-rule>) and the updates to the interim final rule reflecting changes made by the PPP Flexibility Act may be downloaded here (<https://home.treasury.gov/system/files/136/PPP-IFR-Revisions-to-First-Interim-Final-Rule.pdf>).

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<sup>1</sup> For more information on transportation utility fees, see [https://www.fhwa.dot.gov/ipd/value\\_capture/defined/transportation\\_utility\\_fees.aspx](https://www.fhwa.dot.gov/ipd/value_capture/defined/transportation_utility_fees.aspx)

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**Q: What if business revenues remain flat throughout this situation and therefore payroll remains flat? Do revenues need to decrease in order for this loan to be forgiven?**

A: The PPP Flexibility Act, signed into law on June 5, 2020, provides that reductions to FTEs will not impact loan forgiveness if the borrower is able to document (1) an inability to rehire individuals who were employees on February 15, 2020, (2) an inability to hire similarly qualified employees for unfilled positions on or before December 31, 2020, or (3) an inability to return to the same level of business activity as prior to February 15, 2020, due to compliance with worker or customer safety requirements related to COVID-19. The law does not specifically take “revenues” into account in determining loan forgiveness.

**Q: What if I already laid off employees or reduced their salaries before I got the loan?**

A: The salary reduction may reduce the level of loan forgiveness. However, you may avoid any reduction by eliminating the salary or wage deduction by December 31, 2020, (the PPP Flexibility Act extended this period from June 30, 2020).

Regarding recently laid off employees, SBA and Treasury allow a borrower to exclude laid-off employees whom the borrower offered to rehire (for the same salary/wages and same number of hours) from the loan forgiveness reduction calculation. The borrower must have made a good faith, written offer of rehire, and the employee’s rejection of that offer must be documented by the borrower.

The PPP Flexibility Act also provides that reductions to FTEs will not impact loan forgiveness if the borrower is able to document (1) an inability to rehire individuals who were employees on February 15, 2020, (2) an inability to hire similarly qualified employees for unfilled positions on or before December 31, 2020, or (3) an inability to return to the same level of business activity as prior to February 15, 2020 due to compliance with worker or customer safety requirements related to COVID-19.

The SBA’s guidance on wage reduction is that “if the salary or hourly wage of a covered employee is reduced by more than 25% during the Covered Period or the Alternative Payroll Covered Period, the portion in excess of 25% reduces the eligible forgiveness amount unless the borrower satisfies the Salary/Hourly Wage Reduction Safe Harbor (as described in the Loan Forgiveness Application (SBA Form 3508 or lender equivalent)).”<sup>2</sup>

**Q: Can we use PPP funds to pay a caregiver even if we do not have the work for the caregiver because clients have suspended services due to COVID-19?**

A: Yes. In essence, this is a form of paying guaranteed hours.

**Q: Is there a deadline to apply for a PPP loan?**

A: Yes, you must apply by June 30, 2020. Remember that there is a limited amount of PPP funds available and they are disbursed on a first-come, first-serve basis. The PPP Flexibility Act, which amended the PPP, did not change this deadline.

**Q: How many PPP loans may I apply for?**

A: Only one loan per borrower is allowed.

**Q: Is it OK to open applications with multiple vendors for the PPP?**

A: Yes, but once you receive an SBA loan number, you should notify the other lending institutions to which you submitted an application. The SBA PPP loan application requires that an applicant certify that it has not and will not receive another loan under the PPP. As a practical matter, once you have an SBA loan number, you will not be eligible for another SBA PPP loan.

**Q: Are there any other restrictions or requirements for a PPP loan?**

A: Yes. A copy of the application form may be found [here](#). The loan application contains various questions that may result in denial of a loan application. It also includes certain certifications that must be made regarding the need and use of the loan and that you have not received and will not receive another PPP loan during the period February 15, 2020, to December 31, 2020. Littler cannot provide advice on whether you should apply the process for applying, and repayment options or obligations.

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<sup>2</sup> Examples of how to perform this calculation can be found on pages 9 & 10 of the SBA FAQ:  
<https://home.treasury.gov/system/files/136/PPP-Loan-Forgiveness-FAQs.pdf>

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## **Q: May I also apply for an Economic Injury Disaster Loan?**

A: Currently, small business owners in all U.S. States and territories are eligible to apply for a low-interest loan due to COVID-19.

## **Q: If I am funded for PPP, can I still get an SBA EIDL grant (\$10,000)?**

A: You can receive assistance through both the PPP and EIDL. You may also refinance an EIDL loan made between January 31, 2020, and April 3, 2020, with PPP loan proceeds. If you received an EIDL loan from January 31, 2020, and April 3, 2020, you can apply for a PPP loan. If your EIDL loan was not used for payroll costs, it does not affect your eligibility for a PPP loan. If your EIDL loan was used for payroll costs, your PPP loan must be used to refinance your EIDL loan. Proceeds from any advance up to \$10,000 on the EIDL loan will be deducted from the loan forgiveness amount on the PPP loan. Note, for purposes of determining the percentage of use of proceeds for payroll costs, the amount of any EIDL refinanced will be included.

## **Q: If we're getting PPP funds, would another strategy be to use THOSE dollars to pay employees and not rely on the sick leave benefits?**

A: That is an option. However, keep in mind that if you adhere to the FFCRA guidelines and pay emergency sick leave, you can receive dollar-for-dollar tax credits immediately and use your PPP dollars to pay employees who are working (and potentially have enough to pay an incentive to those working). There are restrictions on the PPP that you cannot use PPP funds to pay emergency sick leave and collect tax credits.

## **Q: Does the FFCRA have a loan program for larger businesses?**

A: Yes, the FFCRA created a loan program for mid-sized businesses with 500 to 10,000 employees. Loans do not accrue interest for the first six months and principal payments do not have to be made during that period.

## **Q: Are the mid-sized business loans forgivable?**

A: No.

## **Q: Are there any strings attached with the mid-sized business loans?**

A: Yes. Among other things, applicants must certify that the loans will be used to retain at least 90% of the employer's workforce at full compensation and benefits until September 30, 2020, and that it intends to restore at least 90% of its workforce as of February 1, 2020, with full compensation and benefits. The restoration must no later than four months after the Department of Health and Human Services declares an end to the COVID-19 public health emergency. Other conditions include that, for the life of the loan, the recipient will not outsource jobs, will not abrogate any collective bargaining agreement, and will remain "neutral" in any union organizing effort. The mid-sized business loan is not available if the business receives a PPP loan.

## **Q: How do I decide to whether to apply for a PPP loan or mid-sized business loan?**

A: You should consult your accountant, financial or tax advisor, outside counsel or other trusted advisor. Littler cannot provide advice on whether you should apply, the process for applying, and repayment options or obligations.

## **Q: Does the CARES Act provide for any tax credits?**

A: Yes. It provides an immediate way to pay for FFCRA paid leave and also creates an Employee Retention Tax Credit for businesses that have seen their operations closed or partially closed because of COVID-19 or seen gross receipts decline by more than 50% when compared to the same quarter of the previous year.

## **Q: What is the Employee Retention Credit?**

A: It is a fully refundable tax credit for employers equal to 50 percent of "qualified wages" (including allocable qualified health plan expenses) that eligible employers pay their employees between March 12, 2020, and December 31, 2020.

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**Q: When do we get the tax credit so that it “doesn’t cost us anything?” Do we have to wait for our annual tax filing, or is it an immediate payroll tax credit in our next payroll?**

A: If you can fund FFCRA pay through the withholdings you would otherwise remit to the federal government, then you need to do that. Some employers, however, may not have sufficient federal employment taxes set aside for deposit to the IRS to fund their required qualified leave wages. In that case, the IRS has set up a procedure for obtaining an advance of the refundable credits. For additional information on how this process works, please see the IRS’s FAQs, which are available [here](#).

**Q: What employers are eligible for the Employee Retention Credit?**

A: Any non-governmental employer that either (1) fully or partially suspends operations during any calendar quarter in 2020 due to orders from a governmental authority limiting commerce, travel, or group meetings due to COVID-19; or (2) experiences a significant decline in gross receipts during a calendar quarter in 2020. A “significant decline in gross receipts” begins with the first quarter in which an employer’s quarterly gross receipts are less than 50 percent of its gross receipts for the same calendar quarter in 2019. The significant decline ends with the first calendar quarter that follows a calendar quarter for which the employer’s 2020 gross receipts are greater than 80 percent of its gross receipts for the same calendar quarter during 2019.

**Q: What are “qualified wages” for the Employee Retention Credit?**

A: Qualified wages are wages and compensation (including qualified health plan expenses properly allocable to the wages) paid to employees after March 12, 2020, and before January 1, 2021. The calculation of qualified wages depends on the size of the employer.

If an employer averaged more than 100 full-time employees in 2019, qualified wages are wages paid to an employee for time that the employee is not providing services due to either the full or partial suspension of operations or a significant decline in gross receipts. For these employees, qualified wages taken into account may not exceed what they would have been paid for working an equivalent duration during the 30 days immediately preceding the period of economic hardship.

If an employer averaged 100 or fewer full-time employees in 2019, qualified wages are the wages paid to any employee during any period of economic hardship.

**Q: Can we pay some form of appreciation pay, with an eye to forgiveness under the PPP, as a one-time bonus, or do you recommend just paying as an hourly stipend going forward. Can we also include office staff in the program?**

A: Under the CARES Act, “payroll costs” include, among other things, “any compensation of an employee who is a ... salary, wage, commission or similar compensation.” The SBA has stated that “payroll costs include all forms of cash compensation paid to employees, including tips, commissions, bonuses, and hazard pay. Note that forgivable cash compensation per employee is limited to \$100,000 on an annualized basis.” Therefore, bonuses and incentive pay to all employees are included in the payroll costs that are forgivable under the PPP so long as the bonus or incentive pay does not exceed the salary cap of \$100,000, is paid within the 24 week period from the date you receive the PPP loan (or until the end of 2020, whichever is earlier), and the other conditions are satisfied. Be sure to include any bonus or incentive pay in the calculation of the regular rate for purposes of calculating overtime payments as appropriate.

**Q: Can we use PPP for training pay? For example, we plan to front load our annual training into this time. Would that be eligible to be included in payroll costs to be forgiven?**

A: Yes. Assuming you mean pay to employees for compensable training time spent by them (as opposed to payments to outside trainers to train employees), such pay is wages paid. The FFCRA states that payroll costs, including all wages paid are eligible costs to be forgiven.

**Q: Can the PPP be used to pay workers’ compensation premiums?**

A: The Treasury Department’s Interim Final Rule did not include workers’ compensation premiums in its definition of “payroll costs.” Therefore, it seems unlikely that this would be included. We suggest asking your lender if such expenses are eligible for forgiveness.

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**Q: The amount of forgiveness of a PPP loan depends on the borrower's payroll costs over an eight-week period; when does that eight-week period begin?**

A: The PPP Flexibility Act provides borrowers have the option to extend the Covered Period until the earlier of 24 weeks after loan origination or the end of the year. This extends the Covered Period from the prior eight-week period. The SBA's guidance states that "The eight-week period begins on the date the lender makes the first disbursement of the PPP loan to the borrower. The lender must make the first disbursement of the loan no later than ten calendar days from the date of loan approval." With the exception that "the eight-week period" has now been changed, the remainder of the guidance should remain the same.

**Q: Is there a limit on the amount of qualified wages that may be taken into account for the Employee Retention Credit?**

A: Yes, the maximum amount of qualified wages to be taken into account with respect to each employee for all calendar quarters is \$10,000. Thus, the maximum credit for qualifying wages paid to any employee is \$5,000.

**Q: What does the Employee Retention Credit apply to?**

A: The credit may be used against the employer's share of social security taxes that the employer is liable for with respect to all employee wages paid in that quarter. Any excess over the employer's share of social security taxes is treated as an overpayment and refunded to the employer after offsetting other tax liabilities on the tax return.

**Q: How do you claim the Employee Retention Credit?**

A: Report total qualified wages and the related credits for each calendar quarter on your federal employment tax return (usually Form 941). In anticipation of receiving the credits, you may fund qualified wages by accessing federal employment taxes, including withheld taxes, which are required to be deposited with the IRS or by requesting an advance of the credit from the IRS.

**Q: Can the Employee Retention tax credit be used to pay FFCRA paid leave?**

A: No, you may not include the amount of qualified sick and FMLA wages for which you received tax credits under the FFCRA.

**Q: Can I receive both a PPP loan and use the Employee Retention Credit?**

A: No.

**Q: When do eligible payroll costs start after you receive the loan?**

A: Borrowers with biweekly or more frequent payrolls (e.g., weekly payrolls), may elect to calculate eligible payroll costs using an 8 week (or 24 week) period that begins either on their PPP Loan Disbursement Date (i.e., the date they received the loan proceeds in their bank account) or on the first day of their first pay period following their PPP Loan Disbursement Date.

**Q: Does interest accrue while waiting for the PPP loan to be forgiven?**

A: Borrowers will not need to make payments while their loan forgiveness application is pending and they will not be responsible for interest accrued during the period that the loan forgiveness application is pending.

**Q: Does the CARES Act permit me to defer payment of any taxes?**

A: Yes, employers of any size may defer payment of their portion of social security taxes. Half of the amount owed in 2020 must be paid by December 31, 2021, and the remaining half must be paid by December 31, 2022. PPP recipients who received any amount of loan forgiveness were previously not able to defer payment of payroll taxes as provided in section 2303 of the CARES Act. However, under the PPP Flexibility Act, this restriction has been removed and permits borrowers to defer payroll taxes.

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## Unemployment

### **Q: How does the CARES Act expand or change otherwise available state unemployment insurance benefits? [Updated]**

A: The CARES Act does not change the basic structure of existing state unemployment systems. Rather it adds five key features, including:

- (1) expands eligibility benefits for COVID-19-related reasons;
- (2) adds 13 weeks of eligibility for standard benefits (39 total weeks);
- (3) adds a flat \$600 weekly benefit for qualifying applicants for a period of March 27 to July 31, 2020;
- (4) encourages states to loosen certain restrictions to benefits; and
- (5) supports state-sponsored work-share programs for the under-employed.

The DOL has provided a summary of key unemployment insurance provisions here: ([https://www.dr.doleta.gov/directives/attach/UIPL/UIPL\\_14-20.pdf](https://www.dr.doleta.gov/directives/attach/UIPL/UIPL_14-20.pdf)).

In addition to the CARES Act funding, in late August, President Trump signed an executive order creating the Lost Wages Assistance (LWA) program, which pays an additional \$300 per week from the Disaster Relief Fund to qualifying individuals in qualifying states. All states, except South Dakota, applied and were accepted into the program. As the program extends for six weeks, most Americans will receive a maximum of \$1,800 from the LWA program. Residents in four states – Kentucky, Montana, Vermont, and West Virginia – could receive an additional \$600, on top of the \$1,800, as those states opted to pay an extra \$100 a week in benefits. However, unemployed workers in Florida will receive a maximum of \$1,200, per that state's unemployment program.

### **Q: What additional unemployment eligibility categories did the CARES Act create?**

A: The CARES Act provides for Pandemic Unemployment Assistance (“PUA”). The program now covers individuals who are self-employed (including independent contractors, seeking part-time employment, or who would otherwise not qualify for regular unemployment benefits under state or federal law). Applicants for the expanded unemployment must self-certify that they are able and available for work except cannot due to the following reasons:

- (1) diagnosis or symptoms of COVID-19 and seeking medical diagnoses;
- (2) household member diagnosed with COVID-19;
- (3) providing for care for family member or household member diagnosed with COVID-19;
- (4) child for whom person is primary caregiver cannot attend school or another facility that is closed as a direct result of the COVID-19 public health emergency and such school or facility care is required for the individual to work;
- (5) cannot reach the workplace because of a quarantine imposed as a direct result of the COVID-19 public health emergency;
- (6) cannot reach workplace because advised by health care provider to self-quarantine due to concerns related to COVID-19;
- (7) scheduled to start but no job or unable to reach job as a direct result of the COVID-19 public health emergency;
- (8) has become the breadwinner or major support for a household because the head of household has died as a direct result of COVID-19;
- (9) has to quit as a direct result of COVID-19;
- (10) workplace closed as a direct result of the COVID-19 public health emergency; or
- (11) meets other criteria established by the Labor Secretary

Those who are able to telework with pay or who are receiving paid sick leave or other paid benefits are excluded, even they otherwise meet the expanded eligibility requirements.

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**Q: For how long can someone obtain unemployment insurance benefits under the CARES Act?**

A: Most states allow an individual to claim benefits for 26 weeks. The CARES Act would extend that period by 13 weeks, to 39 weeks.

**Q: What will a claimant's weekly benefit amount be? [\[Updated\]](#)**

A: The amount a claimant will receive depends on state law. Previously, a claimant received \$600 on top of whatever the state unemployment benefit was through July 31, 2020.

In addition to the CARES Act funding, in late August, President Trump signed an executive order creating the Lost Wages Assistance (LWA) program, which pays an additional \$300 per week from the Disaster Relief Fund to qualifying individuals in qualifying states. All states, except South Dakota, applied and were accepted into the program. As the program extends for six weeks, most Americans will receive a maximum of \$1,800 from the LWA program. Residents in four states – Kentucky, Montana, Vermont, and West Virginia – could receive an additional \$600, on top of the \$1,800, as those states opted to pay an extra \$100 a week in benefits. However, unemployed workers in Florida will receive a maximum of \$1,200, per that state's unemployment program.

**Q: I have heard that a claimant's weekly benefit amount can be more than what he or she was earning as an employee. Is that true? [\[Updated\]](#)**

A: Yes, that was true until the \$600 provision expired on July 31, 2020.

In addition to the CARES Act funding, in late August, President Trump signed an executive order creating the Lost Wages Assistance (LWA) program, which pays an additional \$300 per week from the Disaster Relief Fund to qualifying individuals in qualifying states. All states, except South Dakota, applied and were accepted into the program. As the program extends for six weeks, most Americans will receive a maximum of \$1,800 from the LWA program. Residents in four states – Kentucky, Montana, Vermont, and West Virginia – could receive an additional \$600, on top of the \$1,800, as those states opted to pay an extra \$100 a week in benefits. However, unemployed workers in Florida will receive a maximum of \$1,200, per that state's unemployment program.

**Q: If a caregiver chooses/refuses not to work due to COVID-19 even though there is work available, will the caregiver still receive unemployment?**

A: In short, right now, probably yes. There are two exceptions to being eligible for benefits under the CARES Act. One of the exceptions is employees who are able to telework with pay.

Assuming a caregiver cannot feasibly telework (given the importance of client interaction), a caregiver can self-certify that they are able and available to work and cannot because of COVID-19 and have to quit. There is no clear guidance on what this means, *i.e.*, why they have to quit. Based on the language of the CARES Act, this person could receive benefits, but this also depends on the state and what documentation will be required. Some states have begun to put out guidance, which allow easier access to the benefit. On a positive note, the DOL issued guidance stating that individuals are only entitled to benefits if they are no longer working through no fault of their own and quitting work without good cause to obtain additional benefits would be fraud. How effective this guidance will be remains to be seen.

**Q: How should I respond when work is available and a caregiver is claiming he or she has to quit due to COVID-19 concerns?**

A: You can continue to claim this person is ineligible. The DOL guidance explains that States should be making determinations of proper eligibility but that may not be happening.

**Q: How can an employee qualify for unemployment if they quit or if they turn down work in order to file a claim? Isn't that fraud?**

A: We expect that most or all States will award unemployment now and ask questions later. In theory, States could go back and try to recapture benefits, but that may be difficult, particularly given the volume of claims. If additional guidance is given on the "has to quit" qualifying reason, that may improve the situation.

**Q: Are we able to contact caregivers who have fraudulently applied for unemployment and let them know that we will not support their application and that there could be a look back and they could get into trouble over it?**

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A: This is a business decision. We recommend working with your labor and employment attorney. It is important to note that whatever decision you make, you should be consistent across all of your employees (for example, if you contact female employees who do this, be sure to contact your male employees who do this, as well).

**Q: When the caregiver has symptoms, and they are told not to go into work until those symptoms have passed, can they file for unemployment during this period between not working and coming back to work?**

A: The employee can only file for unemployment if they quit, unless the state recognizes a reduction in hours as qualifying for partial unemployment. However, the expanded unemployment may not be taken if the employee is being offered paid leave benefits, such as those available under the FFCRA. In this situation, if the employee then seeks a medical diagnosis, FFCRA paid sick leave benefits would be available if the employer has not excluded them under the "healthcare provider" exemption.

**Q: Could an employee potentially get unemployment plus the federal money plus two weeks of sick pay from us?**

A: Yes, conceivably. If an employee is active and you pay FFCRA sick leave benefits and then leaves employment for any of the qualifying reasons related to COVID-19 unemployment eligibility. This could also happen if the employee exhausts FFCRA expanded FMLA leave and still has to care for a child due to a school/place of care closure. The employee cannot obtain unemployment benefits under CARES for time when they were on paid leave.

**Q: What if an employee does not want to work because he or she is "immunocompromised" or are elderly (i.e., in a higher risk category if infected by COVID-19)?**

A: If an employee indicates that he or she has an impairment that potentially adversely affects the ability to care for a client, then you should start the interactive process required by the ADA and other state laws to identify a reasonable accommodation. If the employee resigns as a result of their concerns, they may be eligible for unemployment benefits under the "has to quit" qualifying reason. DOL may provide additional guidance on this qualifying reason. You should not advise the employee on whether he or she should seek unemployment benefits or is eligible to do so.

**Q: If I choose to pay a caregiver his or her usual weekly pay even without working, can the caregiver collect unemployment as well?**

A: A caregiver is not supposed to do that, but that may happen. A caregiver may not receive unemployment if the individual is receiving paid sick leave or other paid leave benefits, even if he or she meets the other eligibility requirements. We have some documentation strategies we should discuss if this is happening to you.

**Q: Can an employee file for unemployment if s/he did not quit but rather had a reduced number of hours initially due to the client working at home due to COVID-19, then not working further due to potential exposure self-quarantine and childcare issues?**

A: It depends. In some states, an employee can apply and qualify for partial unemployment benefits as a result of reduced hours.

**Q: Will unemployment insurance contribution rates and employer experience rates be affected by the expanded benefits of the CARES Act?**

A: This will depend on the state. Some states are taking the approach of putting COVID-19 related claims into a pool to be distributed at a later date and some states are remaining silent on this topic.

**Q: What if a caregiver who has not worked for me in three months and is now claiming unemployment? Can I fight the claim?**

A: If the employee was still in your employment (regardless of last date worked) and is unable to work now due to COVID-19, he or she will likely be eligible for unemployment.

**Q: Are we able to raise pay temporarily for critical worker groups to make unemployment less attractive?**

A: Yes. Many companies are taking this approach. Incentive pay and most bonuses should be included in the regular rate for purposes of calculating overtime rates. Littler can provide additional guidance if you are interested in implementing such incentives.

**Q: Are we obligated to pay Hazard Duty pay?**

A: No. Hazard duty pay (or other incentive pay) is not a requirement but may make good business sense.

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## **Q: Can caregivers who work for multiple agencies claim unemployment from all agencies for which they work?**

A: Yes, employees who work for multiple employers can file an unemployment claim related to all employers. Unemployment will be based on the average number of hours worked for each employer.

## **ADA Considerations**

### **Q: What if a caregiver calls in sick with symptoms related to COVID-19? How long do we keep them off assignment? Do we need documentation to permit them back to work? Do we have to disclose to any or all people that may have been in contact with said caregiver? Are there notification requirements to a government entity?**

A: The response to a caregiver calling in with symptoms consistent with COVID-19 will depend on the circumstances and guidance provided by your state or local health department.

If the caregiver has been in close contact without appropriate protection with someone who has been diagnosed with COVID-19, the caregiver should be quarantined for 14 days from the date of the last potential contact and asked to monitor their health. You should also direct the caregiver to contact their physician immediately. The caregiver may return to work earlier if cleared by a physician. That is, if the diagnosis is something other than COVID-19 and they are no longer contagious. The CDC has recently provided guidance that individuals who are COVID-19 positive will be contagious for 10 days after symptoms onset or after testing positive if asymptomatic, unless they are severely immunocompromised or have severe or critical illness. In that case, they may be contagious for up to 20 days. The CDC recommends making a return to work decision using this criteria and not using a test-based method (i.e., waiting only until someone tests negative twice over the span of 24 hours or more).

If a caregiver tests positive for COVID-19 and is isolating at home, the person should remain under home isolation until released to return to work by a physician or as allowed by health department guidance.

If the caregiver has not been in close contact with anyone known to have been diagnosed with COVID-19, then they may return to work once they have been free of fever, signs of a fever, and any other symptoms for at least 24 hours, without the use of fever-reducing or other symptom-altering medicines (e.g., cough suppressants), or as allowed by your state or local health department.

Please note that given the current state of our system, it is possible a caregiver would not be able to obtain a physician release. In those cases, you should look to your state or local health department for further guidance. In most areas, the health department will advise that the employee may return to work after 24 to 72 hours of being symptom-free without the use of medications (whether over the counter or prescription) that may mask the symptoms.

You should notify the local health department and all clients with whom the caregiver was in close contact during the 48 hours before the caregiver first developed symptoms or tested positive (if asymptomatic) if the caregiver tests positive for COVID-19. You should check your state and local health departments for additional guidance. We are not aware of any states where an agency would be required to notify the client that the caregiver had been exposed to COVID-19 and was under quarantine. Indeed, the guidance suggests the client is not at a materially increased risk if the caregiver was asymptomatic while caring for the client. However, a client may wonder why the caregiver isn't working, and you may have a perception of transparency issue if the client later learns that the caregiver had been exposed to COVID-19.

### **Q: What do I do if an employee refuses to work with a COVID-19 client/patient?**

A: As long as there is sufficient Personal Protective Equipment for employees qualified to care for COVID-19 patients, an employee who refuses to care for such a client or patient should be disciplined for insubordination and even, potentially, patient abandonment. However, if there is no PPE available (or the employee is not certified or trained on use of the PPE), employees may be given the right to refuse to treat such a client or patient.

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## **Q: What if a caregiver specifically requests to avoid a client who is showing symptoms of or tested positive for COVID-19?**

A: Caregivers who refuse to treat a COVID-19 client or client who may have this virus, should be handled on a case-by-case basis.

If the caregiver has access to and properly wears all necessary PPE, then the caregiver should be protected against the risk of infection arising from “contact” with an exposed/infected client. In such case, generally speaking, the employee who refuses to care for such a client or patient should be disciplined for insubordination or, if applicable, patient abandonment. If the caregiver has a medical condition that makes them more susceptible to infection (suppressed immune system, pregnancy, etc.), however, it would make sense to avoid placing those individuals in a potential exposure situation. In those cases a reasonable accommodation discussion may be needed. If necessary PPE is not available, the employee may be given the right to refuse. And, if PPE is not available, the agency should strongly consider not servicing, or restricting the services provided to the client while showing symptoms of COVID-19 or while deemed contagious.

## **Q: What do I do if an employee indicates that he or she suffers from an impairment that potentially affects his or her ability to care for a COVID-19 patient (e.g., a compromised immune system, asthma, etc.)?**

A: Such employees should be treated like other disabled employees under the Americans with Disabilities Act, and any similar state law. Employers should immediately engage in the interactive process to identify and implement a reasonable accommodation. Such accommodations may include additional or improved PPE, limited exposure to COVID-19 clients or patients, and the like. If it is possible to do so, the best course may be to assign such employees to work involving non-COVID-19 patients. If reassignment is impossible, employers should consider placing the employee on a leave of absence until there is sufficient work available.

## **Q: Can I require employees to be tested for COVID-19 and/or to submit to temperature checks?**

A: Temperature checks and testing normally constitute overly broad medical exams under the ADA and various state laws. As such, mandatory testing and temperature checks are usually inherently risky. But the EEOC has now explained on its [website](#): “Because the 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.”

It is important to note that the New York Department of Health, Division of Home and Community Based Services issued a guidance letter on March 14, 2020, stating that all caregivers “must be screened for respiratory and fever symptoms upon arriving at work.” The guidance goes on to state: “Staff showing symptoms of illness must not be permitted to remain at work or visit patients and must not return to work until completely recovered.” Please note, this guidance is limited to New York State and you should check your own state or local health department for additional guidance.

Also, a temperature check program should only be one element of a comprehensive program, in which other components should include employee education, employee and visitor questionnaires related to other risk factors, limitations on non-essential travel, encouragement of work from home, and assessment of paid leave.

The Equal Employment Opportunity Commission (EEOC) issued guidance on April 23, 2020, that allows employers to test employees for the COVID-19 virus. The test, however, must be accurate and reliable. Anti-body tests are not permitted to be required, and antigen tests are also likely are not sufficiently accurate or reliable to meet this requirement. Employers should be careful and seek legal guidance if they do not desire to require testing for ALL employees.

## **Q: How can I implement a temperature check requirement to ensure a consistent process?**

A: At minimum:

- Checks must be conducted on all employees each time they enter a client's home. For the office, if temperature checks are implemented, they should be performed on everyone entering, regardless of whether an employee, client, vendor or visitor.
- The check may be conducted by the caregiver. In the office, it should be conducted by someone who has adequate training to perform the check consistently and safely (without risking their own health or those being checked) and operate the equipment properly.

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- The check should be documented appropriately and confidentially, and the documentation stored securely, noting
- That each check represents individual medical data that may be subject to various privacy requirements. A single log book is not sufficient.
- There must be an objective cutoff for elevated temperature, e.g., all persons registering 100.4 °F or higher will be excluded from caring for clients and the office's premises for at least 14 days or until provision of a negative test result for COVID-19 and flu.
- All persons whose temperature exceeds the cutoff must be excluded for the requisite time, regardless of their status.
- Ensure that employees are paid for the time spent being temperature-checked.

## **Q: What should I do if an employee refuses a temperature check or other required testing?**

A: When an employee objects to having their temperature taken (or other testing) and is disciplined or sent home, there is the potential for a retaliation claim or a disability discrimination claim under a “regarded as disabled” theory. Based upon the nature of the employee’s job, employers should consider allowing work from home or sending the employee home without pay (if work cannot be performed from home). The employer should consult any policies that may bear on this situation and should strongly consider not disciplining the employee other than the loss of pay.

## **Q: Does contracting COVID-19 constitute having a disability under the ADA?**

A: For exposed employees who experience no symptoms, or only mild, temporary symptoms, COVID-19, standing alone, likely would not qualify as a “disability” under the ADA. However, an employee who contracts COVID-19 may be entitled to reasonable accommodation and protection under the ADA if the employee’s reaction to COVID-19 is severe or if it complicates or exacerbates one or more of an employee’s other health condition(s)/disabilities.

Employers should assess whether a particular employee is “disabled” under the ADA on an individualized basis, taking into account the employee’s particular reaction to the illness, their symptoms and any other relevant considerations. In addition, COVID-19 may qualify as a disability under applicable state disability laws with definitions of “disability” that are less stringent than the ADA’s definition.

## **Q: When should we require a fitness for duty test and/or return to work clearance?**

A: Employers may request a fitness for duty or return to work certification if an employee has been quarantined by a treating medical provider or public health official or the employer has placed the employee off work based upon reasonable, objective evidence that the employee may pose a direct threat of harm in the workplace (such as because he or she exhibits the symptoms of COVID-19). However, the certification should be narrowly tailored to seek information that is job-related and consistent with business necessity. Also note, given the current circumstances, it may be difficult for an employee to obtain a fitness for duty release.

## **Q: Should the employer pay for the employee’s medical examination in conjunction with requesting a fitness for duty or return to work certification?**

A: The EEOC says employers that require employees to go to a healthcare provider chosen by the employer should pay all costs associated with the visit. Employees permitted to go to a provider of their choice generally may be required to cover the cost of any medical examination permitted by the ADA. For more information, click [here](#).

## **Q: Should hourly employees be paid for time spent receiving temperature checks and/or other testing?**

A: Yes. Any temperature checks or other testing should be performed while the employee is “on the clock.”

## **Leaves of Absence**

### **Q: What can we do to help our employees deal with child care needs when schools are closed?**

A: Employers should not hurriedly create an on-site child care center. Child care centers are heavily regulated by government agencies and subject to a multitude of licensing requirements which vary by jurisdiction. Given this, and the liability risks

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associated with such operations, especially in a pandemic situation, we recommend employers leave these types of operations to licensed, professional child care service providers. These types of providers can, and do, operate on-site child care centers for many employers throughout the country; however, these centers generally require extensive time and advance planning before being launched.

There are ways that employers can help their employees care for their children during unexpected school closures. One way is to provide emergency child care stipends or subsidies. Some states have restricted child care centers to children of employees working in the health care field. While it is currently uncertain, whether such payments qualify as tax-free disaster payments under Internal Revenue Code Section 139 (meaning employers can make these payments to employees without having to withhold or pay income and payroll taxes), it is certain that such emergency payments can be excluded from an employee's regular rate of pay when performing overtime calculations under the Fair Labor Standards Act, so long as the monies are not tied to the quality or quantity of work performed. **Note:** the CARES Act provides \$3.5 billion to states for subsidies for children of health care workers.

It is also important to note that several states have forms of "school activities leave" which require protected leave for certain child-related activities, including to address a child care provider or school emergency, including school closures. See, e.g., Cal. Labor Code § 230.8. In addition, pursuant to many states' paid sick leave laws, employees have the right to take paid sick time for school closures ordered by a public official due to a public health emergency. For example, Oregon's and New Jersey's enforcement agencies have specifically advised in connection with COVID-19, that employees may use statutory, paid sick leave if their child's school or daycare is closed due to COVID-19. We expect additional states to take this approach.

## Wage & Hour

### **Q: Do scheduling changes as a result of COVID-19 events qualify as an exception under scheduling law?**

A: The state and/or local laws regarding predictive scheduling of which we are aware and that are currently in effect do not regulate employment in the home care or health care industries.

### **Q: What if the employer has to cut hours because of loss of business?**

A: When an employer shuts down its operations because of a health issue for less than a full workweek, exempt employees must be paid their full salary. This rule also applies if exempt employees work only part of a day. Thus, if an employer decides to send staff home early, it may not dock exempt employees' pay.

Nonetheless, and barring any state law or overly restrictive company policy to the contrary, exempt employees may be required to use accrued leave or vacation time (in full or partial days) for their absences, if the accrued leave policy expressly permits the Company to require its use. While it might not be a popular move, an employer can direct exempt employees to take paid time off for the closure, pursuant to the employer's bona fide leave or vacation policy. If, on the other hand, an employee does not earn or does not have any available leave time, the employee is entitled to his or her full guaranteed salary if the employer decides to close due to the conditions.

If an employer is open for business, on the other hand, an exempt employee who elects to stay home due to the health situation is considered absent for personal reasons. In lieu of paying salary, an employer with a bona fide leave or vacation policy may require the employee to use his or her accrued paid time off to cover the absence, if the accrued leave policy expressly permits the Company to require its use. As long as it is permitted by state law and by the Company's leave program, leave time in this circumstance may be taken in full or partial days.

If an employer has a leave policy, but the absent non-exempt employee does not have a leave account balance, the employer is not obligated to pay the non-exempt employee. The employer can place the non-exempt employee on unpaid leave for the full day(s) that he or she failed to report to work for personal reasons. The employee may be entitled to PUA under the CARES Act in certain circumstances.

Additionally, there are certain reporting time pay laws in some states. Those laws are discussed below. For a more robust analysis, see [Littler's GPS survey](#) on this issue, here, which is included in the subscription Littler Home Care Toolkit subscribers.

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Hours Worked: Reporting Time Pay	
<p><b>California</b></p>	<p><b>General Rule.</b> An employee who reports to work on a scheduled work day but is not put to work or is furnished with less than half his or her usual or scheduled day's work must be paid for half the usual or scheduled day's work, but in no event for less than two hours nor more than four hours, at the employee's regular rate of pay. If an employee is required to report to work a second time in a scheduled workday and is furnished less than 2 hours of work, he or she must be paid for two hours at his or her regular rate. California Wage Orders Nos. 1-15, § 5(A), (B).</p> <p>"Reporting for work" may mean telephoning the employer two hours prior to the start of a shift to determine if an employee should physically come in to work. Employees will be owed reporting time pay for this on-call time. Ward v. Tilly's, Inc., 2019 WL 421743 (Cal. Ct. App. Feb. 4, 2019).</p> <p>A notable exception is that reporting time pay does not apply when "operations cannot commence or continue due to threats to employees or property; or when recommended by civil authorities." It also does not apply when the "interruption of work is caused by an Act of God or other cause not within the employer's control."</p>
<p><b>District of Columbia</b></p>	<p><b>General Rule.</b> An employee who reports for work under general or specific instructions but is given no work or is given less than four hours of work must be paid for a minimum of four hours. However, if an employee is regularly scheduled for less than four hours a day, the employee must be paid for the hours regularly scheduled.</p> <p><b>Calculation of Wages.</b> The minimum daily wage must be calculated using the employee's regular rate for hours worked plus payment at the minimum wage for hours not worked.</p> <p>D.C. Mun. Regs. tit. 7, § 907.1.</p>
<p><b>Massachusetts</b></p>	<p>When an employee who is scheduled to work three or more hours reports for duty at the time set by the employer, and that employee is not provided with the expected hours of work, the employee shall be paid for at least three hours on such day at no less than the basic minimum wage.</p> <p>If an employee is, in good faith, scheduled for less than three hours, the employer may pay the employee for only the hours worked.</p> <p><b>Exceptions.</b> The reporting time pay requirement does not apply to organizations granted status as charitable organizations under the Internal Revenue Code. 454 Mass. Code Regs. § 27.04.</p>

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<p><b>New Hampshire</b></p>	<p><b>General Rule.</b> An employee who reports to work at the employer's request must be paid for at least two hours of work at his/her regular rate of pay. An employer who makes a good faith effort to notify the employee not to report is not required to pay the two-hour minimum. However, if an employee reports to work after the employer's attempt to notify is unsuccessful or the employer is prevented from making notification, the employee shall perform whatever duties are assigned by the employer at the time he/she reports to work.</p> <p><b>Exceptions.</b> The above provisions do not apply when: (1) an employee reports to work and requests to leave on the basis of illness, personal emergency or family emergency provided a written explanation, initialed by the employee, is entered on the employee's time slip or card; (2) an employee who is hired and reports to work with the expectation that he or she will work less than two hours and is notified in writing in advance of his or her schedule; or (3) in the case of healthcare employees of community-based outreach services providers, when an employee voluntarily makes a scheduling change to meet physically or mentally infirm clients' needs, if they signed a statement at the time of hire stating they understood this job requirement was exempt from the reporting time pay requirement.</p>
<p><b>New Jersey</b></p>	<p>An employee who by the request of an employer reports for duty on any day must be paid for at least one hour at the employee's regular rate. This provision does not apply to an employer who made available the minimum number of hours agreed upon between the employer and employee before the work began on the day involved.</p>
<p><b>New York</b></p>	<p><b>General Rule. Miscellaneous Industries:</b> An employee who by request or permission of the employer reports for work on any day must be paid for at least four hours, or the number of hours in the employee's regularly scheduled shift, whichever is less, at the basic minimum hourly wage. N.Y. Comp. Codes R. &amp; Regs. tit. 12, § 142-2.3.</p>
<p><b>Rhode Island</b></p>	<p><b>General Rules.</b> An employer who requests or permits any employee to report for duty at the beginning of a work shift and does not furnish at least three hours work on that shift, shall pay the employee not less than three times the regular hourly rate. Provided, however, that shifts scheduled for less than three hours are permissible when entered into voluntarily and agreed upon by both the employer and employee. In the event that an employee reports for duty at the beginning of a work shift and the employer offers no work for him or her to perform, the employer shall pay the employee not less than three times the regular hourly rate or the amount they would have earned for any shifts consisting of less than three hours, as allowed under this section.</p> <p><b>Exceptions.</b> The above provision does not apply if an employee is prevented from working a normal shift by reason of events beyond the employer's control or by acts of God.</p>

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## Q: How much notice must I give employees of a reduction in pay?

A: Employers should provide written notice no later than the day before the change will be effective. These states require earlier advance notice: State Notice Requirement

### Alaska

Notice by the payday before the change becomes effective

### Maine

One working day's advance notice

### Maryland

One pay period's advance notice

### Missouri

30 days' advance written notice (the sole remedy for violations of this statute, however, is a penalty of \$50 per employee)

### Nevada

Seven days' advance written notice is generally required, but is not required if the "employer complies with the requirements relating to the decrease that are imposed on the employer pursuant to the provisions of any collective bargaining agreement or any contract between the employer and the employee."

### New York

Seven calendar days' advance written notice

### North Carolina

Twenty-four hours' advance written notice

### Pennsylvania

Notice by the payday before the change becomes effective

### South Carolina

Seven calendar days' advance written notice

### Virginia

One pay period's advance notice

New York, Washington D.C. and the City of Minneapolis also require employers to obtain signed acknowledgements by employees of the notice of pay change.

California, Washington D.C., and New York require notices of pay reductions to be provided in the employee's primary language. States with unique "wage theft prevention" laws may require particular format for written notice, depending on the circumstances.

## Q: Can I reduce the pay of exempt employees to reflect a reduced workload related to a furlough, quarantine, etc.?

A: Exempt employees must be paid their full salary for a workweek if they perform any work in the week (whether approved in advance or not, and including minimal tasks, such as checking emails). On the other hand, if an exempt employee performs no work in a seven-day workweek, the employer need not pay the employee's salary for that week. However, most employers grappling with the COVID-19 downturn hope to continue their exempt employees' work in some capacity each week, even if limited.

The issue may be avoided (within limits) by structuring the partial-week furlough as an advance, lengthy reduction in the employee's salary rate, combined with a reduced workschedule. Any programs that combine salary rate reductions with workweek expectation reductions should adhere to the following rules:

First, any combined work schedule and salary rate reductions should be in place for a substantial period. Guidance from the U.S. Department of Labor has consistently rejected short-term reductions in salaries. Reductions need not last forever – they may be reversed after economic conditions improve. However, no guidance exists on how briefly a reduction may be in place. Given the lack of guidance, partial-week furloughs should be intended to continue indefinitely while unusual economic difficulties continue, and generally for months, not weeks.

Second, employers should not adjust salary rates and schedules in concert too often. If an employer varies workschedules and salary rates in concert too often, they will be treating the employee too much like an hourly employee (varying pay in relation to the amount of work performed), and exempt status may be lost.

## Q: Can I reduce the pay of exempt employees while maintaining their workload to reflect current economic conditions?

A: Employers considering advance salary reductions due to reductions in their business activity, without reducing employees' work schedule expectations, should also take care not to adjust salary rates too often. Frequent changes would tempt a court to invalidate exempt status. To maintain exempt status, reduced salary levels must not fall below the higher of the federal and applicable state minimum salary rates required for exempt status. These minimum rates are not pro-rated for reduced work schedules. For 2020, the minimum federal salary rate is \$684 per week. Higher minimum 2020 salary rates exist in Alaska, California, Colorado, Maine, and New York.

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## Q: Can I mitigate some of these issues by converting exempt employees to non-exempt status?

A: Yes. Business requirements may dictate that employers keep some salaried exempt workers on part-time at weekly pay levels not high enough to maintain exempt status. If so, the employer must convert the employees to non-exempt status, subject to all resulting obligations including time keeping, minimum-wage compliance, overtime payments calculated on all wages (including bonuses and other incentive pay), and meal and rest breaks where required. In addition, when the employer can later return the workers to full-time, they may want to consider leaving the employees as hourly non-exempt, to avoid the claim that their loss of salary protection during the downturn shows that they are no longer paid on a salary basis.

## WARN Act

### Q: If the employer has to lay off employees, are there notification requirements under WARN?

A: There may be. Federal WARN and state mini-WARNs require employers to provide advance notification (60 days or 90 days, depending on the jurisdiction) to employees and government officials of certain group employment terminations. Not all layoffs trigger these requirements, however, and exceptions may apply. Temporary layoffs of less than six months in length are not considered to be employment losses under federal WARN, and the same is true under many, but not all, state mini-WARNs. (California WARN, for example, can be triggered by a short-term layoff, but is not necessarily triggered by a short-term layoff imposed to address potential contagion.)

The size of the layoff also matters. Federal WARN is not triggered unless, at a minimum, there are 50 employment losses at a single site of employment in a 90-day period. State mini-WARNs can be triggered at lower levels. For example, New York WARN can be triggered by 25 employment losses at a single site of employment, and effective July 19, 2020, New Jersey WARN can be triggered by 50 employment losses aggregated across all sites in the state.

Even if one of these statutes is triggered, however, an exception in the statute may apply. For example, many (but not all) jurisdictions permit shortened WARN notice when layoffs are the result of an unforeseeable business circumstance. Reliance on shortened notice, however, requires actually giving written WARN notice, with as much advance notice as can be given. It is important to consult the laws of the specific jurisdiction involved.

Jurisdiction	Reduced Notification Requirement
Federal	<p><b>Exceptions That Reduce the Amount of Notice Required:</b></p> <ul style="list-style-type: none"> <li>The dislocating event is caused by business circumstances that were not reasonably foreseen 60 days prior to the layoff or plant closing.</li> <li>The closing or layoff was a direct result of a natural disaster.</li> </ul> <p>In the above situations, the employer must give as much notice as is practicable, and include a statement of the basis for the reduced notice.</p>
Connecticut	<p><b>Exclusions.</b> A closing does not include: Covered establishments shutting down operations due to natural disasters.</p>
Delaware	<p><b>Exceptions.</b> Employers are not required to provide notice:</p> <ul style="list-style-type: none"> <li>if the mass layoff or plant closing is caused by business circumstances that are not reasonably foreseeable (examples include a principal client's sudden, unexpected termination of a major contract, a strike at a major supplier, an unexpected dramatic major economic downturn, or a government shutdown of the site without prior notice);</li> <li>if the mass layoff or plant closing is due to a natural disaster, such as a flood, earthquake, or drought; or</li> </ul> <p>Employers unable to provide notice due to one of these instances must provide as much notice as practicable with a brief statement of the basis for the reduced notification period.</p>

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<p>Iowa</p>	<p><b>Exceptions &amp; Special Circumstances</b></p> <p><i>Unforeseeable business circumstances</i></p> <p>An exception to the 30-day notice requirement will exist if all of the following conditions are met:</p> <ul style="list-style-type: none"> <li>• Business circumstances occurred that were not reasonably foreseeable at the time that the 30-day notice would have been required.</li> <li>• The employer must, at the time notice is actually given, provide a statement of explanation for reducing the notice period in addition to the other general notice requirements.</li> <li>• An important indicator of a reasonably unforeseeable business circumstance is that the circumstance is caused by some sudden, dramatic, and unexpected action or condition outside the employer's control.</li> <li>• The employer exercises commercially reasonable business judgment, as would a similarly situated employer in predicting the demands of the employer's particular market. The employer is not required to accurately predict general economic conditions that also may affect demand for products or services.</li> </ul> <p><b>Natural disasters</b></p> <p>An exception to the 30-day notice requirement will exist concerning natural disasters (floods, earthquakes, droughts, storms, tornadoes, and similar effects of nature are natural disasters) if:</p> <ul style="list-style-type: none"> <li>• A natural disaster occurred at the time notice would have been required.</li> <li>• The employer, at the time notice is actually given, provides a statement of explanation for reducing the notice period in addition to the other general notice requirements.</li> <li>• An employer demonstrates that the business closing or mass layoff is a direct result of the natural disaster.</li> </ul> <p>However, if a business closing or mass layoff occurs as an indirect result of a natural disaster, the exception does not apply but the unforeseeable business circumstance exception may be applicable.</p>
<p>New Hampshire</p>	<p><b>Notice Exceptions Include:</b></p> <ul style="list-style-type: none"> <li>• The need for notice was not reasonably foreseeable at the time notice would have been required; or</li> <li>• The mass layoff or plant closing is necessitated by a physical calamity, natural disaster, or an act of terrorism.</li> </ul>
<p>New Jersey</p>	<p>Termination of Operations is the permanent or temporary shutdown of a single establishment, or of one or more facilities or operating units within in single establishment. It does not include the termination of operations made necessary by a natural disaster, national emergency, act of war, civil disorder or industrial sabotage, etc.</p>
<p>New York</p>	<p><b>Exceptions That Reduce the Amount of Notice Required:</b></p> <ul style="list-style-type: none"> <li>• The dislocating event is caused by business circumstances that were not reasonably foreseen 90 days prior to the plant closing;</li> <li>• The closing or layoff was a direct result of a natural disaster;</li> </ul> <p>In the above situations, the employer must give as much notice as is practicable, and include a statement of the basis for the reduced notice.</p>

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<b>Philadelphia, PA</b>	This ordinance does not apply to involuntary closings. Under the ordinance, involuntary closings are any closing pursuant to a court order or any closing caused by, fire, flood, natural disaster, national emergency, acts of war, civil disorder, or industrial sabotage
<b>Vermont</b>	<p><b>Unforeseen Business Circumstances:</b> 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. A business circumstance that is not reasonably foreseeable may be established by the occurrence of a sudden, dramatic, and unexpected action or condition outside the employer’s control. Examples include a principal client’s sudden and unexpected termination of a major contract with the employer, a strike at a major supplier of the employer, an unanticipated and dramatic major economic downturn, or a government- ordered closing of an employment site, which occurs without prior notice.</p> <p><b>Disaster:</b> The business closing or mass layoff is due to a disaster beyond the employer’s control. The employer must show that: 1) the closing or layoff was the direct result of a natural disaster including fire, floods, earthquakes, droughts, storms, or other similar effects of nature; and 2) it provided as much notice as was practicable and available under the circumstances, either in advance or after an employment loss caused by the disaster. When a plant closing or mass layoff occurs as the indirect result of a disaster, the exception does not apply, but the exception for unforeseeable business circumstances may be applicable.</p>
<b>Wisconsin</b>	<p><b>Events that do not Trigger Notice Requirements Include:</b></p> <ul style="list-style-type: none"> <li>• A natural or man-made disaster beyond the control of the employer.</li> <li>• A temporary cessation in business operations, if the employer recalls the affected employees within 60 days.</li> </ul>

**Q: Is there an exception to WARN for epidemics?**

A: No. Federal WARN and CA WARN each have provisions addressing terminations due to natural disasters. 29 U.S.C. Sec. 2101(b) (2) (shortened notice permitted for “natural disasters such as floods, earthquakes or drought”); Cal Labor Code Sec. 1401(c) (notice not required for “physical calamity or act of war”). We think these provisions cannot be stretched to cover an epidemic. This is particularly so for CA WARN, which requires a “physical calamity or act of war.” Neither statute has an exception specific to epidemics.

## Workers’ Compensation

**Q: What are the employer’s workers compensation obligation if an employee tests positive for COVID-19?**

A: Generally speaking any illness or injury arising out of or in the course of employment is an industrial injury. Any contagious disease contracted at work would be industrial.

The problem with such illnesses is whether we know for sure where the worker contracted it, so as to prove that work is more likely than not the cause. This is even more difficult if the caregiver works for multiple agencies. Determining whether the injury will be deemed industrial will depend on who the caregiver interacted with and when. If one of the caregiver’s clients becomes ill with COVID-19, and then the caregiver is also diagnosed, then there is a good chance the illness will be deemed industrial.

Many states have statutory provisions that indicate that when in doubt, disputes should be resolved in favor of providing benefits. So where it may be impossible to know for sure when or where the worker contracted the illness, the worker may prevail.

Most states’ workers’ compensation laws require that the workplace present an “increased risk” or “risks peculiar” to the workplace as well. So, a home care or healthcare worker who contracts a communicable disease (such as COVID-19) would be more likely to have a compensable claim than an office or factory worker – particularly in areas where community spread is occurring.

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## Health and Safety

### Q: Outside of the CDC, where can I find information related to OSHA and COVID-19?

A: OSHA has prepared a document called: "Guidance on Preparing Workplaces for COVID-19." It is available [here](#). OSHA also maintains a website devoted to this topic, which can be found [here](#). Please keep in mind several states also have occupational health and safety laws and agencies. You should consult your own state's laws and agencies for additional information.

### Q: Is COVID-19 considered an "illness" under OSHA's recordkeeping rules?

A: OSHA's recordkeeping rules only apply to injuries or "illnesses." The rule defines an injury or illness as "an abnormal condition or disorder." "Illnesses include both acute and chronic illnesses, such as, but not limited to, a skin disease, respiratory disorder, or poisoning." Despite this broad definition, OSHA has essentially excluded from coverage cases of common cold or the seasonal flu.

OSHA has made a determination that COVID-19 should not be excluded from coverage of the rule – like the common cold or the seasonal flu – and, thus, OSHA is considering it an "illness." However, OSHA has stated that only confirmed cases of COVID-19 should be considered an illness under the rule. Thus, if an employee simply comes to work with symptoms consistent with COVID-19 (but not a confirmed diagnosis), the recordability analysis would not necessarily be triggered at that time.

### Q: When is a COVID-19 case considered recordable?

A: If an employee has a confirmed case of COVID-19, the employer would need to perform an assessment as to whether the case was "work-related" under the rule and, if so, whether it met the rule's additional recordability criteria (*i.e.*, resulted in a fatality, days away from work, restricted duty, or medical treatment beyond first aid). Given current protocols for treating COVID-19, it is likely that for any case that is confirmed, the additional severity criteria will be met, as affected persons are instructed to self-quarantine and stay home. Thus, the primary issue for employers is whether a particular case is "work-related."

A particular illness is work-related under the rule if an event or exposure in the work environment either caused or contributed to the resulting condition or significantly aggravated a pre-existing injury or illness. Work-relatedness is presumed for illnesses that result from events or exposures in the work environment, unless it meets certain **exceptions**. One of those exceptions is that the illness involves signs or symptoms that surface at work but result solely from a non-work-related event or exposure that occurs outside of the work environment. Thus, if an employee develops COVID-19 solely from an exposure outside of the work environment, it would not be work-related, and thus not recordable.

The employer's assessment should consider the work environment itself, the type of work performed, risk of person-to-person transmission given the work environment, and other factors such as community spread. Health care work environments, where job activities are more likely to result in person-to-person exposure, would present a more likely scenario of work-relatedness, than non-healthcare settings. However, each work environment is different, and employers must conduct an individualized assessment when a confirmed case of COVID-19 presents.

### Q: When is a COVID-19 case reportable?

A: As with the recordability analysis above, if an employee has a confirmed case of COVID-19 that is considered work-related, an employer would need to report the case to OSHA if it results in a fatality or in-patient hospitalization of one or more employees. It is important to note, however, that the reporting obligation is time limited. Thus, if a fatality due to COVID-19 occurs after 30 days from the workplace incident leading to the illness, an employer is not required to report it. Similarly, if the in-patient hospitalization occurs after 24 hours from the workplace incident leading to the illness, an employer is not required to report. Given the nature of COVID-19 and the disease progression, this may result in fewer reports to OSHA despite expected hospitalization of cases going forward.

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Record a COVID-19 case on your OSHA 300 log if: 1) the employee tested-positive for COVID-19; 2) the case is work-related (note, some states have enacted legislation regarding presumptions on this issue for Workers' Compensation purposes for healthcare workers); and 3) the case involves death, days away from work, restricted work or transfer to another job, medical treatment beyond first aid, loss of consciousness, and/or a significant injury or illness diagnosed by a physician or other licensed healthcare professional.

## Labor/Management Relations

**Q: Do we have to bargain with the union over things like mandatory COVID-19 testing, required temperature checks, or other such changes to the terms and conditions of employment?**

A: Yes. Changes to employees' terms and conditions of employment are mandatory subjects of bargaining. However, many collective bargaining agreements contain "management rights" clauses that expressly permit hospitals and medical centers to promulgate and enforce operational policies and practices and/or to dictate standards, methods, or procedures. Other collective bargaining agreements contain specific provisions allowing, or even requiring, employers to maintain the health and safety of the workplace or workforce. Such provisions should allow employers to require testing, temperature checks and the like. However, mandatory testing and/or temperature checks may implicate other workplace laws, as discussed above.

**Q: Does a government mandated quarantine or state of emergency excuse non-compliance with an existing collective bargaining agreement?**

A: Probably not. A government mandated quarantine or declared state of emergency only excuses compliance with a collective bargaining agreement when compliance with the mandated quarantine or state of emergency make compliance with provisions of the agreement impossible. It is not enough that contract compliance is made less convenient or more difficult.

**Q: What is the impact of a government-declared quarantine or state of emergency on union contract provisions that would otherwise prohibit or limit an employer's ability to comply?**

A: A government-declared quarantine or state of emergency would excuse compliance with union contract obligations if and only to the extent the mandated terms of the quarantine or state of emergency make compliance with those obligations impossible. Note that it is not enough that contract compliance is made less convenient or more difficult or that the mandate has created new or expanded obligations. Compliance with existing contract obligations must be impossible in order for the obligation to perform to be excused.

**Q: What is the impact of a government-declared quarantine or state of emergency on NLRA bargaining obligations that would otherwise exist?**

A: Companies have no duty to bargain over the decision to implement non-discretionary changes in terms and conditions of employment mandated by law, though effects bargaining may still be required. To the extent, a government ordered quarantine or state of emergency gives companies discretion over when and how to comply, companies will have a duty to immediately notify the union and, upon request, bargain over the decision absent proof its decision is covered by the CBA or exigent circumstances exist. Also, note that bargaining over the discretionary aspects of a mandate is more akin to "effects" bargaining, and would encompass processes for achieving compliance with legal mandates in a manner consistent with contract obligations and existing policies or practices.

**Q: What do I do if an employee refuses to comply with a change in their terms and conditions of employment (e.g., testing, temperature checks, floating, etc.)?**

A: If employees refuse to comply – or if the union instructs employees not to comply – advise employees they may be subject to discipline if they continue to refuse. If they continue to refuse, consider disciplinary action for insubordination, if discipline is practical. Again, this may cause grievances and/or unfair labor practice charges that can be dealt with afterward. If discipline is impractical or impossible, consider bringing in outside non-union staff, such as agency or contract employees. Also, consider the possible damages from any disciplinary action. Terminating employees creates greater potential liability than putting employees on disciplinary leave.

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**Q: May “Act of God” or “actions beyond the control of the company” language in a CBA apply?**

A: Yes. You should carefully review your CBA to determine if such language exists and may serve as a defense if actions you may want or be required to take to protect employee health and safety and/or your business are alleged to violate your CBA or NLRA bargaining obligations.

**Q: Do the above rules apply to actions a company may take in order to comply with food safety and other regulations?**

A: Yes. Whether or to what degree a company is excused from union contract and/or NLRA bargaining obligations will turn on whether the actions it takes are legally mandated or involve the exercise of some discretion.

**Q: Do the above rules apply to discretionary “best practice” actions companies may choose to implement?**

A: Yes. Companies would have legal risk if and to the extent such actions are not legally required, and violate union contract and/or NLRA bargaining obligations.

**Q: Do “Right to Work” laws in Alabama, Iowa, Indiana, North Dakota, Virginia, and Wisconsin supersede union contract restrictions that would apply to potential COVID-19 responses?**

A: No. These laws simply prohibit companies from enforcing union security clauses that require employees to maintain union membership and pay dues as a condition of employment.

**Q: What are the normal remedies for violating NLRA bargaining obligations?**

A: Unfair labor practice charges usually take 30-60 days for a regional NLRB office to investigate and, if a complaint is issued, a year or more to litigate with appeals. The normal remedies for such violations are:

a cease and desist order requiring a return to the pre-violation status quo;

an order that employees be made whole for economic losses (or a Transmarine remedy if the alleged violation only involves effects bargaining); and/or

a Notice of Rights posting it is unlikely in the current environment that the NLRB would seek or obtain interim 10(j) injunctive relief restoring the status quo while litigation is pending.

**Q: What are the normal remedies for CBA violations?**

A: If a union claims its rights under the CBA were violated, the grievance procedure could take a month or more, and arbitration, if requested, would take over a year to complete with appeals. The normal remedy for a CBA violation is an award requiring a return to the pre-violation status quo and that employees be made whole for economic losses. It is also possible a union will file a reverse Boys Markets action in federal court seeking a temporary injunction restoring the status quo pending arbitration (the union would have to prove a company’s action threatens irreparable harm to the economic security of employees).

**Q: Are unions using COVID-19 as part of new organizing efforts?**

A: Yes. Unions are criticizing company responses (especially the lack of paid leave, sufficient staffing, and a process to address employee safety concerns) in recent organizing efforts. The best thing a non-union employer can do is be transparent.

Develop and communicate a COVID-19 response that is compliant with state/federal mandates and “best practice” recommendations, be as flexible as is reasonably possible in balancing the interests of employees and the business, and regularly update employees. In short, coronavirus responses should be tailored to comply with existing union contracts and bargaining obligations unless it is satisfied it can prove such compliance is truly impossible or unless it determines compliance is so impractical that it is worth assuming the legal risks associated with non-compliance.

**Q: What steps can unionized employers consider as a risk mitigation strategy?**

A: Steps can include:

- Immediately notify unions that the company is developing a COVID-19 response plan. State: (1) safety is a shared priority; (2) the company is monitoring the situation to understand best practices and intends to comply with any legal mandates; and (3) the company appreciates the unions’ cooperation.

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- For non-discretionary responses or discretionary responses covered by your rights under a CBA, notify unions what you intend to do, when, and why, and request that questions be directed to a single point of contact. Give reasonable pre-implementation notice if possible and bargain over the effects upon request without delaying implementation.
- For discretionary decisions where union consent is needed or bargaining obligations are believed to apply, seek to fulfill these obligations if at all practical but not at the expense of more material business risk.

## Employee Relations

### **Q: How much information can an employer collect about an employee's personal travel?**

A: An employer can ask employees whether they traveled in the last 14 days or have plans to travel to any high risk areas (high-risk areas being a Level 3 on the CDC's website or so designated by a state order). We would suggest listing the high-risk areas, but not requiring employees to identify which exact location they have been to or are going to.

### **Q: I am being asked by a facility that all caregivers going into their facility to work are not allowed to go into other facilities or businesses for work or even other personal homes to care for others. Are you seeing this in other places? Are they legally allowed to do this?**

A: Yes, facilities can make this request from private employers, just as you might make this request from a staffing agency. You may ask employees to disclose any work performed for other employers.

### **Q: Some clients want their caregiver to stay at the client's house to avoid the caregiver going on public transportation. Does Littler have template letters for the client and caregiver to sign off that the caregiver would be off the clock if they stay beyond their scheduled hours?**

A: This would be a live-in situation. There is a template live-in agreement and sample timesheets on the toolkit (Policy and Document Library > Continuing Employment > Home Care-Specific). You can exclude up to eight hours for sleep time and maybe another three hours for meals, depending on the state. There has to be a reasonable sleeping arrangement. The DOL did a Field Assistance Bulletin on sleep time and when you can exclude it (see <https://www.dol.gov/agencies/w hd/ direct-care/sleep-time>).

### **Q: We have some calls from local assisted living facilities with infected residents to help them to staff. The assisted living facilities will be providing all PPE. What in your view shall we do to protect workers and the business from the exposure stand point?**

A: First, you need to inform the caregivers that the facility has infected residents and confirm their willingness to provide service (and be specific as to whether they are willing to care for infected residents or just to care for non-infected residents). Second, you should have a staffing agreement with the facility that includes indemnification language and clearly sets out the expectations regarding communication, training, and scope of services. Littler can assist with drafting these kinds of agreements. Third, you need to make sure caregivers working in the facility do not care for other clients outside the facility to limit the potential spread if one of the caregivers contracts COVID-19. Fourth, you need to train caregivers on proper use of PPE, handwashing (both before donning and after doffing PPE), hygiene, cough etiquette, etc. Be sure to document what you have done in setting up this arrangement.

### **Q: In the instance of caregivers working for multiple agencies - could they sign a release of some sort acknowledging that they are working for multiple agencies and the associated risks for doing so?**

A: You could obtain an acknowledgment of their work for multiple agencies and the associated risks for later use in any workers' compensation claim or other litigation. Workers' compensation claims generally cannot be released in advance of a workplace injury. We would not recommend seeking a release.

### **Q: If we find out a client might have COVID-19, and we want to pull the caregiver until we know s/he's clear, what do we tell the caregiver?**

A: The best answer is to tell Caregivers the truth so, with your help, they can make a decision best for them and their family. That said, we are not discouraging you from taking clients who have COVID-19; rather we encourage you to take all necessary

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precautions, with PPE available and being worn, and follow the CDC guidelines on caring for a COVID-19 client in their home.

**Q: How would an employer “prove” that a COVID-19 infection occurred while caring for my agency’s client?**

A: There is community spread of the disease occurring. Such spread can occur in a caregiving situation or any other contact with the coronavirus. As a result, proving causation will be difficult, even to a “more likely than not” standard. However, but if a caregiver was caring for a client that is or later tests positive for COVID-19, that evidence would likely be given significant weight.

**Q: What type of eye protection can caregivers wear if shields are not available when working with at risk clients?**

A: The CDC recommends wearing at least goggles that protect the sides of the eyes.

**Q: Can we bring in nurses or other healthcare professionals from other states to meet patient demand?**

A: Many states recognize the Nurse Licensure Compact (NLC). Under the NLC, nurses licensed in one NLC state can practice in other NLC states, without having to obtain additional licenses. Currently, 32 states have implemented the NLC. In non-NLC states, nurses must be licensed by the state in which they intend to practice.