



Workplace and Education Law Advisors

Jules Z. Halpern, Esq.
jhalpern@halpernadvisors.com

1225 Franklin Avenue, Suite 200
Garden City, NY 11530

Paul L. Scrom, Esq.
pscrom@halpernadvisors.com

Employer FAQs on COVID-19

In the wake of the coronavirus (“COVID-19”) outbreak, the law firm of Jules Halpern Associates has received numerous questions about the virus and its impacts on the workplace. We have created this Frequently Asked Questions (“FAQs”) document to inform employers of their rights and responsibilities during this difficult time. This situation is incredibly fact-specific, and impacts on employers will, in many cases, require individualized answers. Please note this document is for informational purposes only and is not intended to be legal advice. If you have any additional questions and would like to speak with us, please reach out.

Please see page 11 for links to the various articles we have authored on the COVID-19 outbreak and its business implications. We are continuing to monitor this situation closely and are updating our resources accordingly. If you would like to subscribe to our newsletter to receive these updates, please [click here](#).

Families First Coronavirus Response Act (“FFCRA”)

What is the effective date of the FFCRA?

The FFCRA’s effective date is April 1, 2020.

What leave benefits are provided under the FFCRA?

The FFCRA contains two leave law provisions: the Emergency Family and Medical Leave Act (“EFMLA”) and the Earned Paid Sick Leave Act (“EPSLA”).

What employers do the EFMLA and EPSLA apply to?

Both the EFMLA and EPSLA apply to all employers with fewer than 500 employees.

How are part-time employees’ hours counted under the EFMLA and EPSLA?

A part-time employee is entitled to leave for their average number of work hours in a two-week period. Therefore, an employer calculates hours of leave based on the number of hours the employee is normally scheduled to work in a two-week period.



If the normal hours scheduled are unknown, or if the part-time employee's schedule varies, an employer may use a six-month average to calculate the average daily hours. A part-time employee may take paid sick leave for this number of hours per day for up to a two-week period, and may take EFMLA leave for the same number of hours per day up to ten weeks after that.

Do employers have to pay employees for overtime hours under the FFCRA?

Yes. Under the EFMLA, employers must pay an employee for hours the employee would have normally been scheduled to work, even if that amount is more than 40 hours in a week.

Under the EPSLA, employees are entitled to 80 hours of paid sick leave over a two-week period. For example, an employee who is scheduled to work 50 hours a week may take 50 hours of paid sick leave in the first week and 30 hours of paid sick leave in the second week. However, the total number of hours paid under the EPSLA is capped at 80.

If an employer reduces an employee's schedule work hours, is the employee entitled to leave under the FFCRA for the hours they are no longer scheduled to work?

No. If an employer reduces an employee's work hours because it does not have work for the employee to perform, the employee may not use EFMLA or paid sick leave for the hours they are no longer scheduled to work.

If an employer furloughs an employee on or after April 1, 2020, is that employee entitled to leave under the EFMLA or EPSLA?

No. If an employer furloughs its employees because it does not have enough work or business, the employees are not entitled to then take EFMLA leave or paid sick leave. However, employees may be eligible for unemployment insurance benefits.

What documents can employers require an employee to submit to get EFMLA leave or paid sick leave?

Employees must provide documentation in support of their paid sick leave as specified in applicable IRS forms, instructions, and information.

If an employee is taking EFMLA leave, an employer may also require an employee to provide a notice of closure or unavailability from the employee's child's school, place of care, or child care provider, due to COVID-19 related issues. This includes a notice that may have been posted on a government, school, or day care website, or emailed to you from an employee or official of the school, place of care, or child care provider.



EFMLA

What are employees entitled to under the EFMLA?

The EFMLA allows employees to take up to 12 weeks of job-protected leave. The first 10 days of this EFMLA leave may be unpaid. An employee may choose to use accrued paid time off, but an employer cannot require an employee to do so. After the first 10 days, employers must pay the EFMLA leave at no less than two-thirds of the employee's regular rate of pay for the number of hours the employee would normally be scheduled to work. The EFMLA limits each employee to a maximum of \$200 per day and a \$10,000 total.

What employees are eligible to take leave under the EFMLA?

To be eligible, the employee must have been on the employer's payroll for 30 days before taking leave. Employees may use EFMLA leave to care for a child (under the age of 18) of an employee if the child's school or place of care has been closed, or the childcare provider is unavailable, due to a coronavirus.

What if an employer cannot afford to provide EFMLA?

The U.S. Secretary of Labor can exempt small businesses with fewer than 50 employees if the requirements under the law would jeopardize a business' ability to maintain operations.

What if an employee's job no longer exists after their EFMLA leave?

As mentioned above, this leave is job-protected, which means an employer is required to return an employee who takes EFMLA to the same or equivalent position once the employee returns to work. This requirement could be waived for employers with less than 25 employees if the employee's position does not exist after taking EFMLA leave due to an economic downturn or other conditions that affect employment caused by COVID-19 during the employee's period of leave.

EPSLA

What are employees entitled to under the EPSLA?

Eligible employees are entitled to up to 80 hours of paid sick leave under the EPSLA. Paid sick leave wages are capped at \$511 per employee per day up to a total of \$5,110 for reasons 1-3 set forth below (the employee is subject to a quarantine or isolation order, is advised by a health care provider to self-quarantine, or is experiencing symptoms of COVID-19).



If an employee needs to take sick time for reasons 4-6, the employee's sick time is paid at a rate of two-thirds their regular rate, with a cap of \$200 per day and \$2,000 total.

What employees are eligible to take paid sick leave under the EPSLA?

An employee is eligible to take sick leave under the EPSLA because the employee is:

1. subject to a federal, state or local quarantine or isolation order related to COVID-19;
2. advised by a health care provider to self-quarantine due to COVID-19 concerns;
3. experiencing COVID-19 symptoms and seeking medical diagnosis;
4. caring for an individual subject to a federal, state or local quarantine or isolation order or advised by a health care provider to self-quarantine due to COVID-19 concerns;
5. caring for the employee's child if the child's school or place of care is closed or the child's care provider is unavailable due to public health emergency; or
6. experiencing any other substantially similar condition specified by the Secretary of Health and Human Services.

Do employees have to be taking care of a family member to be eligible for paid sick leave?

No, employees can receive paid sick leave if they are caring for anybody under a quarantine or isolation order, it is not limited to only family members.

Coronavirus Aid, Relief, and Economic Security ("CARES") Act

What is the Payment Protection Program ("PPP")?

The PPP is a program designed to help small businesses financially through this crisis. The PPP provides eight weeks of cash-flow assistance through federally guaranteed loans to small employers who maintain their payroll during this period.

If the employer maintains its payroll, then the portion of the loan used for covered payroll costs, interest on mortgage obligations, rent, and utilities would be forgiven. This requirement is retroactive to February 15, 2020 in an effort to help bring back workers who may have already been laid off back onto an employer's payroll.



What businesses are eligible for small business loans under the PPP?

Employers with 500 employees or fewer, as well as businesses that meet the current Small Business Administration (“SBA”) size standards are eligible. Additionally, self-employed individuals, gig economy workers, and certain nonprofits with fewer than 500 employees would be eligible.

How much money can a business receive under the PPP?

The size of the loans available to businesses would equal 250% of an employer’s average monthly payroll, up to a maximum loan amount of \$10 million.

What are “covered payroll costs” under the PPP?

Covered payroll costs include salary, wages, and payment of cash tips (up to an annual rate of pay of \$100,000).

Where can an employer get a qualified loan?

Loans are immediately available through more than 800 existing SBA-certified lenders, including banks, credit unions, and other financial institutions.

What if an employer has to lay off, furlough, or reduce the salaries of employees during the term of the loan? Is the loan still forgiven?

If an employer terminates, furloughs, or reduces the salaries of employees during the term of the loan, the loan will still be forgiven, so long as the employer rehires the employees or returns them to their normal salaries by June 30, 2020.

This issue is nuanced, so if you have any questions about loan forgiveness under the CARES Act, please contact us.

Workplace Safety

What workplace safety guidance should we follow?

The Occupational Safety and Health Administration (“OSHA”) published [Guidance on Preparing Workplaces for COVID-19](#). These guidelines outline the steps employers can take to protect their employees.

Can an employer ask an employee to stay home or leave work if they appear sick?

Yes, an employer can ask an employee to seek medical attention and get tested for COVID-19. The CDC has advised that employees who exhibit symptoms of COVID-19 should leave the workplace.

The Equal Employment Opportunity Commission (“EEOC”) has previously ruled that asking workers to go home is not disability-related if the symptoms present are akin to the seasonal influenza or a pandemic virus. Therefore, an employer may require workers to go home if they show symptoms of COVID-19.

What should an employer do if an employee tests positive for COVID-19?

If an employee has tested positive and has been in the workplace, you should send home all employees who have been in close contact (three to six feet) in the previous 14 days. If possible, ask the sick employee to identify all individuals who worked closely with them in the previous 14 days.

Inform your employees that an employee has tested positive, but do not identify the infected employee, which could violate confidentiality laws.

An employee has self-reported that they came into contact with someone who had a presumptive positive case of COVID-19. What should we do?

Take the same precautions as above. Treat this situation like you would a confirmed case. Inform employees that no employee has tested positive for the virus, but that you are acting in an abundance of caution.

Can an employer require an employee to notify the employer if they have been exposed, have symptoms, and/or have tested positive for COVID-19?

Yes, an employer should require any employee who becomes ill at work with COVID-19 symptoms to notify their supervisor. Employees who are suffering from symptoms should stay home and not return to work until they are free of fever and other symptoms for at least 24 hours, without the use of fever-reducing or other symptom-alleviating medication

If an employee starts experiencing symptoms while outside of work, or has been exposed to someone that is exhibiting symptoms, or has tested positive for the virus, that employee should contact the organization by telephone or email and should not report to work.



How can we minimize risk of transmission?

All employees should exercise best practices to prevent the spread of germs and illness in the workplace. When coughing or sneezing, you should cover your nose and mouth with either the bend in your elbow or a tissue. If a tissue is used, it should be discarded immediately, and you should wash your hands.

The CDC recommends washing your hands frequently with warm water and soap for at least 20 seconds or using an alcohol-based hand sanitizer that contains at least 60-95% alcohol. If your hands are visibly dirty, wash them using soap and water. We will set up hand washing and sanitation stations in the office to encourage good hand hygiene.

You should also routinely clean frequently touched surfaces such as your workstations, countertops, and cell phones. Avoid touching your eyes, nose, and mouth unnecessarily. If you develop a fever, cough, or upper-respiratory illness, you should stay home.

Employers can provide handwashing stations in the workplace to promote good hand hygiene, including tepid water and soap. Also, they can ensure that cleaning/custodial schedules are ramped up and cleaning is more thorough.

Employers should also evaluate remote work capacities and policies. Use teleconference or other remote work tools instead of meeting in person, if possible. Consider staggering employee starting and departing times, along with lunch and break periods, to minimize interactions in the workplace.

Do employers need a communicable disease policy?

While a communicable disease policy is not required by law, we highly recommend inserting this policy during this time. If you need assistance in drafting this policy, please contact us.

Business Travel

What travel restrictions are currently in place?

Most employers have banned all outside travel. The State Department has issued Travel Advisories due to the coronavirus for many countries and territories. It is best to check their website for the latest travel restrictions.



Remote Work

With most employers who can do so, requiring their employees work from home, should employers have a remote work policy?

We recommend that most organizations implement a remote work policy. If you need assistance drafting this policy, please contact us so we can help.

HIPAA Issues

Does the COVID-19 coronavirus pandemic trump HIPAA privacy rules?

No. Employers must still comply with the protections contained in the Health Insurance Portability and Accountability Act Privacy Rule during the COVID-19 outbreak.

Benefits Issues

If employees are no longer working, are they still entitled to group health plan coverage?

The best answer is: it depends. Employers should check with the group health plan providers to determine how long employees are covered if they are not actively working. Once that period expires, the employee's plan must be terminated, and COBRA notice must be sent.

What happens to group health plan coverage if employees are not working and unable to pay their share of premiums?

Normally, group health plan coverage ends when an employee's fails to pay their share of premiums. However, several actions might be taken that could allow coverage to continue during this emergency.

First, the insurance carrier providing the health coverage may voluntarily continue the coverage while the disaster is sorted out and until an employer reopens its doors. More likely, the employer may make an arrangement with the insurance carrier providing health coverage to pay the employees' share of premiums to keep coverage in place (at least temporarily) and possibly until the employer can reopen its doors. Each situation will be different, depending upon the insurance carrier and the relationship between the employer and the insurance carrier. Therefore, each factual situation will need to be individually assessed.



Wage and Hour Issues

Do employees still have to be paid even though they are not working?

Generally, under the Fair Labor Standards Act employees who are not performing any work are not required to be paid. If an employee opts to stay home and does not perform any work even though their employer is open for business, then they would not be entitled to their regular pay.

For those employees who are non-exempt and are paid on a “fluctuating workweek” basis will be entitled to their full fluctuating-workweek pay for every workweek that they do *any* work during. There are very limited exceptions to this, even more so than the exceptions for exempt employees. Employers will be legally required to continue to pay those employees who have an employment contract, a collective bargaining agreement, or any other document that is enforceable as a contract or under a state wage law.

Lastly, during this time of uncertainty it is important to consider the “big picture.” Opting not to pay your employees who are being affected directly by this pandemic could tarnish your public image and reflect back negatively on your business as a whole.

How can I track my employee’s hours while they are working from home?

As previously mentioned, it is important to implement a working from home policy during this time. Part of this policy should cover employees tracking their time, whether this be through clocking in and out on an online program or by drafting and submitting weekly time sheets.

Employee Leave/ADA

Are employees entitled to paid leave or other benefits?

The federal government has enacted the FFCRA, as outlined above. In addition, certain states have enacted certain benefits and leaves of absence to cover circumstances related to the coronavirus. If you have specific questions that are not answered in this guide, please contact us.

Are employees entitled to standard FMLA during this time?

Employees who are requesting leave could potentially be covered by the Family and Medical Leave Act. Employees who are staying home to avoid getting sick and not performing work generally are not entitled to take FMLA.



Can employers ask employees who call in sick if they are experiencing symptoms consistent with COVID-19?

Yes. However, employers must maintain information about all employee illnesses as a confidential medical record in compliance with the ADA.

Does a positive diagnosis of COVID-19 implicate the ADA?

In short, no. This is because in majority of cases, COVID-19 is a “transitory condition.” It is possible some could argue that the ADA is implicated if the virus significantly limited a major life activity, such as an individual’s ability to breathe. Furthermore, if an employer “regards” an employee diagnosed with COVID-19 as being disabled, that could trigger ADA coverage.

If the pandemic becomes “severe” or “serious” according to local, state, or federal health officials, ADA-covered employers may have to reasonably conclude that employees will face a direct threat if they contract COVID-19.

Discrimination/Harassment/EEO Issues

Are there any EEO concerns related to COVID-19?

In the wake of COVID-19, there have been numerous racist attacks against individuals of Chinese or Asian descent throughout America. In the workplace, actions such as refusing to interact with colleagues or clients who are of Asian descent could lead to discrimination complaints. Employers who allow or tolerate discriminatory conduct or hostility towards Asian employees can create potential legal liability.

An employer cannot ban an employee from the workplace based on the employee’s national origin. However, if an employee, regardless of their race or national origin, was recently in a country affected by the outbreak and has symptoms of the virus, then the employer may have legitimate cause to ban that employee from the workplace.

WARN Act/Plant Closings

If we are forced to suspend operations due to COVID-19, is there an obligation to provide notice of such to employees under the federal WARN Act?

Yes, the federal WARN Act requires covered employers (those with 100 or more full-time employees) who decide to carry out a plant closing or mass layoff in certain situations, even if it is for economic reasons, to provide 60 days’ notice prior to any covered plant closing or mass layoff.



If employees are laid off for less than six months, then they do not suffer an employment loss and, depending on the various circumstances, notice may not be required. During these uncertain times, it is hard to predict how long the layoff will be for and notice cannot be provided retroactively, so giving notice is typically the best practice.

Workers' Compensation

If an employee alleges that they contracted COVID-19 while at work, will this lead to a workers' compensation claim?

For those who are in the healthcare or first responder field the answer is most likely yes. The analysis for employees in all other fields would be extremely fact specific. Since workers' compensation is a "no fault" system, the employee would typically need to prove that an injury occurred while at work and because of their employment.

Since COVID-19 is not an injury, it must be examined as an "occupational disease." The criteria for occupational diseases varies from state to state, but generally an employee must prove: (1) the virus arose out of and was in the course of employment and (2) the virus arose or was caused by conditions peculiar to their work which created a greater risk of contracting the virus than the general public.

Our Articles

- **State and City Governments Respond to Coronavirus**
- **Working from Home: Tips for the New Normal**
- **Coronavirus Workplace Awareness**
- **Coronavirus in Community Settings**
- **COVID-19: "Essential Employers" – New York**
- **COVID-19: "Essential Employers" – New Jersey**
- **COVID-19: "Essential Employers" – Connecticut**
- **Families First Coronavirus Response Act Provides Paid Leave**