

10 Questions Employers Are Asking Themselves Regarding COVID-19 + Their Employees

1) What are my obligations as an employer, if one of my employees needs to utilize Emergency Paid Sick Leave or Emergency FMLA under the Families First Coronavirus Response Act?

If an employee is unable to work or telework and experiences a qualifier under EPSL or EFMLA, their employer will need to provide them applicable compensation for a given amount of days or weeks they will be out of the business. Under FFCRA, return to work protocol may look different so employers should be cautious in what they ask for.

2) Can our employees use their sick and/or PTO time during this slowdown?

Yes, for any days that employees may need to miss because they are ill, need to care for a family member, or are dealing with school/after-school program closures, can utilize sick, vacation, or PTO hours. Employers are also able to waive applicable waiting periods for employees who may have recently started with the company, though this is not mandatory.

3) We have some employees choosing to stay home from work due to underlying health conditions and concerns about exposure to the virus, what benefits are they eligible for?

Without an official shelter-in-place order for the municipality in which the employee lives or quarantine orders from a doctor, an employee who chooses to stay home from work because they are at an increased risk to contract the virus would not be eligible for benefits currently offered through the state.

4) If business shut down prior to April 1st, but my employees were not terminated or laid off, are they eligible for EPSL or EFMLA?

The short answer is no. If business operations stopped due to COVID19 prior to April 1st, your employees would not be eligible for the programs offered under FFCRA. However, they would be eligible for Unemployment Insurance through the state.

5) We've allowed some employees to telecommute during this uncertain time. How can we maintain effective and consistent communication with employees while they are working from home and how can we ensure they're performing their responsibilities?

From a functionality standpoint, you may want to agree on a single communications platform that all workers will be required to participate in. It could be email, instant messaging, Slack, Skype, Zoom Conferencing, or some other designated tool. For official company statements or protocol, email is typically the best channel of communication. Take an honest approach with yourself about whether any concerns you have regarding reduced productivity among your workers while they are working at home are realistic or overblown. Recognize that you aren't babysitting your employees while they are performing work at the office, so you shouldn't begin to micromanage them while they are at home. Keep an eye on the bigger picture and track overall productivity, not moment-by-moment activities.

6) Can I move an employee from Exempt (salary) to Nonexempt (hourly) if business has slowed down and we can't afford their salary during this uncertain time?

Yes! In a situation where you need to reduce salaries which may no longer meet the exempt level threshold, moving an employee to an hourly rate is the safest approach. This allows the business to pay only for hours worked, versus the assumption of a 40 hour work week in cases where there might not be 40 hours' worth of work. In the event an employee has seen a reduction in their hours due to COVID-19, they are eligible to apply for supplemental wage benefits through the state.

7) How can we complete Form I-9 for any new employees who onboard while working remotely?

The Department of Homeland Security (DHS) has announced that it will exercise discretion to defer the physical presence requirements associated with Employment Eligibility Verification (Form I-9) under Section 274A of the Immigration and Nationality Act (INA). Employers with employees taking physical proximity precautions, such as sheltering in place, due to COVID-19 will not be required to review the employee's identity and employment authorization documents in the employee's physical presence. However, employers must inspect the Section 2 documents remotely (e.g., over video link, fax or email, etc.) and obtain, inspect, and retain copies of the documents, within three business days for purposes of completing Section 2. Employers also should enter "COVID-19" as the reason for the physical inspection delay in the Section 2 Additional Information field **once physical inspection takes place after normal operations resume**. Once the documents have been physically inspected, the employer should add "documents physically examined" with the date of inspection to the Section 2 additional information field on the Form I-9, or to section 3 as appropriate. These provisions may be implemented by employers for a period of 60 days from the date of this notice OR within 3 business days after the termination of the National Emergency, whichever

comes first.

Employers who avail themselves of this option must provide written documentation of their remote onboarding and telework policy for each employee. **This burden rests solely with the employers.**

Once normal operations resume, all employees who were onboarded using remote verification, must report to their employer within **three business days** for in-person verification of identity and employment eligibility documentation for Form I-9, Employment Eligibility Verification. Once the documents have been physically inspected, the employer should add “documents physically examined” with the date of inspection to the Section 2 additional information field on the Form I-9, or to section 3 as appropriate.

Any audit of subsequent Forms I-9 would use the “in-person completed date” as a starting point for these employees only.

This provision only applies to employers and workplaces that are operating remotely. If there are employees physically present at a work location, no exceptions are being implemented at this time for in-person verification of identity and employment eligibility documentation for Form I-9, Employment Eligibility Verification. However, if newly hired employees or existing employees are subject to COVID-19 quarantine or lockdown protocols, DHS will evaluate this on a case-by-case basis. Additionally, employers may designate an authorized representative to act on their behalf to complete Section 2. An authorized representative can be any person the employer designates to complete and sign Form I-9 on their behalf. The employer is liable for any violations in connection with the form or the verification process, including any violations in connection with the form or the verification process, including any violations of the employer sanctions laws committed by the person designated to act on the employer’s behalf.”

Effective March 19, 2020, any employers who were served NOIs by DHS during the month of March 2020 and have not already responded will be granted an automatic extension for 60 days from the effective date. At the end of the 60-day extension period, DHS will determine if an additional extension will be granted.

Going forward DHS will continue to monitor the ongoing National Emergency and provide updated guidance as needed. Employers are required to monitor the DHS and ICE websites for additional updates regarding when the extensions will be terminated, and normal operations will resume.

For employers:

The three-day requirement for completing the form is still required.

8) If designated officials contact us for personal health information about one of our employees, what information should we disclose to ensure we are still in adherence to HIPAA privacy rules?

HIPAA privacy restrictions only apply to “covered entities” which employers are not

considered. Therefore any medical information you might have in your employment records would not be subject to these outlined mandates. Nevertheless, always exercise the utmost caution when disclosing personal information about an employee. Only authorized personnel should be privy to sensitive information, and all necessary precautions should be taken when disclosing information to government personnel or other pertinent groups such as the Red Cross. No information should ever be released to an individual until you have properly identified them.

9) What is my obligation as an employer to continue an employees' health insurance coverage if our employees are not working the required number of hours to retain coverage and they're unable to pay their share of premiums?

In typical business practice, group health plan coverage would end in the event an employee's share of premiums are not paid in a timely manner. However, several factors could come into play, allowing coverage to continue.

First, insurance carriers may voluntarily continue coverage while we are still in a state of emergency, until the disaster is resolved and/or 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 on a number of factors, therefore each situation should be individually assessed.

10) My workforce is unionized. Can the company make changes to unionized employees' work schedules or duties in response to the COVID-19 coronavirus?

The NLRA states that employers are able to bargain in good faith over mandatory subjects such as wages, hours, and terms and conditions of employment. Generally speaking, employers who make unilateral changes to these facets of employment may be subject to unfair labor practice charges that would apply even in emergency situations such as this one, unless your collective bargaining agreement provides otherwise so proceed with caution. Many collective bargaining agreements contain provisions that allow for employer flexibility in determining work assignments, scheduling, and layoffs. You should refer to your own collective bargaining agreement to best determine your rights and obligations.