

Partnering with a PEO Does Not Negatively Influence Qualification for a CARES Act Loan

With the recent passage of the Coronavirus Aid, Relief, and Economic Security Act (the CARES Act), many businesses have begun to ask whether contracting for services with a professional employer organization (PEO) will interfere with the business's ability to qualify for a CARES Act loan, including under the new Paycheck Protection Program.

The answer is a resounding "NO!" according to case law, statutory regulations, and statements made by the Small Business Administration (SBA).

The Concern

- Sections 1101, et. seq., of the CARES Act creates a new line of small business loans—funded by over \$349 billion — for relief from economic pressures caused by the COVID-19 outbreak.
- These loans were created by (among other things) amending Section 7(a) of the Small Business Act (the SBA), which is the statute that governs small-business loans in less turbulent times.
- In general, to qualify for one of these new loans, the business must have fewer than 500 employees.
- In a traditional PEO relationship, while the business employs the employees for purposes of day-to-day worksite functions, the PEO acts as the administrative employer by paying wages and collecting and remitting payroll taxes under its own FEIN not only for the business's employees but all of the PEO's other business clients.
- Given this relationship, some small businesses are concerned that they will not qualify for the new loans if the "500 or fewer" requirements (or other similar requirements) are examined at the PEO level — which could have hundreds of thousands of co-employees — rather than at the client level.

The Solution

- As far back as 1989, the Small Business Administration's Office of Hearings and Appeals reversed its regional office's determination that the PEO's total number of co-employees must be counted against the small-business client. In reversing, the tribunal found that the PEO was merely acting as an administrative employer and so only the employees of the small-business client would be counted. *SIZE APPEAL OF: Maryland Assemblies, Inc.*, 1989 SBA LEXIS 74 (SBA Office of Hearings and Appeals).
- Based in part on *Maryland Assemblies*, 13 CFR § 121.103(b)(4) of the SBA's affiliation regulations were amended to echo the same result:

BUSINESS CONCERNS WHICH LEASE EMPLOYEES FROM CONCERNS PRIMARILY ENGAGED IN LEASING EMPLOYEES TO OTHER BUSINESSES OR WHICH ENTER INTO A CO-EMPLOYER ARRANGEMENT WITH A PROFESSIONAL EMPLOYER ORGANIZATION (PEO) ARE NOT AFFILIATED WITH THE LEASING COMPANY OR PEO SOLELY ON THE BASIS OF A LEASING AGREEMENT.

- Additionally, Question (6) on page 16 of the Small Business Administration's own Small Business Compliance Guide: Size and Affiliation dated June 2018 agrees:

(6) A BUSINESS THAT LEASES EMPLOYEES FROM A BUSINESS PRIMARILY ENGAGED IN LEASING EMPLOYEES TO OTHER BUSINESSES OR WHICH ENTER INTO A CO-EMPLOYER ARRANGEMENT WITH A PROFESSIONAL EMPLOYER ORGANIZATION (PEO) IS NOT AFFILIATED WITH THE LEASING COMPANY OR PEO SOLELY BECAUSE IT LEASES OR CO-EMPLOYS EMPLOYEES.

EXAMPLE: COMPANY A LEASES 80% OF ITS EMPLOYEES FROM A COMPANY THAT PRIMARILY LEASES INDIVIDUALS TO OTHER COMPANIES. COMPANY A IS NOT AFFILIATED WITH THE LEASING COMPANY SOLELY BECAUSE OF THE LEASING RELATIONSHIP.

EMPLOYEE RIGHTS

PAID SICK LEAVE AND EXPANDED FAMILY AND MEDICAL LEAVE UNDER THE FAMILIES FIRST CORONAVIRUS RESPONSE ACT

The **Families First Coronavirus Response Act (FFCRA or Act)** requires certain employers to provide their employees with paid sick leave and expanded family and medical leave for specified reasons related to COVID-19. These provisions will apply from April 1, 2020 through December 31, 2020.

▶ PAID LEAVE ENTITLEMENTS

Generally, employers covered under the Act must provide employees:

Up to two weeks (80 hours, or a part-time employee's two-week equivalent) of paid sick leave based on the higher of their regular rate of pay, or the applicable state or Federal minimum wage, paid at:

- 100% for qualifying reasons #1-3 below, up to \$511 daily and \$5,110 total;
- $\frac{2}{3}$ for qualifying reasons #4 and 6 below, up to \$200 daily and \$2,000 total; and
- Up to 12 weeks of paid sick leave and expanded family and medical leave paid at $\frac{2}{3}$ for qualifying reason #5 below for up to \$200 daily and \$12,000 total.

A part-time employee is eligible for leave for the number of hours that the employee is normally scheduled to work over that period.

▶ ELIGIBLE EMPLOYEES

In general, employees of private sector employers with fewer than 500 employees, and certain public sector employers, are eligible for up to two weeks of fully or partially paid sick leave for COVID-19 related reasons (see below). *Employees who have been employed for at least 30 days* prior to their leave request may be eligible for up to an additional 10 weeks of partially paid expanded family and medical leave for reason #5 below.

▶ QUALIFYING REASONS FOR LEAVE RELATED TO COVID-19

An employee is entitled to take leave related to COVID-19 if the employee is unable to work, including unable to **telework**, because the employee:

- | | |
|---|---|
| <ol style="list-style-type: none">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); | <ol style="list-style-type: none">5. is caring for his or her child whose school or place of care is closed (or child care provider is unavailable) due to COVID-19 related reasons; or6. is experiencing any other substantially-similar condition specified by the U.S. Department of Health and Human Services. |
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▶ ENFORCEMENT

The U.S. Department of Labor's Wage and Hour Division (WHD) has the authority to investigate and enforce compliance with the FFCRA. Employers may not discharge, discipline, or otherwise discriminate against any employee who lawfully takes paid sick leave or expanded family and medical leave under the FFCRA, files a complaint, or institutes a proceeding under or related to this Act. Employers in violation of the provisions of the FFCRA will be subject to penalties and enforcement by WHD.



WAGE AND HOUR DIVISION
UNITED STATES DEPARTMENT OF LABOR

For additional information
or to file a complaint:
1-866-487-9243
TTY: 1-877-889-5627
dol.gov/agencies/whd



Prepared by the **U.S. CHAMBER OF COMMERCE**

CORONAVIRUS EMERGENCY LOANS

Small Business Guide and Checklist



The Coronavirus Aid, Relief, and Economic Security (CARES) Act allocated \$350 billion to help small businesses keep workers employed amid the pandemic and economic downturn. Known as the Paycheck Protection Program, the initiative provides 100% federally guaranteed loans to small businesses who maintain their payroll during this emergency.

Importantly, these loans may be forgiven if borrowers maintain their payrolls during the crisis or restore their payrolls afterward.

The administration soon will release more details including the list of lenders offering loans under the program. In the meantime, the U.S. Chamber of Commerce has issued this guide to help small businesses and self-employed individuals prepare to file for a loan.

Here are the questions you may be asking—and what you need to know.

1 Am I ELIGIBLE?

You are eligible if you are:

- A small business with fewer than 500 employees
- A small business that otherwise meets the SBA's size standard
- A 501(c)(3) with fewer than 500 employees
- An individual who operates as a sole proprietor
- An individual who operates as an independent contractor
- An individual who is self-employed who regularly carries on any trade or business
- A Tribal business concern that meets the SBA size standard
- A 501(c)(19) Veterans Organization that meets the SBA size standard

In addition, some special rules may make you eligible:

- If you are in the accommodation and food services sector (NAICS 72), the 500-employee rule is applied on a per physical location basis
- If you are operating as a franchise or receive financial assistance from an approved Small Business Investment Company the normal affiliation rules do not apply

REMEMBER: The 500-employee threshold includes all employees: full-time, part-time, and any other status.

2 What will lenders be LOOKING FOR?

In evaluating eligibility, lenders are directed to consider whether the borrower was in operation before February 15, 2020 and had employees for whom they paid salaries and payroll taxes or paid independent contractors.

Lenders will also ask you for a good faith certification that:

1. The uncertainty of current economic conditions makes the loan request necessary to support ongoing operations
2. The borrower will use the loan proceeds to retain workers and maintain payroll or make mortgage, lease, and utility payments
3. Borrower does not have an application pending for a loan duplicative of the purpose and amounts applied for here
4. From Feb. 15, 2020 to Dec. 31, 2020, the borrower has not received a loan duplicative of the purpose and amounts applied for here (Note: There is an opportunity to fold emergency loans made between Jan. 31, 2020 and the date this loan program becomes available into a new loan)

If you are an independent contractor, sole proprietor, or self-employed individual, lenders will also be looking for certain documents (final requirements will be announced by the government) such as payroll tax filings, Forms 1099-MISC, and income and expenses from the sole proprietorship.



What lenders will NOT LOOK FOR

- That the borrower sought and was unable to obtain credit elsewhere.
- A personal guarantee is not required for the loan.
- No collateral is required for the loan.

3

How much can I BORROW?

Loans can be up to 2.5 x the borrower's average monthly payroll costs, not to exceed **\$10 million**.



How do I calculate my average monthly PAYROLL COSTS?



sum of
INCLUDED
payroll costs

-

sum of
EXCLUDED
payroll costs

=

**PAYROLL
COSTS**

INCLUDED Payroll Cost:

- 1. For Employers:** The sum of payments of any compensation with respect to employees that is a:
 - salary, wage, commission, or similar compensation;
 - payment of cash tip or equivalent;
 - payment for vacation, parental, family, medical, or sick leave
 - allowance for dismissal or separation
 - payment required for the provisions of group health care benefits, including insurance premiums
 - payment of any retirement benefit
 - payment of state or local tax assessed on the compensation of the employee
- 2. For Sole Proprietors, Independent Contractors, and Self-Employed Individuals:** The sum of payments of any compensation to or income of a sole proprietor or independent contractor that is a wage, commission, income, net earnings from self-employment, or similar compensation and that is in an amount that is not more than \$100,000 in one year, as pro-rated for the covered period.

EXCLUDED Payroll Cost:

1. Compensation of an individual employee in excess of an annual salary of \$100,000, as prorated for the period February 15, to June 30, 2020
2. Payroll taxes, railroad retirement taxes, and income taxes
3. Any compensation of an employee whose principal place of residence is outside of the United States
4. Qualified sick leave wages for which a credit is allowed under section 7001 of the Families First Coronavirus Response Act (Public Law 116–5 127); or qualified family leave wages for which a credit is allowed under section 7003 of the Families First Coronavirus Response Act

NON SEASONAL EMPLOYERS:

Maximum loan =

2.5 X Average total monthly payroll costs incurred during the year prior to the loan date

For businesses not operational in 2019:

2.5 X Average total monthly payroll costs incurred for January and February 2020

SEASONAL EMPLOYERS:

Maximum loan =

2.5 X Average total monthly payments for payroll costs for the 12-week period beginning February 15, 2019 or March 1, 2019 (decided by the loan recipient) and ending June 30, 2019

4

Will this loan be FORGIVEN?

Borrowers are eligible to have their loans forgiven.

How Much?

A borrower is eligible for loan forgiveness equal to the amount the borrower spent on the following items during the 8-week period beginning on the date of the origination of the loan:

- Payroll costs (using the same definition of payroll costs used to determine loan eligibility)
- Interest on the mortgage obligation incurred in the ordinary course of business
- Rent on a leasing agreement
- Payments on utilities (electricity, gas, water, transportation, telephone, or internet)
- For borrowers with tipped employees, additional wages paid to those employees

The loan forgiveness cannot exceed the principal.

How could the forgiveness be reduced?

The amount of loan forgiveness calculated above is reduced if there is a reduction in the number of employees or a reduction of greater than 25% in wages paid to employees. Specifically:

Reduction based on reduction of number of employees



PAYROLL COST
Calculated on page 2

X

Average Number of Full-Time Equivalent Employees (FTEs) Per Month for the 8-Weeks Beginning on Loan Origination

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Option 1:

Average number of FTEs per month from February 15, 2019 to June 30, 2019

Option 2:

Average number of FTEs per month from January 1, 2020 to February 29, 2020

For Seasonal Employers:

Average number of FTEs per month from February 15, 2019 to June 30, 2019

Reduction based on reduction in salaries



PAYROLL COST
Calculated on page 2

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For any employee who did not earn during any pay period in 2019 wages at an annualized rate more than \$100,000, the amount of any reduction in wages that is greater than 25% compared to their most recent full quarter.

What if I bring back employees or restore wages?

Reductions in employment or wages that occur during the period beginning on February 15, 2020, and ending 30 days after enactment of the CARES Act, (as compared to February 15, 2020) shall not reduce the amount of loan forgiveness **IF** by June 30, 2020 the borrower eliminates the reduction in employees or reduction in wages.

WHAT'S NEXT?

Look out for more information about eligible lenders and additional loan guidance.

Visit [sba.gov](https://www.sba.gov) for updates.



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As the legislation focused on assisting people and businesses that have been impacted by the Coronavirus Pandemic continues to grow, Lever1 is here for you and your employees. In order to help you make sense of the new Paid Sick Leave and Expanded FMLA laws, we have compiled below a list of frequently asked questions. The answers to these questions are for informational purposes only and should not be construed as legal advice in any manner. Please consult with your legal counsel before taking any action in relation to these new regulations. We will continue to provide more information as it becomes available from the respective Federal Agencies. As always, Lever1 is here to support you, and if you have further questions, please reach out to our Human Resources Department or your designated service coordinator.

General Questions

- 1. When does the expanded FMLA leave and paid sick leave start?**
 - a. April 1, 2020
- 2. Is the paid sick leave and expanded FMLA leave the same thing?**
 - a. No. They are two separate clauses of the legislation and are two separate types of leave.
- 3. Are laid off employees still eligible for paid sick leave or expanded FMLA leave under the new legislation, if laid off prior to April 1st?**
 - a. No. The Expanded FMLA and Paid Sick Leave portions of the bill go into effect on April 1st and only applies to employees who are still employed at the time the bill is effective.
- 4. If providing childcare-related paid sick leave and expanded family medical leave at my business with fewer than 50 employees would jeopardize the viability of my business as a going concern, how do I take advantage of the small business exemption?**
 - a. Currently, a business cannot self-exempt from these requirements and the government has not established a process to submit an application for exemption but we anticipate the DOL to provide further guidance in April. In the interim, you should document why your business would be at jeopardy because of this leave and you should not send any materials to the Department of Labor prior to the establishment of a formal process.



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5. Do my employees qualify for the Healthcare provider and emergency responder exemption within the expanded FMLA and Paid Sick Leave legislation?

- a. Although the Department of Labor has yet to definitively outline which professions are included within this exemption. The traditional definition of healthcare provider under the FMLA can be found here:

https://webapps.dol.gov/elaws/whd/fmla/3.aspx?Glossary_Word=PROVIDER

6. Are part-time employees included in the expanded FMLA Leave and Paid Sick leave?

- a. Yes, all employees are included in both leaves. To qualify for the expanded FMLA, an employee must be employed for at least 30 days. Any employee is eligible for Paid Sick Leave regardless of length of employment. Please be aware the employee must also have a listed qualifying event in both cases.

7. Can an employee get both the 2 weeks of Paid Sick Leave and the expanded FMLA leave?

- a. Yes. If the employee meets the qualifying event requirements of both types of leave. See below for further information on qualifying events.

8. Can the employer REQUIRE the employee to use accrued PTO first?

- a. No.

9. Can an employee take paid sick leave or expanded family and medical leave intermittently while teleworking?

- a. Yes, if the employee is unable to telework their normal schedule of hours due to one of the qualifying reasons in the Emergency Paid Sick Leave Act. In that situation, you and your employee may agree that they may take paid sick leave intermittently while teleworking. Similarly, if they are prevented from teleworking their normal schedule of hours because they need 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, you and your employee may agree that they can take expanded family medical leave intermittently while teleworking. Intermittent leave may be taken in any increment as long as agreed upon by you and the employee.



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10. What should we be communicating to our Employees about COVID-19?

- a. In addition to maintaining any required postings mandated by the Families First Coronavirus Response Act, providing employees with information from health officials and assuring employees that their health and safety is of utmost importance can help to prepare and educate employees.

11. How can we prevent the spread of germs at work?

- a. As with most communicable diseases, common hygiene practices are the foundation for avoiding the spread of germs while following CDC guidelines. Employers should actively encourage sick employees to stay home and adopt the following rules (click on any of the embedded links for more information):
 - i. Employees who have symptoms (i.e., fever, cough, or shortness of breath) should notify their supervisor and stay home.
 - ii. Sick employees should follow CDC-recommended steps. Employees should not return to work until the criteria to discontinue home isolation are met, in consultation with healthcare providers and state and local health departments.
 - iii. Employees who are well but who have a sick family member at home with COVID-19 should notify their supervisor and follow CDC recommended precautions.

12. Can I tell employees if a specific co-worker has tested positive for COVID-19 or other communicable disease?

- a. No. The American with Disabilities Act (ADA) privacy rules restrict employers from sharing personal health information of an employee. Employers should inform employees that possible exposure has occurred in the workplace without disclosing any identifying information about the individual who tested positive. Follow this message with reassurance of what the company is doing to safeguard against the spread, assure of flexibility (where able).

13. What should we do if an employee disclosed that they have been in close contact with a person who tested positive for COVID-19?

- a. According to the CDC guidelines, individuals who have had close contact with a person diagnosed with COVID-19 should self-quarantine. Employers can require an employee who has been exposed to the virus to stay at home.



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14. Is Asking About Symptoms Permitted?

- a. Yes, during a pandemic, ADA-covered employers may ask employees who call in sick if they are experiencing symptoms of the pandemic virus, per the EEOC. For COVID-19, these include fever, chills, cough, shortness of breath and sore throat. Employers must maintain all information about employee illness as a confidential medical record in compliance with the ADA. So, while asking about coronavirus symptoms is permitted, don't ask about symptoms of other conditions.

15. Can we require a Dr's note before the employee reports back to work?

- a. If an employer applies the practice consistently, clearance from a health care provider to return to work can be required. However, guidance from the Centers for Disease Control and Prevention (CDC) suggests employers remove such requirements during a health crisis as access to health care providers may be limited. If you do decide upon requiring a Dr's note consistently amongst your staff, you can choose to have them send you the image, email it, etc. until they're back in the workplace.

16. Are there other options other than Doctor's Notes?

- a. New approaches may be necessary given the reduce access to health care providers. These could include reliance on local clinics to provide a form, a stamp or an e-mail certifying that an individual does not have the pandemic virus. Until more tests for coronavirus are available, if an employer can't get such alternative documentation, it will have to consider how much risk it's willing to take if the employee can't prove he or she is free of the virus.

17. Can we take our Employee's Temperature?

- a. In guidance updated on March 18, The Equal Employment Opportunity Commission (EEOC) gave employers the green light to take employees' temperatures to try and ward off the spread of the coronavirus despite the fact that measuring an employee's body temperature is a medical examination and the Americans with Disabilities Act (ADA) prohibits medical examinations unless they are job-related and consistent with business necessity. However, employers should be aware that some people with COVID-19 do



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not have a fever. And some people with a fever do not have COVID-19. Related items below:

- i. The temperature reading should be kept confidential and the person administering the temperature check should be trained on the procedure.
- ii. Ensure that there is social distancing and keep people at least six feet apart when they are standing in line to have their temperatures measured.
- iii. Employers are cautioned against using oral thermometers, which are more invasive than infrared digital thermometers
- iv. There may be an obligation to pay employees for time spent waiting to have their temperatures checked.

18. Should employees returning from business or personal travel be required to stay away of the office for 14 days?

- a. Employees returning from counties that have a Level 3 Travel Health Notice from the CDC should stay home for a period of 14 days after returning to the U.S.

19. Can we ask about symptoms on a pre-employment screen?

- a. The EEOC guidance also provided that:
 - i. An employer may take an applicant's temperature as part of a post-offer, pre-employment medical examination.
 - ii. An employer may screen applicants for symptoms of COVID-19 after making a conditional job offer.
 - iii. An employer may delay the start date of an applicant who has COVID-19 or symptoms associated with it.
 - iv. An employer may withdraw a job offer when it needs the applicant to start immediately but the individual has COVID-19 or symptoms of it.



20. What records do I need to keep when my employee takes paid sick leave or expanded family and medical leave?

- a. If one of your employees takes paid sick leave under the Emergency Paid Sick Leave Act, you should require your employee to provide you with appropriate documentation in support of the reason for the leave, including: the employee's name, qualifying reason for requesting leave, statement that the employee is unable to work, including telework, for that reason, and the date(s) for which leave is requested. Documentation of the reason for the leave will also be necessary, such as the source of any quarantine or isolation order, or the name of the health care provider who has advised you to self-quarantine. For example, this documentation may include a copy of the Federal, State or local quarantine or isolation order related to COVID-19 applicable to the employee or written documentation by a health care provider advising the employee to self-quarantine due to concerns related to COVID-19. If you intend to claim a tax credit under the FFCRA for your payment of the sick leave wages, you should retain this documentation in your records. 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.

Expanded FMLA Leave Questions

1. Who qualifies for the expanded FMLA leave?

- a. The only way an employee qualifies for the expanded FMLA leave is to be employed for at least 30 days prior to request, be unable to work or telework, and have a child whose school or daycare provider is closed due to the health emergency.

2. If we offer telework as an option and an employee wants to take the expanded FMLA leave instead, can they do this?

- a. If an employee is unable to perform those teleworking tasks or work the required teleworking hours because they need 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, then they are entitled to take expanded family and medical leave. Of course, if they are able to telework while caring for their child, paid sick leave and expanded family and medical leave is not available.



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3. Can employee take expanded FMLA paid leave because of a reduction in their hours?

- a. No, reduction of hours is not a qualifying event under the legislation. The only way an employee qualifies for the expanded FMLA leave is to be employed for at least 30 days prior to request, be unable to work or telework, and have a child whose school or daycare provider is closed due to a health emergency.

4. Will an employee be paid during the expanded FMLA Leave?

- a. Yes. The first two weeks of the 12-week FMLA leave is unpaid but may be supplemented by the employee's own PTO in accordance with regular business policies. The remaining 10 weeks of expanded FMLA leave will be paid at two-thirds the employee's regular rate of pay

5. Can an employee take intermittent expanded FMLA?

- a. Yes. Intermittent expanded family and medical leave should be permitted only when you and your employee agree upon such a schedule.

6. Can an employee still receive expanded FMLA paid leave if they have the option of telework but can't because they must care for their child whose school or childcare provider is closed due to COVID-19?

- a. Yes, if an employee is unable to perform those teleworking tasks or work the required teleworking hours because they need to care for a child whose school or place of care is closed, or child care provider is unavailable, because of COVID-19 related reasons, then they are entitled to take expanded family and medical leave.

Paid Sick Leave Questions

1. If we offer telework as an option and an employee wants to take the paid leave instead, can they do this?

- a. The employee cannot simply "choose" to take paid leave as the employee must be unable to perform those tasks or work the required hours. If the employee is unable to



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perform those tasks or work the required hours because of one of the qualifying reasons for paid sick leave, then the employee is entitled to take paid sick leave.

2. If an employee refuses to work because of fear of contracting the COVID-19 virus, are they eligible for paid sick leave?

- a. No, an employee's concern for contracting the virus is not included within the six allowable reasons for leave. The employee, however, may be eligible for leave under another employer policy (such as a leave of absence, accrued vacation, etc.) as per the requirements of that policy. If an employee's fear, however, is related to a serious health condition, they may be eligible for traditional FMLA leave. Normal notice and certification procedures would be followed for that determination.

3. If we already offer sick leave, would this be 80 additional hours or 80 hours total?

- a. Yes, these are new and additional hours of sick leave on top of normal company sick leave policies.

4. What if we already have PTO/Paid Sick Leave...can we deduct accrued PTO from this new PSL?

- a. No.

5. Do shelter in place orders allow employees to receive the additional sick leave?

- a. Yes – assuming they are unable to work remotely.

6. What qualifies an employee for the 2 weeks paid sick leave?

- a. The following conditions are qualification;
 - i. subject to a Federal, State, or local quarantine or isolation order related to COVID-19.
 - ii. has been advised by a health care provider to self-quarantine related to COVID-19.
 - iii. is experiencing COVID-19 symptoms and is seeking a medical diagnosis.
 - iv. is caring for an individual subject to an order described in (1) or self-quarantine as described in (2).



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- v. is caring for a child whose school or place of care is closed (or childcare provider is unavailable) for reasons related to COVID-19
- vi. 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.

7. How much pay is an employee eligible under the 2 week Paid Sick Leave?

- a. The underlying reason for the leave determines the pay rate
 - i. Two weeks (up to 80 hours) of paid sick leave at the employee's regular rate of pay: if they are subject to a quarantine or isolation order, they have been advised to self-quarantine by a health care provider, or they are experiencing symptoms and seeking medical diagnosis.
 - ii. Two weeks (up to 80 hours) of paid sick leave at two-thirds the employee's regular rate of pay because: the employee is caring for an individual subject to a quarantine or isolation order, the other individual was advised to self-quarantine by a health care provider, the other individual is experiencing symptoms and seeking medical diagnosis, or the employee must care for a child whose school or day care provider is closed or unavailable due to COVID-19 related reasons.

8. Would employees who are deemed 'high risk' and have made the decision themselves to self-isolate be eligible for paid sick leave?

- a. No. They would have to have been ordered to be quarantined by a health provider. But some states are allowing for this.

9. Can an employee take 80 hours of paid sick leave for a self-quarantine order and then another amount of paid sick leave for another reason provided under the Emergency Paid Sick Leave Act?

- a. No. An employee may take up to two weeks—or ten days—(80 hours for a full-time employee, or for a part-time employee, the number of hours equal to the average number of hours that the employee works over a typical two-week period) of paid sick leave for any combination of qualifying reasons. However, the total number of hours for which an employee receives paid sick leave is capped at 80 hours under the Emergency Paid Sick Leave Act.



FURLOUGH/LAYOFF/REDUCTION IN FORCE

1. What is a furlough?

- a. A **furlough** is considered an alternative to layoff, requiring employees to work fewer hours or to take a certain amount of unpaid time off while remaining “active”. For example, an employer may furlough its nonexempt employees one day a week for the remainder of the year and pay them for only 32 hours instead of their normal 40 OR an employer may require all employees to take a week or two of unpaid leave sometime during the year. Employers must be careful when furloughing exempt employees so that they continue to pay them on a salary basis and do not jeopardize their exempt status under the Fair Labor Standards Act (FLSA). A furlough that encompasses a full workweek is one way to accomplish this, since the FLSA states that exempt employees do not have to be paid for any week in which they perform no work. An employer may require all employees to go on furlough, or it may exclude some employees who provide essential services. Generally, the theory is to have many employees share some hardship as opposed to a few employees losing their jobs completely.

2. What is a Layoff?

- a. A **layoff** is a temporary separation from payroll because there is not enough work for the employee to perform. The employer, however, believes that this condition will change and intends to recall the person when work again becomes available. Employees are typically able to collect unemployment benefits while on an unpaid layoff, and frequently an employer will allow employees to maintain benefit coverage for a defined period of time as an incentive to remain available for recall.

3. What is a Reduction in Force (RIF)?

- a. A **reduction in force (RIF)** occurs when a position is eliminated without the intention of replacing it and involves a permanent cut in headcount. A layoff may turn into a RIF or the employer may choose to immediately reduce their workforce. A RIF can be accomplished by terminating employees or by means of attrition. When an



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employee is terminated pursuant to a reduction in force, it is sometimes referred to as being "riffed." However, some employers use layoff as a synonym for what is actually a permanent separation. This may be confusing to the affected employee because it implies that recall is a possibility which may prevent the employee from actively seeking a new job.

4. If I furlough an employee on or after April 1, 2020 (the effective date of the FFCRA), can they receive paid sick leave or expanded family and medical leave?

- a. No. If the furloughs are because you do not have enough work or business for your employees, they are not entitled to then take paid sick leave or expanded family and medical leave. However, they may be eligible for unemployment insurance benefits.

BENEFITS

1. If an employer furloughs employee, what happens to their benefits?

- a. If employees are furloughed, they *may potentially be eligible to continue coverage*. Employers are urged to check with their insurance or stop-loss carriers on this point.
 - i. Fully-insured Plans – We've heard that some carriers are allowing employees to remain covered under insured plans until 4/30/2020 even if they are not actively working due to COVID-19. This will need to be confirmed with individual carriers, however. Beyond this accommodation, insured plans are limited to what they can do by what the carrier will allow.
 - ii. Self-insured Plans – These plans have much more leeway to allow for furloughs, however this must be allowed by the stop loss carrier.

2. What happens if an employer furloughs employee but the carrier or stop loss carrier does not approve the furlough?

- a. The biggest overall risk is that claims will be denied either by the fully insured carrier or won't be covered under stop loss. Keeping ineligible employees on the plan violates ERISA because it means the plan isn't being administered according to its written terms. It also exposes the plan fiduciaries to potential breach of fiduciary duty claims.



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3. What happens to benefits if an employer lays off employee, even if just temporarily?

- a. When an employee terminates employment (even if temporarily) employees who are enrolled in benefits are eligible for COBRA and/or state continuation coverage as applicable.