



April 2020

NYC | HOSPITALITY
ALLIANCE

HOSPITALITY EMPLOYER UPDATE:

Sick Leave, WARN, Immigration and COBRA in Light of COVID-19

YOU ASKED, WE ANSWERED

1. **Question: What if a company has several entities and the total number of employees are over 500?**

Answer: An employer has had fewer than 500 employees if, at the time an employee's leave is to be taken, the employer employs fewer than 500 full-time and part-time employees within the United States, which includes any State of the United States, the District of Columbia, or any Territory or possession of the United States. In making this determination, employers should include employees:

- on leave;
- temporary employees who are jointly employed by the employer and another employer (regardless of whether the jointly-employed employees are maintained on only your or another employer's payroll); and
- day laborers supplied by a temporary agency.

Workers who are independent contractors under the Fair Labor Standards Act (FLSA), rather than employees, are not considered employees for purposes of the 500-employee threshold.

Typically, a corporation (including its separate establishments or divisions) is considered to be a single employer and its employees must each be counted towards the 500-employee threshold. Where a corporation has an ownership interest in another corporation, the two corporations are separate employers

unless they are joint employers under the FLSA with respect to certain employees. Under the FLSA, two entities will be deemed to be joint employers if they have:

- related activities;
- unified operation or common control; and
- a common business purpose.

If two entities are found to be joint employers, all of their common employees must be counted in determining whether paid sick leave must be provided under the Emergency Paid Sick Leave Act and expanded family and medical leave must be provided under the Emergency Family and Medical Leave Expansion Act.

2. **Question: We have temporarily laid off employees with the intent to reinstate them. Are they eligible for federal or New York sick leave and/or paid FMLA?**

Answer: Such individuals are not eligible for paid federal sick leave or paid FMLA. However, such individuals may be eligible for paid sick leave under New York law. As long as there is an employment relationship, under New York law, the individual may be eligible for Emergency Paid Sick Leave, should the individual satisfy the criteria necessary to be entitled to such leave.

3. **Question: If the employee wants to take this leave, do we need to immediately pay them on April 2nd or do we need to wait for their request to pay?**

Answer: Please note that the FFCRA, which included Federal Emergency Paid Sick Leave and paid FMLA, goes into effect on April 1, not April 2. If an employee is entitled to such leave, the employer must pay the employee for such leave on April 1, provided the employee provides the necessary documentation to support the need for such leave.

4. **Question: I am in NYC and still open and doing deliveries. What happens if all of my employees call on April 1 and say they do not feel comfortable and/or are sick and they want their two-weeks of paid leave? If I hire employees to replace them for two weeks, do those employees also get the two weeks?**

Answer: If you are open on April 1, any individual who is employed on April 1 (or hired thereafter) may take New York or Federal Emergency Paid Sick Leave, provided the employee meets the criteria to be eligible for such leave. Under

New York law, the employee would have to be subject to a quarantine or self-monitoring order issued by a public health official (the current shelter-in-place order is not sufficient). Under federal law, the employee must be diagnosed with COVID-19, experiencing symptoms of COVID-19 and awaiting medical diagnosis, ordered to self-monitor or quarantine by a governmental official or health care provider, or needs to care for someone who meets the aforementioned criteria or needs to care for a child whose school or care center has been closed due to COVID-19. Simply being “afraid” or “not comfortable” is insufficient to satisfy the criteria necessary to trigger any of these emergency leave requirements.

5. **Question: Do you have to pay out federal or NYS sick pay if your restaurant closed on March 20?**

Answer: You do not need to pay out federal sick pay if you closed on March 20. If you closed on March 20 and terminated the employees, you would not need to pay New York State paid sick leave. If you closed on March 20 and did not terminate the employees, then you may have to pay New York State paid sick leave should the individual become subject to a mandatory quarantine or self-monitoring order issued by a public health official (the current shelter-in-place order is insufficient to trigger the leave requirement).

6. **Question: What if we have laid off or furloughed employees on 3/15? Are we still responsible for paying the 80 hours of federal sick leave to our employees?**

Answer: No. There is no requirement to pay 80 hours of sick leave under federal law to employees who were laid off or furloughed prior to April 1.

7. **Question: If an employee requests paid sick leave can I request proof from DOL, NYS or health provider?**

Answer: If an employee is requesting sick leave under federal or state law, then you can require them to produce documentation necessary to support their need for the leave. Depending on the need for the leave, the documentation could be a note from a health care provider, a copy of the quarantine order, or some other relevant documentation.

8. **Question: If you have an employee who is currently on an unpaid FMLA leave through April 13, can s/he request paid leave to care for a child because school closed due to COVID?**

Answer: It depends. If the employee has not used up all of their 12-weeks of FMLA leave, then the employee would be entitled to take paid FMLA to care for the child whose school has been closed due to COVID-19. However, if the employee has already used, for example, 7 weeks of unpaid FMLA leave, the employee would only be entitled to take an additional 5 weeks of paid FMLA leave. If the employee has already used up their 12 weeks of FMLA leave, the employee would not be entitled to any additional FMLA leave simply because the employee needs to care for a child whose school has been closed due to COVID-19. In other words, the employee gets 12-weeks of FMLA in total. The FFCRA's expanded paid FMLA benefits simply provides another manner in which an employee can take FMLA leave.

9. **Question: Our locations have been closed since 3/16, but none of our employees exhibited symptoms of COVID-19, nor has anyone reported symptoms to us. How does this new act affect us (if any)?**

Answer: The new federal law does not allow any of your "inactive" employees (employees who are currently not scheduled to work due to your closure) to take paid sick leave or FMLA leave. However should you reopen after April 1, the new law may allow any active employees to take paid leave related to COVID-19.

10. **Question: Is sick leave applicable to employees who are not scheduled to work any shifts?**

Answer: Federal sick leave is not applicable to employees who are not scheduled to work any shifts. New York Emergency Paid Sick Leave may be applicable; however, the employee would have to be subject to a quarantine or self-monitoring order issued by a public health official in order to be eligible for such leave, the current shelter-in-place order is not sufficient to trigger the leave requirement.

11. **Question: Are the new paid sick leaves retroactive for laid off employees that were let go because of the COVID situation?**

Answer: No, the federal law goes into effect on April 1 and it is not retroactive. The new state law went into effect on March 18 and it is not retroactive to that date.

12. **Question: What is the correct way to notify employees on being laid-off versus termination?**

Answer: The correct way to notify employees about either a termination or a lay off is in writing, and, in certain circumstances, the writing may have to conform to federal or state requirements under applicable Worker Adjustment and Retraining Notification Acts ("WARN"). The writing would state, among other things, that the employment relationship has been severed (in the case of a termination) or that the employee is temporarily laid off or furloughed (in the event of a lay off) due to the COVID-19 pandemic.

13. **Question: If the restaurant has negative capital or liquidity how will employees be paid?**

Answer: If the employer is required to pay the employee sick leave under federal, state, or local laws, the payment, like any other wages, must be paid. There are various emergency loan programs, tax credits, and various other disaster relief that may assist a business owner in making these and other required payments.

14. **Question: What are the legal differences between furlough, lay-off and temporarily lay off?**

Answer: Legally, the term "furlough," "lay-off," and "temporary layoff" have no meaning. Unless there is a "mass layoff" under an applicable WARN Act, we generally prefer not to use the term "layoff" because it confuses most business owners. An employee is either terminated (there is a severance of the employment relationship, whether voluntary or involuntary) or there is a furlough (the employee is informed that there is no work available and the employee will not be scheduled to work for a specific or indefinite period). Thus, a furlough is akin to an involuntary, unpaid leave of absence, but the employment relationship between the employer and the employee still exists.

15. **Question:** **When paying tipped food service workers subject to the NYS tip credit, what is the correct rate of pay for paid sick leave, \$10, \$15 or other?**

Answer: The correct pay rate to pay a tipped food service worker sick leave is the regular minimum wage, which in New York City is currently \$15.00 per hour.

16. **Question:** **If you tell an employee they are laid off, but you are not then able to hire them back later, does that cause a problem?**

Answer: It depends on what you mean by "lay off". If you terminated the employment relationship when you laid off the employee, then there is no legal obligation to rehire the employee. If you did not terminate the employment relationship, there may be an obligation to rehire the laid off employee when you ramp up (or at least give them the right of first refusal). You should consult with legal counsel regarding hiring issues when you are able to ramp up.

17. **Question:** **How is a furloughed employee able to collect unemployment benefits while still getting sick leave?**

Answer: The State determines eligibility and employees not working and not receiving pay will likely qualify for unemployment benefits.

Legally, employees who are getting paid sick leave benefits cannot collect unemployment benefits.

18. **Question:** **Why is 4/1 the effective date when the federal bill was not supposed to go into effect 4/2?**

Answer: The legislation stated that it was to go into effect "not later than 15 days after its enactment." As the legislation was signed into law by President Trump on March 18, most believed that the law would go into effect on April 2. When the U.S. Department of Labor announced that it would become effective on April 1, it took the entire employer-community by surprise.

19. **Question:** **Are furloughed employees able to collect unemployment benefits?**

Answer: Yes, they should be able to collect unemployment benefits if they meet all other eligibility requirements.

20. **Question:** **While on this leave, how do they pay for insurance premiums? Can we cancel it during this time due to non-payment?**

Answer: Employees are entitled to group health coverage during their paid sick leave on the same terms as if they continued to work. If the group plan requires that the employee pay a portion of the premiums, if the employee is on leave he or she must continue to pay a portion of the premiums in order to maintain their health insurance benefits. Employee can continue to make such payments by writing a check to the employer to continue their health insurance benefits. If the employee does not make such payments, the employee risks losing coverage. However, employer should consult with legal counsel before terminating the health insurance of any employee.

21. **Question:** **I thought furloughs had a ten-day limit?**

Answer: No. There is no a limit under law with respect to the terms “furlough” or “lay-off”. In CA, there is a Division of Labor Standards Enforcement opinion letter stating that furloughs of more than 10 days trigger “final pay” obligations.

22. **Question:** **Do you think continuing to pay health insurance qualifies as maintaining the employment relationship so that the employee is eligible for the extended sick leave?**

Answer: Not necessarily, but it will depend on other facts and circumstances to determine whether the individual and the employer have severed the employment relationship or whether the relationship is still active.

23. **Question:** **How does the NY State law regarding COVID-19 sick/family leave compare to the Federal Families First Coronavirus Response Act?**

Answer: The New York State emergency Sick Leave Act is more narrowly drafted than the FFCRA with respect to sick or family leave. Under New York law, an individual can only take sick leave if the individual is subject to a quarantine or a

self-monitoring order issued by a public health official. In contrast, under the FFCRA, an individual can take sick leave for his/her own care if the employee cannot work (or telework) and the employee is (i) subject to a quarantine or self-monitoring order issued by the governmental official or a health care provider; or (ii) the employee is experiencing symptoms of COVID-19 and is seeking a medical diagnosis. With respect to caring for others, under New York law, if the employer has less than 100 employees, the employee will be eligible to take Paid Family Leave in order to care for family member who is experiencing COVID-19 symptoms or whose school has been closed due to COVID-19. Under the FFCRA law, the employee is eligible to for leave because the employee needs to: (i) care for a close family member who (i) is subject to a quarantine or self-monitoring order issued by the governmental official or a health care provider; (ii) is experiencing symptoms of COVID-19 and is seeking a medical diagnosis; or (iii) needs to care for a child whose school or care provider has been closed due to COVID-19.

24. **Question:** **At this point, who would take the extended paid family leave when it would only be 2/3 of their wages/salary, while unemployment would be 100% or about 100% their wages/salary (excluding people making a large salary)?**

Answer: If an employee is receiving unemployment benefits, the employee is not eligible to receive extended family leave under the FFCRA. Similarly, if the employee is eligible to receive paid FMLA leave under the FFCRA, the employee is not eligible to receive unemployment benefits.

25. **Question:** **When an employer furloughs team members, does the employer need to pay unused Paid Time Off?**

Answer: It depends on what is contained in your PTO policy, past practice and the state you are in. In New York, unless your policy provides otherwise you do not have to pay out PTO at termination. Per the Division of Labor Standards Enforcement opinion letter mention earlier, a furlough of ten or more days triggers "final pay" requirements, including accrued but unused PTO payout.

26. **Question:** **Is "shelter in place" the same as quarantine?**

Answer: No. A shelter-in-place order is not a quarantine order for FFCRA or New York Emergency Sick Leave purposes. There are municipalities in CA that

specifically allow use of paid sick leave for shelter-in-place purposes, such as San Francisco, Los Angeles and San Diego.

27. **Question: Is the paid sick leave reimbursed? Also, how are we to track it and monitor employees are using it for that?**

Answer: It is unclear what the questioner means by “reimbursed”. The sick leave must be paid to employees who are entitled to it in the same manner and at the same time as the employee would be paid his/her wages had the employee worked instead of taking the leave. With respect to leave taken under the FFCRA, the employer can receive a dollar for dollar tax credit for any payments made to employees for leave taken under this new law. There are no tax credits available for leave taken under New York State law.

Employers should track and monitor employees taking FFCRA or New York Emergency Paid Sick Leave as they would any other legally-mandated leave.

28. **Question: If your business is closed due to a governor’s order to close if not an essential business, are employees subject to 80 hour of sick time due to the NY state order of isolation?**

Answer: No. The Governor’s closure Order is not a quarantine or self-monitoring order issued by a public health official or health care provider that triggers paid leave requirements under state or federal law.

29. **Question: Should employers pay both COVID paid sick leave and PFL if the employee has been granted unemployment insurance benefits?**

Answer: If the employee is receiving unemployment benefits then they are not eligible for paid sick leave or PFL.

30. **Question: If a business is closed due to the NY Governor’s order, are employees eligible for 12 weeks FMLA is they are taking care of child who's school is closed?**

Answer: No. If the employee is not scheduled to work any hours, then the employee is not eligible to take paid FMLA leave under the FFCRA.

31. **Question:** Can furloughed employees also work for our company and get paid while keeping their unemployment benefits as long as they stay under the \$350/week threshold? And do furloughed employees get less in unemployment benefits vs. terminated employees?

Answer: Regardless of how you describe the separation from work if an employee is still paid, it will more than likely reduce their state unemployment benefits. No, there is no difference in benefits between furlough and termination—so long as the employee is not paid.

32. **Question:** Is the FFCRA's "active employee count" for these purposes counting laid off employees?

Answer: It will depend on whether the laid off employees were terminated or furloughed. If they were terminated, then they are not counted in the active employee count. If they were furloughed, they are on a temporary, unpaid leave of absence and therefore they would be counted in determining whether the employer is a covered entity under the FFCRA.

33. **Question:** So, if you are closed, you do not need to pay for sick leave? Assuming you closed on March 17.

Answer: You do not need to pay out federal sick pay if you closed on March 17. If you closed on March 17 and terminated the employees, you would not need to pay New York State paid sick leave. If you closed on March 17 and did not terminate the employees, then you may have to pay New York State paid sick leave should the individual become subject to a mandatory quarantine or self-monitoring order issued by a public health official (the current shelter-in-place order is insufficient to trigger the leave requirement).

34. **Question:** Is the New York State emergency sick leave amount in addition to their current paid time off?

Answer: Yes.

35. **Question:** **Do New York City and New York State sick leave apply to employers closed and who have terminated all employees after the ban on all restaurants?**

Answer: Regarding NYC paid sick leave, if you closed due to the Governor's or Mayor's order, then the employee who requested paid sick leave, would be entitled to any paid leave that they have accrued for any shifts that were cancelled as a result of the Order; otherwise, employees are not entitled to be paid under NYC law.

Under New York State law, if the employment relationship has been terminated, then there is no requirement to pay the individual under the New York Emergency paid Sick Leave Act.

36. **Question:** **Can leave allowed under FFCRA, NYS, and NYC sick leave laws run concurrently?**

Answer: No, such leaves must run consecutively (assuming all three are applicable).

37. **Question:** **I understand the sick leave laws from New York State and New York City, so is the panel saying that we now have to pay all of our employees paid sick leave even though we are shut down? As of 4/1/20, what is the skinny on that?**

Answer: If you are not currently operating, then employees who are not working as a result of the closure are not entitled to paid sick leave or paid family leave under federal law. Depending on the situation, they may be entitled to NYC and New York State paid sick leave. However, employees cannot receive unemployment benefits and paid sick leave at the same time.

38. **Question:** **So, all New York State non-essential businesses who were mandated to close, do not qualify for the New York State sick leave?**

Answer: No; the test is whether the employees have been terminated or laid off. Simply closing the business does not relieve an employer of paid sick leave obligations.

39. **Question:** I'm a New York City restaurateur who furloughed its hourly employees. Could I now terminate them to avoid the sick leave obligations?

Answer: No. If you are terminating employees simply to avoid paid sick leave mandates, such terminations would be deemed retaliatory under applicable law and therefore impermissible.

40. **Question:** Do any of these paid sick leave times overlap, or are they all able to be taken separately?

Answer: They do not overlap. They apply separately and in addition to one another.

41. **Question:** What documentation can you request from an employee if a doctor requires an employee stay home because they are sick, or to take care of a loved one who is sick in order to pay them those 14 days?

Answer: You may request a note from the doctor (or other health care provider) that supports the need for the leave.

42. **Question:** Does the emergency sick leave or new paid sick leave back date to a certain day, or is it for all employees that are currently scheduled and/or receiving a paycheck on 4/1?

Answer: The federal emergency paid sick leave law applies to any employees scheduled to work on or after April 1. The New York paid sick leave law applies to all employees as of March 18.

43. **Question:** How long do employees have to request their New York State and New York City sick leave once their employer is closed?

Answer: With respect to New York State paid sick leave, as long as they are still employees they can request the leave. As for NYC paid sick leave, if they have had a shift cancelled because you were required to close due to a public health emergency, they are entitled to be paid sick leave. If they are not scheduled to work or you closed for business reasons, then they are not entitled to take NYC paid sick leave.

44. Question: **Do employees have to put in the emergency paid sick leave request to be paid, or should the company payout automatically under qualifying events?**

Answer: The employer should pay the employee for the leave once the employee submits appropriate documentation supporting the need for the leave under federal or state law.

45. Question: **So, if we sent termination letters on Monday 3/16, do we still pay NYC sick leave requests OR do we not because the relationship is severed?**

Answer: This depends on when the business closed and why. If it was because of the Mayor's order, then accrued but unused NYC PSL is due if the employee affirmatively requested it for days he/she/they was previously scheduled to work. Otherwise, the employer is not required to pay NYC PSL

46. Question: **Are employers responsible for communicating to employees they might be eligible for emergency leave? Do employees need to reach out and request it?**

Answer: Yes, the FFCRA requires the employer to provide employees information about their rights to federal paid sick leave and expanded FMLA leave. The notice can be sent electronically.

47. Question: **What is the best way to terminate employees?**

Answer: Under New York law, once an employee is terminated, the employer has 5 business days to send to the employee written confirmation detailing the employee's last day of work and the date that any employee benefits ended. Additional documentation may be required pursuant to federal and/or state WARN requirements. How you communicate to employees about their determination is employer-specific and should be discussed with legal counsel.

48. Question: **Are there liquidated damages (double unpaid sick leave) under FFCRA, NYS, and NYC? Or, are double damages only under some laws?**

Answer: Liquidated damages (double damages) are available for violations of the FFCRA. Fines and penalties (in addition to any back pay) are available for violations of the New York Emergency Paid Sick Leave Law or NYC law; such fines and

penalties may not necessarily be equal to the compensatory damages and thus may not necessarily be “double damages”.

49. Question: **What about right of recall in California for rehiring laid off workers?**

Answer: In a non-union environment, there is currently no right of recall, though there are several pending laws addressing this issue.

50. Question: **For WARN, would it be considered a "plant closing" if the venue is entirely closed; what if the restaurant only kept a few employees employed to work from home (admin, phone calls, etc.)?**

Answer: If a venue is entirely closed for more than 30 days, it is likely that it would be deemed a temporary plant closing under the New York WARN Act, which may require that WARN notices be issued. The analysis does not change if a few employees remain employed working from home. In California, we recommend WARN notices be issued for any temporary closures of longer than two weeks.

51. Question: **Why are employers over 500 exempt?**

Answer: The belief is that most employers with over 500 employee have policies that already provide paid sick leave for events covered by the FFCRA. In addition, Congress did not want “large employers” to be eligible for tax credits that are being provided to employers that are required to provide paid sick leave under the FFCRA.

52. Question: **What about the process of onboarding (terminated) employees once we have some foresight of reopening?**

Answer: We will hold another webinar in advance of this occurring.

53. Question: **How would an employer now terminate all employees if they have already told them we are shut down due to mandated city and state shutdowns? Is there any terminology that should be used? Possibly with a WARN notice of permanent closure over 30 days?**

Answer: You should consult legal counsel about how to terminate your employees if you have not already done so as there are a number of legal issues that arise and are extremely fact-dependent.

54. Question: **For businesses looking to slowly resume operations, what is a more cautious approach with re-hiring employees that were laid off? Is there any risk with hiring certain employees (could you use seniority, outstanding with company, need for position to decide)?**

Answer: We will hold another webinar in advance of this occurring.

55. Question: **Do current, furloughed, or laid-off employees have to receive notice of the new federal sick leave laws?**

Answer: As long as such individuals are still employees and the employer has not terminated the employment relationship, such individuals should receive notice of the new federal sick leave laws.

56. Question: **Do we need to provide sick pay to employees with children out of school if they are in temporary layoff?**

Answer: Under federal law, such employees are not eligible for paid leave. Under New York state law, such individuals may be entitled to Paid Family Leave if you have under 100 employees.

57. Question: **Do you need to hire employees who were laid off or if business resumes within 12 months?**

Answer: Not necessarily, but you should consult with legal counsel when you are ready to reopen your business.

58. Question: **What if an employee refuses to sign the new NYS wage form but a change in rate occurred?**

Answer: The employer has a couple of options. First, the employer could terminate the employee for refusing to work at a new rate. Second, the employer could take the position that it sent the employee the new rate of pay form and that is sufficient (provided it can prove that it provided the new rate of pay form and waited 7 days).

Third, the employer could remind the employee that he/she needs to sign the form and wait to implement any change until the employee does. The business should consult with legal counsel before electing any of the aforementioned options.

59. **Question:** **Can you confirm that employees who are collecting unemployment cannot collect paid sick leave benefits of any kind?**

Answer: Employees who are collecting unemployment benefits are ineligible to collect paid sick leave benefits.

60. **Question:** **What happens to an employee currently on a visa has been termed, and we cannot reopen in the necessary window (60 day- Italian)?**

Answer: Upon termination, an individual on an employer-sponsored visa is immediately considered out of status; certain visa holders (E-1, E-2, E-3, H1B, H1B1, L-1, O-1, TN) receive a 60 day grace period within which to file to change employers, change to a different visa status or to depart the U.S. Regardless of nationality, the foreign national will be out of status and if a new petition is not filed within that period (to enable return to work, work for another employer or to change status), the foreign national will be out of status and subject to deportation.

61. **Question:** **Is there any relief package or unemployment options for our independent contractors? We have so many DJs and promoters that are just out of work but have been paid as 1099's**

Answer: The new CARES Act allows, under certain circumstances, some independent contractors to collect unemployment insurance benefits. However, it is likely that DJs and promoters who apply for such benefits will list their venue as their employer. In such an event, it is very likely that a business that has so many 1099's will get audited by the New York Department of Labor to determine whether they were appropriately categorized as contractors.

62. **Question:** **Are furloughed employees eligible to take vacation during the furlough period?**

Answer: No.

63. **Question: Do we have a grace period for wage rate forms for salary changes in NYC as we are working remote?**

Answer: The government has not as of yet allowed for any “grace period.” As such, under New York law, before a salary/wage rate change can be implemented, the employer must complete a new Rate of Pay form, provide the new form to the employee, wait seven (7) days, and then the employer can implement the salary/wage rate change.

64. **Question: What is the safest thing to do if you had to close the restaurant and layoff everybody a part from send the termination note as soon as it is possible?**

Answer: You should consult with counsel to determine what is the “safest” approach for your particular establishment as the options are heavily fact-dependent.

65. **Question: Can NYC employers terminate employees retroactively? That said, if the employer terminate all employees today, can employees claim sick leave days between 03/16 (date the restaurant ban went into effect) and today?**

Answer: Generally, you cannot terminate an employee retroactively. As such, employees may be able to claim sick leave for the period between when the business closed (or the employees were let go) and when the employees were terminated. However, the employees may not be entitled to any such leave and receipt of paid sick leave could impact their ability to collect unemployment.

66. **Question: What happens to an E-2 visa holder if we terminate?**

Answer: As with all other employer-sponsored visas, the E-2 employee is considered to be immediately out of status upon termination. The foreign national will have a period of 60 days to file a new petition, per the above. Unfortunately, the E-2 visa is less “transferrable” because it requires employment by a foreign national who shares nationality with the company located in the U.S., with that nationality being eligible for E-2 visa status per a treaty, AND the U.S. company having been invested into by a foreign national individual or company of the same nationality.

67. **Question:** **If you have an employee that is here on a company-sponsored visa, can we furlough them so they can collect unemployment?**

Answer: Generally speaking, foreign nationals are not able to obtain unemployment because it requires that the person be "immediately" available for work. Check with employment counsel on the laws of your state.

68. **Question:** **What about people who are on L1's that are furloughed, are they eligible for unemployment?**

Answer: Same as above.

69. **Question:** **We have some J-1s that are not able to return home because the borders have been closed. Is it a problem since they are in the states and cannot work?**

Answer: Generally speaking, foreign countries will allow citizens of their own country in, even when they have "closed" the border to entry by others, so it is unlikely that there are foreign nationals here that *cannot* go home. Potentially, there could be a problem with obtaining a flight. J-1 visitor's visas are sponsored by a J-1 sponsoring agency, which should be the first place an employer/J-1 visa holder goes to for determination on how to proceed. If a J-1 visa holder is unable to work and unable to secure a flight home, again, speak to the J-1 agency for advice, but a viable option would be to apply for a change of status to B-2 visitor status, with proof of being unable to depart the U.S. While it may take many months for the application to be adjudicated, it will afford the foreign national limited protection from being considered an overstay, which could prevent him/her from obtaining a new visa in the future.

70. **Question:** **Can someone on an L-2 that was let go collect unemployment?**

Answer: Luckily, employment is not required for an L-2 visa holder to maintain status, so this person would not be considered out of status. Whether s/he would be eligible for unemployment will depend on the law in your state.

71. **Question: If an EE completed an older version of the I9, do they need to redo the new I9 upon rehire?**

Answer: If you plan to follow the rehire procedures for returning employees, you would not need to redo the I-9 for every employee who completed an older version (i.e the correct version at the time of their original hire), however, you WOULD need to complete/update Section 3 on a new/current version of the Form I-9 when completing the new hire procedure. Of course, if you plan to have every returning employee complete a new I-9, you must use the current/most recent version.

72. **Question: Is there any change in procedure regarding COBRA for laid off employees? For this question, assume the employee has is laid off and was paying a portion of the premium when they were employed with us.**

Answer: When an employee (or other qualified beneficiary) elects to continue his/her coverage through COBRA, he/she becomes responsible for 100% of the premium, plus any administrative charge (not to exceed 2% of the premium) that may apply. The employer may subsidize the premium but is not required to do so.

73. **Question: Currently we are paying for full health insurance premium for all affected employees. If we want to cut off our payments on a certain date (for example end of May), does this have to coincide with a termination?**

Answer: Not necessarily. Individuals could still be employed and lose their health insurance benefits, triggering COBRA. Conversely, an employee could have their employment terminated, but the employer has agreed to cover their COBRA premiums or has agreed with the insurance provider to keep the individual on the health care plan.

74. **Question: For ESPL, what is the part time standard? Working less than 40 hours or 30 hours per week?**

Answer: Under the FFCRA, working fulltime is defined as an employee who is generally scheduled to work 40 or more hours per week as well as salaried, exempt employees. All other employees are deemed part time for FFCRA

purposes and thus would receive a pro-rated payment amount should they be eligible and elect to take federal Emergency Paid Sick Leave.

75. Question: **Does NY WARN apply to a seasonal business that operates 6 to 7 consecutive months out of the year?**

Answer: Yes, although the lay off or termination of seasonal workers may not necessarily be a WARN event.

76. Question: **If we terminate employees in order to protect ourselves from WARN:1. Do we have to onboard them again when we decide to rehire? 2. Will terminating now (after being closed for business for a short time already) cause any complications?**

Answer: This is fact-specific inquiry and it is recommended that you consult with legal counsel before terminating employees or rehiring laid off employees.

77. Question: **Is the WARN notice requirement triggered for plant closings that last less than 6 months (i.e., not necessarily an "employment loss")?**

Answer: If there is a temporary or permanent plant closing in which more than 25 employees suffer a job loss and which is expected to last more than 30 days, New York WARN will usually be triggered. If there is a mass layoff or reduction in hours in which the plant remain open but simply operates with fewer workers, then the mass layoff and/or reduction in hours must be expected to last for more than 6 months in order for WARN to be triggered.

78. Question: **If an employer has closed but did not provide WARN notices, should they send them as soon as they realize they have been non-compliant?**

Answer: Yes, if WARN is applicable, which is a determination that should be made in consultation with counsel.

79. Question: **What if we terminate more than 25 people and close the business, having no idea on when/if we will re-open, but then wind up re-opening within 6 months, should we submit a WARN Notice?**

Answer: Yes, as it is likely that under New York WARN, the closure has triggered requirements under that statute. Nevertheless, you should consult with legal counsel to determine the best course of action for your business.

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