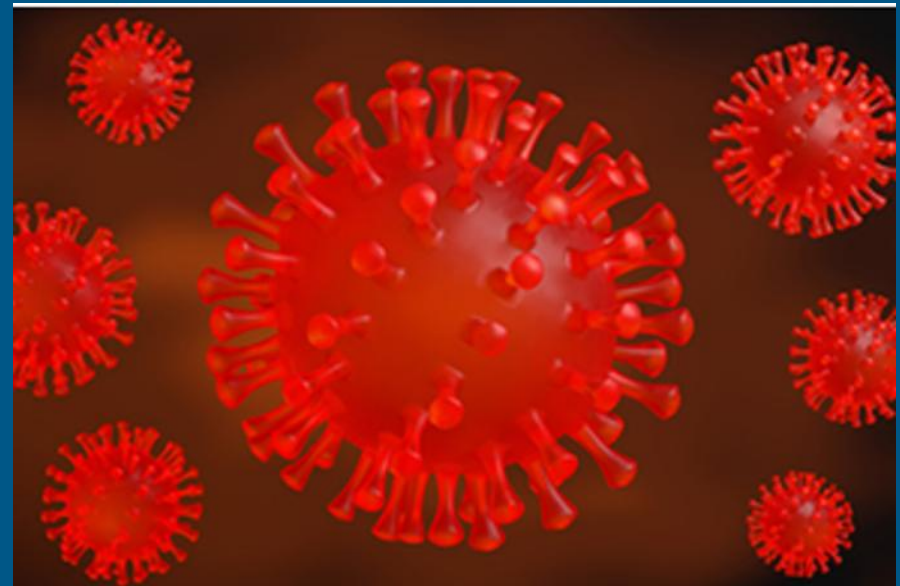
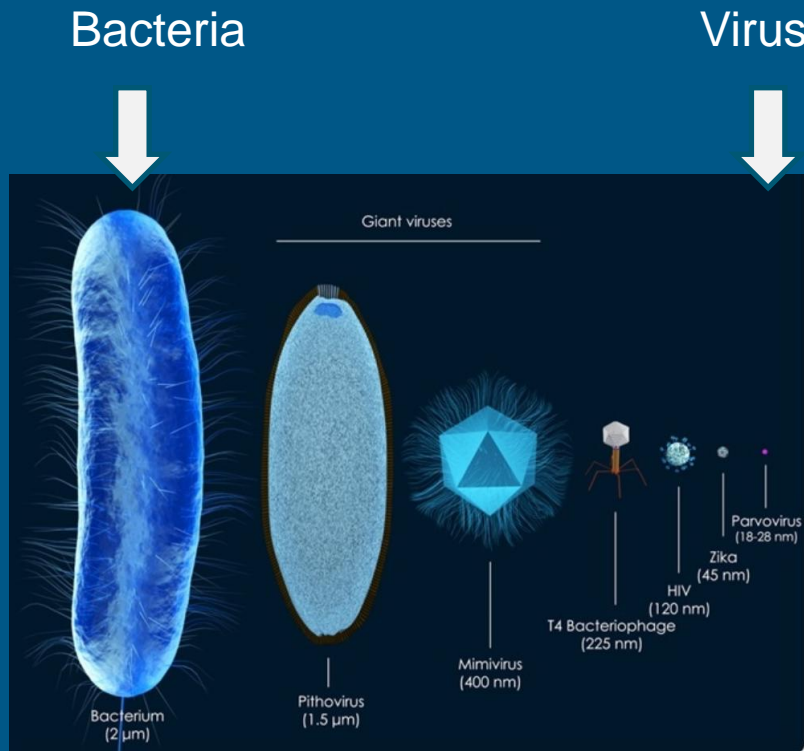


# Covid-19

## A Global Pandemic



# FAMILIES FIRST CORONAVIRUS RESPONSE ACT (FFCRA)

- March 19 – December 31, 2020
- Enacted to combat the workplace effects of the coronavirus by giving tax credits to small businesses and providing employees with paid leave for certain reasons related to the coronavirus.

**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:

- 10 days (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 \$5,115 total;
  - 66 2/3% for qualifying reasons #4 and 5 below, up to \$209 daily and \$2,088 total; and
  - 13 to 12 weeks of paid sick leave and expanded family and medical leave paid at 2/3 for qualifying reason #6 below for up to \$209 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**  
Generally, employers of private sector employees with fewer than 500 employees, and certain public sector employees, 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 90 days prior to their leave request may be eligible for up to an additional 12 weeks of partially paid expanded family and medical leave for reason #6 below.

**QUALIFYING REASONS FOR LEAVE RELATED TO COVID-19**  
An employee is eligible to take leave related to COVID-19 if the employee is unable to work, including unable to telework, because the employee:

1. is subject to a Federal, State, or local quarantine or isolation order related to COVID-19;	2. 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; or
3. has been advised by a health-care provider to self-quarantine related to COVID-19;	4. is experiencing any other substantially similar condition specified by the U.S. Department of Health and Human Services;
5. is experiencing COVID-19 symptoms and is seeking a medical diagnosis;	
6. is caring for an individual subject to an order described in (1) or self-quarantine as described in (2);	

**ENFORCEMENT**  
The U.S. Department of Labor's Wage and Hour Division (WHD) has the authority to investigate and enforce compliance with the FFCRA. Employees 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. This is prohibited, or includes a prohibiting order or related to this Act. Employees in violation of the provisions of the FFCRA will be subject to penalties and enforcement by WHD.

For additional information, or to file a complaint:  
**1-866-687-2343**  
TTY: 1-877-489-3627  
[dol.gov/agencies/eis/whd](http://dol.gov/agencies/eis/whd)

U.S. DEPARTMENT OF LABOR  
WAGE AND HOUR DIVISION  
OFFICE OF SATELITE ENFORCEMENT OF LABOR

800-000-0000

The **FFCRA** includes two paid leave provisions offering relief to many employees needing time away from work for reasons related to COVID-19:

1. **Emergency Paid Sick Leave Act (EPSLA).** The EPSLA covers private employers with fewer than 500 employees and all government employers and provides 80 hours of paid sick leave for full-time employees for specified purposes (FFCRA, Division E, §§ 5105 to 5111 ([P.L. 116-127](#))).
2. **Emergency Family and Medical Leave Expansion Act (EFMLEA).** Amends the [Family and Medical Leave Act](#) (FMLA) to provide up to 12 weeks of paid and unpaid protected leave to covered employees with a qualifying need related to COVID-19 (FFRCA, Division C, §§ 3101 to 3106 ([P.L. 116-127](#)); [29 U.S.C. §§ 2612\(a\)\(1\)\(F\)](#) and [2620](#)).

# EPSLA: Six Qualifying Reasons for Leave

Covered employers must provide paid sick leave if an employer has work for the employee and the employee cannot work or telework because the employee:

1. Is under 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 due to COVID-19.
3. The employee has COVID-19 symptoms and seeking a medical diagnosis.
4. The employee is caring for someone subject to a quarantine or isolation order.
5. The employee is caring for a son or daughter where the child's school or place of care has been closed due to COVID-19; or child care provider is unavailable.
6. Other substantially similar condition specified by the Secretary of Health and Human Services in consultation with the Secretary of the Treasury and the Secretary of Labor.

# EFMLEA: One Qualifying Reason for Leave

The EFMLEA amends the FMLA by adding another qualifying reason for leave and requiring pay for most of it. It provides up to 12 weeks of leave (two weeks unpaid and ten weeks paid) for “a qualifying need related to a public health emergency” until December 31, 2020 (FFCRA, Division C, § 3102(b) ([Pub. L. No. 116-127](#)); [29 U.S.C. § 2612\(a\)\(1\)\(F\)](#)).

EFMLEA leave can be used to care for the employee’s son or daughter under 18 years of age if, due to a public health emergency related to COVID-19, the child’s:

1. School or place of care has been closed.
2. Care provider is unavailable.



# Recent Changes Application to “Health Care Providers”

- Originally excluded all employees of employers who provided health care.
- As of September 2020 the DOL narrowed this exception to apply to only those employees who actually provide healthcare services.

# WHO IS A “HEALTH CARE PROVIDER”

## REQUIRES AN INDIVIDUALIZED DETERMINATION

### INCLUDES

- Doctors
- Nurses
- Others who directly provide diagnostic, preventative, treatment
- Employees providing services under the supervision of, or providing direct assistance to, a health care provider
- Employees who are integrated into and necessary to the provision of healthcare services
- Lab technicians
- Performs duties such as: bathing, dressing and feeding

### DOES NOT INCLUDE

- Maintenance Staff
- Human Resources
- Cooks
- Record staff
- Billing clerks

Even if their service could affect health care services.

# Do smaller employers with fewer than 50 employees automatically qualify for a hardship exemption?

No. There is no automatic or across-the-board exemption for smaller employers.

However, employers with fewer than 50 employees may qualify for an exemption if providing leave would “jeopardize the viability of the business as a going concern.”





# If employers have 500 or more employees, can they ignore the FFCRA?

For private employers, technically yes (public employers are covered regardless of size). However, if they conduct any layoffs, furloughs, or employment terminations that cause their employee count to drop below 500, they are immediately covered.

Even if not covered by the FFCRA, the regular FMLA may apply and require that they provide unpaid leave.

State or local leave laws may require leave.

# Can employers not covered by the FFCRA give employees unpaid leave for FFCRA-qualifying reasons?

Yes. Nothing in the law prevents employers from being more generous to their employees than the law requires. However, employers that do so should determine whether:

1. The employee qualifies for unpaid leave under the regular FMLA, in which case:
2. certain requirements and protections apply; and
3. the employer should deduct the unpaid leave from the employee's FMLA 12-month leave entitlement.
4. A state or local paid sick or family and medical leave law requires covers the leave and therefore must be paid.

# **Is an employee with a preexisting condition that puts them at higher risk (such as diabetes) entitled to EPSLA leave if they fear coming to work?**

No, not if that is the only reason they cannot come to work. An employee's generalized fear of exposure to COVID-19, even by high-risk individuals, is not in itself a qualifying reason for FFCRA leave. However, the employee may be entitled to leave if unable to work or telework and either:

1. A government authority has advised individuals with the employee's preexisting condition to shelter in place, stay at home, isolate, or quarantine (Reason 1).
2. A health care provider has advised the employee to self-quarantine because of COVID-19 concerns due to employee's preexisting condition (Reason 2).



# Implications of Back to School

- If a school is closed for a COVID related reason an employee qualifies for leave provided the child needs care and if there is no other suitable person available to care for the child, and the employee has not exhausted all available leave.
- If the school opens on a hybrid basis (part in-person, part remote learning) an employee qualifies for leave for the days when the child is required to do remote learning.
- If a parent opts to enroll a child in online versus in person classes, this is not a covered leave. Unless another reason for leave applies.

# Interaction with Other Leave

**Can an employer require that employees use other accrued paid leave before getting any FFCRA benefits?**

- For **EPSLA** leave, the answer is no. Employers cannot require employees to use any other leave entitlement before (or concurrently with) the EPSLA.
- For **EFMLEA** leave, when an employee needs leave to care for a child because of a school closure or child care unavailability, the employee may also qualify for EPSLA leave. If the employee has not used any EPSLA leave, the employee may elect (but the employer may not require) that the first two weeks of unpaid EFMLEA leave run concurrently with the EPSLA paid leave or other paid leave under the employer's policies.

# WAGE & HOUR ISSUES IN THE COVID-19 ERA

We recently had to close several locations. Do we have to keep paying employees who are not working as a result of those closures?

- Generally no. The FLSA does not require employers to pay nonexempt employees for non-working time.



# WAGE & HOUR ISSUES IN THE COVID-19 ERA

We need our employees to work extra shifts to keep up with the increased demand for our goods and services. Can we make our employees work 12-hour shifts?

OR

Can we modify our employee's job duties due to being short staffed?

Yes, with caveats.

# WAGE & HOUR ISSUES IN THE COVID-19 ERA

**Business is way down and we foresee having to cut hours or pay rates. Can we do that? Yes, generally.**

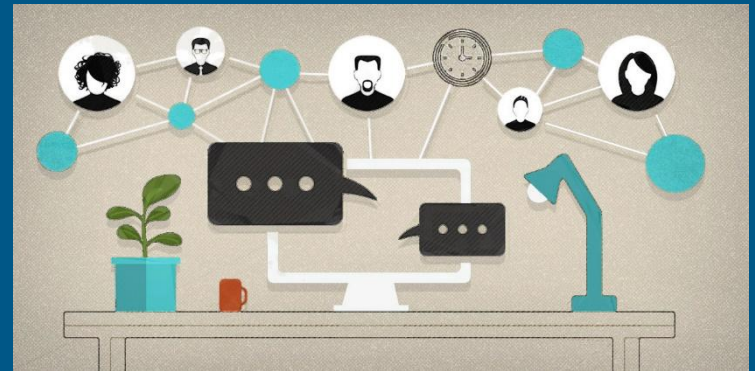
- Pay rate changes should be prospective and state and local law may require advance, written notice of those changes
- Nonexempt employees still must be paid at least the applicable federal, state, or local minimum wage and overtime compensation and exempt employees still must satisfy the minimum compensation level for exemption
- For exempt employees, the pay rate change also should be made on a weekly basis (that is, not changed mid-week)



# WAGE & HOUR ISSUES IN THE COVID-19 ERA

## Tips for the remote workplace:

- Employees work the same schedule unless approved.
- Strengthen policies on timekeeping.
- Train employees on recording time while working from home and monitor compliance.
- Employee must be instructed to record all time accurately and completely. Off-the-clock work will be subject to discipline.
- Have employees certify that the time that they have reported is accurate and reflects all time worked.



# WAGE & HOUR ISSUES IN THE COVID-19 ERA



## Beware of Bonuses

Certain types of bonuses – non-discretionary and hazard pay, attendance bonuses, retention bonuses, and others affect the “regular rate” of pay.

In this case you may have to go back and calculate the overtime wage for the period of the bonus.

# MISTAKES MADE WITH LAYOFFS AND FURLOUGHS

1. Plan.
2. Implement in a non-discriminatory way – think about how you're going to about conducting the layoff and the outcome.
3. The same considerations apply when bringing employees back to work.
4. Consider notice requirements.
5. Consider benefits.

# OSHA

## General Duty Clause



Reporting Requirements – for work related COVID-19 fatalities and hospitalizations

# LITIGATION TRENDS

## CAN EMPLOYEES SUE EMPLOYERS IF THEY CONTRACT COVID-19 AT WORK?

- Probably not. State workers' compensation acts will likely bar those kinds of claims. In most jurisdictions, a claim such as this would require a showing of intent to harm.
- Some actions for wrongful death and failure to notify of employees of COVID-19 cases in the workplace.
- The best way to protect yourself as an employer is to implement and follow policies and procedures that are consistent with CDC and OSHA guidance as well as your state's pandemic directives.
- Be transparent. Inform employees if there is a confirmed COVID-19 case in the workplace. Maintain confidentiality of the individual.



# Arbitration Agreements

- Currently the law says that employer can require employees to sign an arbitration agreement as a condition of employment.
- These are a very effective means to deterring litigation.

# THANK YOU

These are quickly changing areas of the law.

Free Coronavirus Resources:

<https://www.dol.gov/coronavirus>

<https://1.next.westlaw.com/w-024-3138?transitionType=Default&contextData=%28sc.Default%29>

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