

APRIL 2020

# EMPLOYMENT & COVID 19



arizona small business association

## RECENT EMPLOYMENT LAW DEVELOPMENTS RELATED TO THE COVID-19 PANDEMIC

The COVID-19 Pandemic has created challenges for business owners operating in a changing environment of new laws, administrative rules and executive orders. As such, employers should remain on the lookout for changes at the national, state and local level impacting their workforce. Below is a summary discussion of select matters that may be helpful in guiding small business owners through this challenging time. NOTE THAT THE ARIZONA SMALL BUSINESS ASSOCIATION DID NOT PREPARE THIS LEGAL SUMMARY AND TAKES NO RESPONSIBILITY FOR ITS CONTENT.<sup>1</sup> YOU SHOULD ALWAYS CONSULT LEGAL COUNSEL REGARDING THESE MATTERS.

### PAID TIME OFF AND VACATION (“PTO”) OBLIGATIONS

- There are currently no federal or Arizona obligations regarding PTO. Nor are there any new rules regarding PTO. Thus, your obligation to provide PTO remains unchanged.
- The Fair Labor Standards Act (“FLSA”) allows employers to require that employees on unpaid leave to use their PTO while out.

### CURRENT ARIZONA PAID SICK TIME OBLIGATIONS

- Employers’ obligation to pay paid sick time (“PST”) remain the same. In that regard, PST must be paid only if an employee or an employee’s child is actually sick. A.R.S. § 23-373(A) sets forth the permissible uses of PST: <https://www.azleg.gov/viewdocument/?docName=https://www.azleg.gov/ars/23/00373.htm>.
- Under Arizona’s PST laws, earned PST “shall be provided to an employee ... for closure of the employee's place of business by order of a public official due to a public health emergency.” See A.R.S. § 23-373(A)(3).
- Executive Order 2020-09 issued by Governor Ducey ordered, effective as of the close of business on March 20, 2020, the closure of (1) bars; (2) movie theaters; (3) gyms; and (4) restaurants w/onsite dining (except take out ok). Additionally, Executive Order 2020-10, effective 3/21/20, declared that all “non-essential or elective surgeries, including dental surgeries” no longer be performed. “Non-essential elective” is defined as “a surgery that can be delayed without undue risk

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<sup>1</sup> This document was prepared by the law firm Sacks Tierney. If you have any question regarding the information contained in this summary, please direct your inquiry to Patrick VanZanen or Shar Bahmani at Sacks Tierney at 480- 425-2600 or to your own attorney.

to the current or future health of a patient.” These orders remain in place and subject to revision or repeal for two weeks. You can find access to the Governor’s Executive Orders here: [Executive Orders](#).

- Accordingly, if you operate a business that has been shut down by one of these executive orders, regardless of whether you decide to lay-off employees or place them on leave, you are obligated to pay out paid sick leave.
- Employees who are re-hired within 9 months must have their accrued paid sick time reinstated unless it was paid out at the time of separation. *See* A.R.S. § 23-372(D)(5).
- Application consistent with the Federal Government’s paid sick time laws set to take effect on April 1: The obligation to comply with the Arizona paid sick time statute does not change.

### **FEDERAL PAID SICK TIME OBLIGATIONS AS OF APRIL 1**

- The new law becomes effective April 1, 2020.<sup>[1]</sup>
- Generally, the Federal Government passed an emergency initiative entitled the Families First Coronavirus Response Act. Division C of the Act is entitled Emergency Family and Medical Leave Expansion Act. This part of the Act provides paid sick time of up to 80 hours to all employees working for employers with less than 500 employees, as well as reduced-pay FMLA job-protected leave to employees who need time off to care for a child whose school was closed. The use of this PST must be for one of the enumerated reasons under the statute. Employers will receive a dollar-for-dollar tax credit on their tax return.
- Covered Employers. Employers with 500 or fewer employees are covered by the statute. There is no minimum threshold.
- Eligible Employees. All employees are eligible regardless of length of employment with the employer.
- Full-time employees receive up to 80 hours, while part-time employees receive the equivalent of the average number of hours they work in a two-week period. (Sec. 5102(b).)
- Permissible Use. The circumstances giving rise to an employee’s right to PST under the statute are much broader than under existing Arizona law, particularly because of category 1 and 5 below:
  1. Employee is subjected to a federal, state or local quarantine due to COVID-19.

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<sup>[1]</sup> The Act says that the effective date of the Act is 15 days from signature by the President. That would have made the Act effective April 2nd. However, guidance from the DOL states the Act is effective as of April 1. [Department of Labor FFCRA Guidance](#). Therefore, it’s safest to assume the Act is effective April 1.

2. Employee has been advised by a health care provider to self-quarantine.
  3. Employee is experiencing symptoms of COVID-19 and seeking medical diagnosis.
  4. Employee is caring for an individual<sup>[2]</sup> because of 1 or 2 above.
  5. Employee must care for a child whose school or care provider is closed due to COVID.
  6. Employee is experiencing a similar condition as specified by Health and Human Services, DOL or Treasury.
- Maximum Payment Per Employee. For reasons 1-3 above, an employee shall receive the employee's regular rate of pay, capped at \$511 per day and \$5,110 in total. For reasons 4-6, the employee shall receive two-thirds of the employee's regular rate of pay, capped at \$200/day and \$2,000 total. Thus, individual PST would fully compensate employees earning up to about \$130,000 per year for the two-week period.
  - Tax Credit to Employers. The Act appears to incentivize employers to do their best to fight through these rough times and allow employees to remain employed until at least April 2, 2020 in order to have access to PST. To that end, the bill provides a dollar-for-dollar tax credit to employers to cover the costs of paid sick leave and family leave. The credit will be applied to the tax that the company or nonprofit normally pays for each employee's Social Security, which is the 6.2% tax that employers pay on each employee's salary. If the paid sick leave or family leave exceeds the employer's Social Security bill, the U.S. Government will send the employer a check to cover the remaining costs. The Treasury and the Internal Revenue Service will make this determination.
  - Loophole. Companies with less than 50 employees may be exempted from compliance if having to pay these benefits "would jeopardize the viability of the business." This is likely a very difficult standard to meet. The Department can also exempt health care providers like hospitals and nursing homes.
  - Information from the Department of Labor:
    - Fact Sheets
      - [Families First Coronavirus Response Act: Employee Paid Leave Rights](#)
      - [Families First Coronavirus Response Act: Employer Paid Leave Requirements](#)

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<sup>[2]</sup> This is currently broadly written.



- Questions and Answers
  - [Families First Coronavirus Response Act: Questions and Answers](#)
  - [COVID-19 and the Fair Labor Standards Act: Questions and Answers](#)
  - [COVID-19 and the Family and Medical Leave Act: Questions and Answers](#)
- Posters
  - [Employee Rights: Paid Sick Leave and Expanded Family and Medical Leave under The Families First Coronavirus Response Act \(FFCRA\)](#)
  - [Families First Coronavirus Response Act Notice – Frequently Asked Questions](#)
- Field Assistance Bulletin
  - [Field Assistance Bulletin 2020-1: Temporary Non-Enforcement Period Applicable to the Families First Coronavirus Response Act \(FFCRA\)](#)

## **FEDERAL EMERGENCY FMLA EXPANSION ACT**

- Effective Date. April 1.<sup>[3]</sup>
- Covered Employers. Same as the paid sick leave Act.
- Eligible Employees. All employees who have worked a minimum of 30 days with the employer.
- Duration of Leave. The employer must provide up to 12 weeks of paid family leave (the first two weeks are unpaid.)
- Permissible Reason for Use. An eligible employee may take leave if the employee is unable to work due to a need to care for the employee's children whose schools have closed due to COVID-19 and who do not have other childcare options. This is the only permissible for use of this emergency FMLA expansion. Importantly, employees who are able to telework, are not qualified for leave as this means that the employee remains able to work from home while caring for the child.
- Maximum payment.
  - The first 10 days of the leave are unpaid.
  - After ten days, paid family leave must be paid at two-thirds (67%) of the employees' usual pay rate but is capped at \$200 per day and \$10,000 in the aggregate.

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<sup>[3]</sup> The Act says that the effective date of the Act is 15 days from signature by the President. That would have made the Act effective April 2nd. However, guidance from the DOL states the Act is effective as of April 1. [Department of Labor FFCRA Guidance](#). Therefore, it's safest to assume the Act is effective April 1.



- Tax Reimbursement to Employers. Same as the paid sick leave act. Employers receive a dollar-for-dollar tax credit.
- Loopholes. Same as above with respect to the PST. It is anticipated that it will be difficult to get an exemption.

## UNEMPLOYMENT

- Ability to Apply for Unemployment: Governor Ducey issued Executive Order 2020-11, effective immediately, which provides the following:
  - Reasons related to COVID-19 are themselves acceptable reasons for unemployment benefits, including, but not limited to, loss of work or a drastic reduction in work.
  - The requirement that individuals on unemployment continue to seek out new work is waived.
  - The one-week waiting period requirement before employees can receive benefits is waived.
  - Employers receiving unemployment claims due to COVID-19 reasons will not have their charge account increased.
- Availability. Unemployment is available to fully laid off employees and those who have had their hours reduced. An individual shall be deemed “unemployed” with respect to “any week during which the individual performs no services and with respect to which no wages are payable to the individual, *or with respect to any week of less than full-time work* without any fault on the individual's part *if the wages payable to the individual with respect to the week are less than the individual's weekly benefit amount.*” [A.R.S. § 23-621\(A\)](#) (emphasis added).
- There have been no other changes to the unemployment scheme, although, Democratic legislators are seeking to increase the weekly benefit, which is currently \$240.00. This benefit amount looks to be significantly increased by the pending Federal Stimulus Package. One draft of the stimulus package proposes to increase states’ benefit amount by up to \$600 per week in addition to the state’s existing weekly benefit amount. The weekly benefit amount could be lower and is calculated as 4% of the wages paid in the highest quarter of the employee’s base period. The federal government recently set aside \$1 billion as reserve aid to overwhelmed state unemployment systems through the Families First Act which becomes effective April 2, 2020. Thus, legislators may be able to use this to push for a higher weekly benefit. Nonetheless, you should operate under the assumption that the benefit will not be increased for now.





## SHARED WORK UNEMPLOYMENT COMPENSATION PROGRAM

- Purpose. It allows an employer to divide the available work or hours of work among a specified group of affected employees in lieu of a layoff, and it allows the employees to receive a portion of their Unemployment Insurance (UI) benefits while working reduced hours.

For example, if you anticipate that you can keep employed all employees working at 70% capacity, the benefit to the employee through this program is that they can then apply for and receive benefits covering a portion of their 30% reduction in pay.

Another example from the Arizona Department of Economic Security (“DES”) website provides: “A business facing a 20% reduction in production usually lays off one-fifth of its workforce. Under an approved Shared Work plan, a company could employ its total workforce by reducing the workweek to four days. This allows the employer to carry out the 20% reduction without initiating layoffs. Each employee participating in the reduction would receive a partial payment equal to 20% of his or her individual weekly UI benefit amount in addition to income for the four days of work.”

- Requirements. The employer must fill out an application and become approved by the DES as a shared work employer.
- Employee eligibility.
  - Employees must be members of an affected group for whom a plan has been approved by DES. [See A.R.S. § 237-763\(A\).](#)
  - The second applicable eligibility criterion is problematic, requiring that the individual’s work not have been reduced by more than between 10% to 40%. Fortunately, [SB 1694](#),<sup>[4]</sup> which was recently transmitted to the House, proposes to enlarge the range of permissible work reduction from 40% to 80%. Additionally, if this is approved, it will apply retroactively to March 10, 2020.
- Submitting the Plan. The requirements for submitting the plan are set forth in [A.R.S. § 23-762](#).<sup>[5]</sup> Before going through all of these requirements, it is prudent to review [Form Number UB-400](#)<sup>[6]</sup> on the DES website entitled “Shared Work Unemployment Compensation – Information and Application.”
- Timing. Apply now if you intend to use it.
  - Pursuant to statute, DES has up to fifteen days to approve the plan. *See* A.R.S. § 23-762(C).

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<sup>[4]</sup> <https://legiscan.com/AZ/text/SB1694/2020>

<sup>[5]</sup> <https://www.azleg.gov/viewdocument/?docName=https://www.azleg.gov/ars/23/00762.htm>

<sup>[6]</sup> <file:///C:/Users/bahmani/Downloads/UB-400.pdf>



- Per DES' own instructions, the application and list of participants should be submitted ten days in advance of the planned start date.
- Employee Separate Filing Requirement. Once an employer's shared work plan is approved, employees must still separately submit their UI claim on their own and deal with DES on their own to receive reimbursements.





