



UNCOMMONLY INDEPENDENT

COVID-19 questions and answers for U.S. employers:

Leave and unemployment

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Please note: *The spread of the coronavirus (COVID-19) is a quickly changing situation. For the most up-to-date information and resources, visit the Centers for Disease Control and Prevention's National Institute for Occupational Safety and Health (NIOSH). The CDC should be your primary source for emergency preparedness and response to the coronavirus. The below information is designed to guide businesses to known, credible online resources covering the coronavirus and does not constitute legal or medical advice.*

Employers with offices outside the U.S. should review their statutory obligations for reporting suspected cases and paid time off policies with employment counsel to ensure compliance with local and national legislation.

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Leave

General

If public health officials order an employee to take specific action, what should we do?

It is important to note that public health orders are “legally enforceable directives issued under the authority of a relevant federal, state or local entity that, when applied to a person or group, may place restrictions on the activities undertaken by that person or group.” The CDC provides [definitions](#) of specific public health orders and what these mean to a group or individual.

If your employee has been ordered by public health officials to take specific action, you must support the employee in complying with this action. If working remotely is an option for the employee, then allow the employee to do so. Otherwise, follow the CDC’s [guidance for businesses and employers](#). As this could be a stressful and frightening time for the employee, provide them with information about supportive resources, such as an Employee Assistance Program.

Can I make an employee stay home without pay after returning from an international personal vacation?

Employers should really assess the risk by reviewing the State Department's travel alerts and the CDC’s risk assessment levels. Currently, the [CDC recommends](#) delaying international travel until you are fully vaccinated. If you are not fully vaccinated and must travel, the CDC recommends getting tested with a viral test one to three days before your trip and three to five days after international travel, and to stay home for seven days after travel. Even if the employee tests negative, the employee should stay home for the full seven days. If the employee does not get tested, the safest measure is for the employee to stay home for 10 days after travel.

Fully vaccinated people [can travel internationally](#) without getting a COVID-19 test before travel unless it is required by the international destination. They do not need to self-quarantine after returning to the United States, unless required by a state or local jurisdiction. Fully vaccinated people must still have a negative COVID-19 test result before they board a flight to the United States and get a COVID-19 test three to five days after returning from international travel. State guidelines may be more stringent and may include mandatory quarantine provisions.

Under the Occupational Safety and Health Administration's (OSHA) general duty clause, employers have an obligation to protect their workforce from known hazards and taking precautions to contain the spread of communicable diseases could fall under that requirement. OSHA's recent guidance for employers in conjunction with COVID-19 can be found [here](#). Employers could set the expectation that anyone returning from any international travel is held to that standard. An employee traveling for personal reasons may feel they have been singled out due to their national origin (for example, those visiting family in heavily infected areas), which could lead to discrimination claims.

Compliance with CDC guidelines is a legitimate, nondiscriminatory reason for the stay at home requirement. All employees should be held to the same standard to avoid any disparate treatment of those in a protected class. Additionally, care should be taken not to treat an employee with an actual or assumed medical condition different from other employees, even if your intentions are good, or you may run afoul of the Americans with Disabilities Act (ADA).

Employers are encouraged to review and be flexible with current time off practices, to extend the reasons they would typically allow an employee to use such time during the quarantine.

Nonexempt employees need only be paid for actual hours worked, unless the employer has a policy or collective bargaining agreement that is more generous.

Absent a state or local regulation requiring some form of paid leave, before docking PTO banks or pay, we'd encourage employers try to work out a way for employees to work from home. For employees without available paid leave, consider paying regular wages as a temporary emergency measure for a specified time frame. Depending on the jurisdiction and the terms of a vacation, sick or PTO policy, another option may be to allow the employee to use paid leave before it is accrued. The [American Rescue Plan Act of 2021](#) (ARPA) did not mandate leave under the FFCRA. To the extent an employer is voluntarily providing Emergency Paid Sick Leave (EPSL), it would potentially apply in this situation if the employer chose to offer it.

We also recommend providing the employee with advance notice whenever possible of the stipulations in place prior to their travel out of the country.

We are a critical infrastructure business and one of our employees indicated that they were exposed to COVID-19 but have no symptoms. Can the employee return to work so long as they are symptom free?

Ideally, to protect others in the workplace, the employee should not return to work for 14 days following the exposure to COVID-19. Fully vaccinated people with no COVID-like symptoms following an exposure should be tested three to five days following the exposure and wear a mask in public indoor settings for 14 days, or until they receive a negative test result. They should isolate if they test positive. Most fully vaccinated people with no COVID-like symptoms do not need to quarantine or be restricted from work following an exposure if they follow the testing and masking recommendation above. Due to the Delta variant, the CDC recommends and encourages everyone wear a mask in public settings.

If the employee can telework, that would be the best solution. Absent that option, the CDC recognizes that critical infrastructure businesses may permit employees exposed to COVID-19 and are asymptomatic to continue working in limited circumstances when it is necessary to preserve the function of the workplace. This option should be a “last resort” and only used in limited circumstances such as when closing the facility may result in serious harm or danger to public health or safety. The CDC outlines the mitigating measures employers must take [here](#).

FFCRA & ARPA

The American Rescue Plan Act of 2021 (ARPA) contains modified leave provisions for paid sick leave and paid family leave. If my company has fewer than 500 employees, are we required to provide this leave as of April 1, 2021?

The [American Rescue Plan Act of 2021](#) (ARPA) extended leave under the Families First Coronavirus Response Act (FFCRA) but on a voluntary basis. As of April 1, 2021, employers with fewer than 500 employees have the option to voluntarily provide Emergency Paid Sick Leave (EPSL) and/or Emergency Paid Family and Medical Leave (EPFML) for the period April 1, 2021 through Sept. 30, 2021, and continue to take the available tax credits.

Starting April 1, 2021, employees of employers who choose to provide EPSL have a new “bank” of leave. Given the voluntary nature of the FFCRA leave provisions, an employer may choose to provide only the EPSL, only the EPFML, both or neither. Further, absent guidance from the Department of Labor to the contrary, an employer can choose to provide fewer than 10 workdays of EPSL or fewer than 12 weeks of the EPFML. It is

important that employers notify employees regarding what leave and leave amounts it will provide. Employers must still document the reasons for the leave to take the tax credit.

Additionally, the new FFCRA provisions contain a non-discrimination requirement meaning that employers which choose to provide leave benefits must provide the same leave benefit to all employees and cannot discriminate on any basis including tenure, full-time status and compensation.

The new FFCRA has a few notable changes with respect to the reasons an employee can take EPSL or EPFML. First, the reasons are the same for both types of leave. Further, in addition to the reasons originally identified in the FFCRA, there are three new reasons leave may be taken:

1. Obtaining the COVID-19 vaccination,
2. Recovering from an illness or injury related to the COVID-19 vaccination, and
3. Seeking or awaiting the results of a COVID-19 test or diagnosis because either the employee has been exposed to COVID or the employer requested the test or diagnosis.

Effective July 29, 2021, the IRS [advised](#) that employees can also use emergency leave to accompany a family member to get vaccinated and to care for a family member with vaccine-related symptoms. Note that a family member includes not only immediate family members, but also anyone regularly living in the employee's home *or* whose relationship with the employee creates an expectation that the employee would care for that person. A benefit to providing leave under the new FFCRA is that the wages paid are not a loss given the tax credit so if administered correctly, it should be a wash (short of the costs and effort in administering the leave). The key to receiving the tax credit is ensuring the leave is administered properly. Employers need a clear and consistent plan with no room for arbitrary and potentially discriminatory decisions.

In addition to the FFCRA, employers should ensure that there are no other state or local laws or company policy(ies) which may entitle employees to paid time off. Many states and localities have laws providing for paid time off for the vaccine. President Biden, as well as OSHA, has urged companies to provide paid time off to employees for purposes of obtaining the vaccine.

If we provided FFCRA voluntarily through March 31, 2021, and are providing the EPSL under the new FFCRA provisions starting April 1, 2021, do we have to pay an

employee EPSL for time off work to get the COVID-19 vaccination back in February?

No. First, there are no retroactive payments required under the new FFCRA. It began April 1, 2021. Further, prior to April 1, 2021, time off work to get the COVID-19 vaccination was not covered under the FFCRA. This basis for EPSL and EPFML is new as of April 1.

Do note that some states or localities may have laws requiring retroactive payment for time off for the COVID-19 vaccine. For instance, the California COVID-19 Supplemental Paid Sick Leave Law [requires](#) retroactive payment.

Paid sick leave issues

Can paid sick or family leave laws apply when employees work from home?

Yes. Many states, counties and municipalities have paid sick and family leave laws, and their requirements can vary significantly. If you send an employee home to work, typically the employee will still have protection under the law or ordinance, meaning if the employee – while working remotely – needed time off for the employee’s own illness or to care for a family member, the law would operate just as if the employee had been coming into the office or other workplace. State and local paid leave laws vary considerably, so an employer should ensure it is complying with any such applicable state or local requirements. Employers may need to speak to employment law counsel about these matters.

If an employee has already used all their vacation and sick leave when they contract the coronavirus, are they entitled to further paid time off? If so, what laws apply here?

If an employee has used all paid leave the employer offers or that the law requires, then no, the employee would not be entitled to further paid time off. In some instances, an employer may *choose* to offer employees additional paid sick time to encourage employees who are ill or may be ill to stay home from work.

Keep in mind, an employee may be entitled to unpaid time off under the Family and Medical Leave Act (FMLA) or applicable state law if they qualify as having a serious health condition and are eligible to take leave. Unpaid leave may also be considered a reasonable accommodation under the Americans with Disabilities Act (ADA), which may be determined through the employer’s interactive process with the employee.

What is “long COVID” and how does it impact employees?

Some employees who have had COVID-19 may continue to experience ongoing symptoms for months afterward, known as [Post-Acute COVID-19 Syndrome](#), or long COVID. It has caused a wide variety of limitations for the workforce. Employees may have difficulty working in the same way as before and may be entitled to workplace accommodations under the ADA to perform their job. Recently, the U.S. Departments of Health and Human Services, Justice, Education and Labor provided [information](#) about resources and accommodations relating to long COVID.

For purposes of the FMLA expansion under the FFCRA, when is the 500-employee count conducted?

The Act states the count is conducted at the time the employee requests leave.

If an employer has more than 500 employees, but wants to offer the paid leave, would it qualify for the tax credits?

No.

Can you clarify the employer tax credit? Do we deposit taxes for those wages and claim credit in quarterly return?

No, you hold back (do not submit) the payroll taxes you would have otherwise paid, up to the amount of the credit you are due. If the amount of payroll taxes you hold back is not adequate to cover the amount you are due, the IRS will reimburse you in cash for the difference.

If we just hit 50+ employees, do the same guidelines of FMLA apply for definition of 50 employees based on a certain time frame?

Generally, yes.

In the FFCRA, does “public employers” mean publicly traded?

Public employer means government entity.

If employees are quarantined by public health officials because they’ve been exposed to the coronavirus, will short-term disability normally provide salary continuation? What if they’re quarantined because they’re sick? Different answer?

As it relates to short-term (and even long-term) disability programs, we expect a coronavirus diagnosis of to be treated as any other illness under those policies. However, for those individuals who are quarantined by public health officials but do not

have a diagnosis, the situation is less certain. The answer will likely hinge on the definition of disability under the plan. Employers who self-insure short-term disability have the flexibility to expand coverage to include a quarantine in the absence of a diagnosis, but absences for this reason might just as well be addressed under a paid leave policy.

For individuals who request to stay home or for employers who cease operations and send all employees home out of an abundance of caution, fully insured disability programs likely will not provide coverage. Here too, employers might revisit their paid leave or salary continuation policies and proactively communicate potential scenarios with their employees.

Are we required to inform employees of the guidelines in the new FFCRA?

There is no requirement since the leave under the new FFCRA is voluntary; however, if you choose to provide EPSL or EPFML to employees starting April 1 you should notify them accordingly.

Is pay under the paid leave taxable for the employee?

Yes.

Does the EPSL offset an existing disability policy?

Most disability policies will reduce their benefit by the amount of other compensation paid by the employer.

What if the employee has the capability to telecommute, but the employer will not allow them to do so because day care is now closed, and the children are at home? Is the employee still eligible for the EPFML benefit?

As of April 1, 2021, an employer is not required to provide leave under the Emergency Paid Family Medical Leave Expansion Act. An employer covered by this provision may choose to provide such leave to employees and qualify for the tax credit. Other state or local paid leave laws may require pay in this situation. The employer should exercise caution to ensure its telecommuting policy is applied uniformly to similarly situated employees.

For employees who work from home and are not eligible for emergency FMLA, are they also ineligible for emergency paid sick leave?

Yes, they are ineligible.

If an employee is working from home and then gets sick, do we need to pay them as part of this? What if they can continue working?

Employers are not required to provide paid leave under the new FFCRA. An employer which chooses to do so will qualify for the tax credits. An employee who can continue working from home while ill, such as someone who is asymptomatic, is not entitled to the paid leave.

Does the new FFCRA apply to nonprofits?

Yes.

Is there guidance on how we can confirm that someone is sick, taking care of someone who is sick or homeschooling? What can we do, as an employer, more than simply taking their word?

To the extent an employer chooses to extend the leave afforded by the new FFCRA and take advantage of the tax credit extension, employers can require that employees submit documentation to their employer prior to taking FFCRA leave or as soon as practical. The Department of Labor previously issued guidance on the acceptable documentation an employee can provide to suffice an employee's need for leave, for employers subject to the FFCRA. Until the DOL issues guidance for the new FFCRA leave provisions, the past guidance should be followed. Please click to review the [DOL Q&A](#).

Acceptable documentation supporting the absence includes a copy of the quarantine or isolation order or written documentation from a healthcare provider advising self-quarantine. For employees using leave to care for a child, examples include a notice posted on a government, school or day care website, or published in a newspaper, or an email from an employee or official of the school, place of care, or child care provider, noting the closure is COVID-19-related.

USERRA/Military leave

We have employees being called up for National Guard duty. What are our obligations with respect to their benefits and reemployment rights?

A great summary from the Department of Labor is available [here](#).

Additional information can be found [here](#).

Return to work and doctor's notes

We've heard a lot about not requiring a doctor's note to allow an employee to return to work after having COVID-19, because (for example) public health officials are encouraging individuals to avoid seeing a doctor in person unless they are manifesting severe symptoms. Is there a recommendation for a substitute to a doctor's note?

CDC [guidance](#) states that employers should not require sick employees to provide a doctor's note to validate their illness, qualify for sick leave, or to return to work. Your jurisdiction may have a state or local paid sick leave law that has additional guidance on the topic.

Employers should actively encourage all employees who have symptoms of COVID-19 to notify their supervisor and stay home. Isolation can be discontinued 10 days after symptom onset and resolution of fever for at least 24 hours, without the use of fever-reducing medications, and with improvement of other symptoms. For an employee who tested positive for COVID-19 and did not develop other symptoms, isolation can be discontinued 10 days after the date of their first positive COVID-19 test.

For anyone with COVID-like symptoms, we recommend using telehealth visits to consult with a healthcare provider.

When an employee was a confirmed or suspected coronavirus case and has been in home isolation, is there guidance related to symptoms for letting that employee return to the workplace?

Current CDC guidance provides that persons who tested positive for COVID-19 or persons who think they had COVID-19 based on symptoms, can return to work if the following three criteria are met:

- 10 days after symptoms first appeared, and
- 24 hours with no fever without the use of fever-reducing medications, and
- Other symptoms of COVID-19 are improving

It is noteworthy that the loss of taste and smell resulting from COVID-19 may persist for weeks or months after recovery and need not delay the end of isolation.

For persons who tested positive for COVID-19 but had no symptoms, they can return to work after 10 days have passed since the positive viral test for COVID-19.

If we require an employee to stay home because of COVID-19 concerns, and the employee does not have any PTO or paid sick leave, do we have to compensate the employee for time away from work?

If the employee feels well enough to work from home, you can allow the employee to do so and compensate the employee just as if he was working in the office. If telework is not an option or if the employee is unable to work, you have the option of providing paid leave under the new FFCRA if you choose to provide such leave to all employees. So long as you provide leave under the new FFCRA to employees in a non-discriminatory manner, you can take advantage of the tax credit for such leave.

State and local jurisdictions have enacted laws that may afford additional leave to your employees. Even if you cannot take advantage of the FFCRA tax credits and are not otherwise required to provide paid leave, you may consider implementing temporary policies to incentivize employees to remain home while ill. One option would be to front-load additional PTO or paid sick leave time. Consult with legal counsel as to whether such additional time would be subject to laws regulating vacation and/or paid sick leave in your jurisdiction.

Unemployment

How are unemployment benefits impacted by the coronavirus?

[DOL announced guidance](#) urging states to review and be flexible with unemployment as it relates to the coronavirus in order to assist individuals affected by the disease.

Generally, unemployment insurance (UI) may require individuals to be *able* and *available for work* and to *actively seek work*, which could be problematic during a pandemic given the current recommendations of reduced travel and social distancing.

States have significant flexibility in implementing these requirements, as well as in determining the type of work that may be suitable given the individual's circumstances. In short, while UI is generally not intended to be used as paid sick leave, an individual may be quarantined or otherwise affected by the coronavirus and still eligible to make an unemployment claim, *depending on state law*.

Each state administers a separate UI program, but all states follow the same guidelines established by federal law. Updated guidance on Federal Pandemic Unemployment Compensation and Mixed Earner Unemployment Compensation can be found [here](#).

For more information regarding rules in your state, [contact your state's UI program](#). [You can also view Lockton's grid of unemployment compensation and state temporary disability program responses to the coronavirus here.](#)