



FAQ ON COVID-19 FOR LOUISIANA RESTAURANT ASSOCIATION MEMBERS

(as of March 30, 2020)

On March 18, 2020, President Trump signed the “Families First Coronavirus Response Act.”

This emergency law takes effect on April 1, 2020 and will expire on December 31, 2020. The following are frequently asked questions that the Firm is receiving from restaurant and hospitality clients. For an in-depth discussion of many of these issues, you can access the Firm’s “Comprehensive and Updated FAQs for Employers on the COVID-19 Coronavirus” found here: <https://www.fisherphillips.com/resources-alerts-comprehensive-faqs-for-employers-on-the-covid>. **These FAQs are updated as of March 30, 2020.**

Q. Who is a “covered employer” under the federal emergency law?

A. All private employers with “fewer than 500 employees” are covered under the emergency law. For most LRA members, this is an easy analysis. For larger restaurant and hospitality groups with multiple locations, whether you are a covered employer depends on a variety of factors under what are referred to as the “integrated” and “joint employer” tests. If you operate multiple locations, contact your Fisher Phillips attorney to discuss whether you are a covered employer under the emergency law.

Q. What does the emergency law require me to do with respect to employees?

A. The primary impact is the requirement to pay employees for “emergency paid sick leave” (“EPSL”) up to 80 hours at the employee’s regular rate or weekly salary and for 12 weeks of “emergency family and medical leave” (“EFML”) at 2/3 of the employee’s regular rate or weekly salary. Accordingly, there are two “buckets” of paid leave and they have to be read and administered in conjunction.

Q. How does an employee qualify for EPSL?

A. Any employee, regardless of the amount of time the employee has worked, qualifies for EPSL if one or more of the following conditions are met: 1) the employee is subject to a federal, state or local quarantine or isolation order; 2) the employee has been advised by a health care provider to self-quarantine; 3) the employee is experiencing symptoms of the virus and is seeking a medical diagnosis; 4) the employee is caring for an individual who is subject to an order of self-quarantine or who has been advised by a health care provider to self-quarantine; 5) the employee is caring for a son or daughter if school or child care is closed or unavailable; 6) the employee is experiencing “any other substantially similar condition” specified by the Department of Health and Human Services.

Q. What is the rate of pay for EPSL?

A. For reasons 1-3 above, the rate of pay is the higher of the employee's regular rate of pay, the federal minimum wage, or the local minimum wage. For reasons 4-6 above, the rate of pay is 2/3 of the higher of the employee's regular rate of pay, the federal minimum wage, or local minimum wage.

Q. Are there caps on EPSL?

A. Yes. For reasons 1-3 above, the cap is \$511 per day and \$5,110 in the aggregate per employee. For reasons 4-6, the cap is \$200 per day or \$2,000 in the aggregate per employee.

Q. Are all employees eligible for the full 80 hours of EPSL leave, assuming they qualify?

A. No. Full-time employees who qualify are paid for 80 hours. Part-time or "irregularly" scheduled employees will be paid based on the average number of hours the employee worked during the last six months. If the part-time or irregularly scheduled employee has worked less than six months, the number of hours of paid sick leave is the reasonable expectation of the number of hours for which the employee was hired to work.

Q. How does EPSL interact with other paid sick leave I provide to employees?

A. EPSL is in addition to other paid sick leave you provide. You may not require an employee to use other paid sick leave or paid time off prior to using EPSL. Nor can you require an employee to find someone to cover their shift in order to take paid sick leave. However, EPSL will not carry over to 2021.

Q. Does the emergency family and medical leave law supplant the traditional Family and Medical Leave Act?

A. No. The emergency family and medical leave law is in addition to your obligations under the traditional Family and Medical Leave Act. However, an employee would not be entitled to take 12 weeks of EFML and 12 weeks of traditional FMLA.

Q. How does an employee qualify for emergency family and medical leave (EFML)?

A. EFML applies to employees who have been employed for at least 30 days. An employee is entitled to 12 weeks of job protected leave only if the employee is unable to work (or telework) due to the need for leave to care for a son or daughter under 18 years of age if the school or place of care has been closed, or the child care provider is unavailable, due to the public health emergency as declared by a federal, state, or local authority. A "son or daughter" is the employee's own child, which includes a biological, adopted, or foster child, a stepchild, a legal ward, or a child for whom the employee has standing in loco parentis – someone with day-to-day responsibilities to care for or financially support a child. Under the FFCRA a "son or daughter" is also an adult son or daughter (i.e., one who is 18 years of age or older), who (1) has a mental or physical disability, and (2) is incapable of self-care because of that disability.

Q. What documents should an employee provide to me if he or she requests either EPSL or EFML?

A. You can require an employee to provide documentation in support of the paid leave that is requested, as specified in applicable IRS forms, instructions, and information. For EFML, you can require the employee to provide additional information in support when the leave is requested to care for a child whose school or place of care is closed, or child care provider is unavailable, due to COVID-19-related reasons. For example, this may include a notice of closure or unavailability from the child's school, place of care, or child care provider, including a notice that may have been posted on a government, school, or day care website, published in a newspaper, or emailed from an employee or official of the school, place of care, or child care provider.

If an employee requests leave but is unable to provide, at that time, certification from a health care provider of the need for leave, then document your conversations with the employee (including the date the conversation occurred and substance of the conversation) and maintain these notes for future use.

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

A. Employers that provide EPSL and EFML are eligible for reimbursement of the costs of that leave through refundable tax credits. If you intend to claim a tax credit for your payment of the wages, you should retain appropriate 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. You are not required to provide leave if materials sufficient to support the applicable tax credit have not been provided.

If an employee takes EFML to care for his or her child whose school or place of care is closed, or child care provider is unavailable, you may also require your employee to provide you with any additional documentation in support of such leave, to the extent permitted under the certification rules for conventional FMLA leave requests. For example, this could include a notice that has been 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.

Q. Are there limits or a cap on EFML?

A. Yes. The first 10 days of EFML is unpaid. However, an employee may elect to substitute any accrued paid leave such as vacation or other sick leave to cover some or all of the 10 day unpaid period. After the first 10 days, an employee is compensated at 2/3 of their regular rate of pay. The total cap is \$200 per day or \$10,000 in the aggregate per employee. Also, if an employee qualifies for 80 hours of EPSL, this time may be used as the first 10 days of unpaid leave under the EFML.

Q. If I have fewer than 50 employees, can I completely exempt my business from both EPSL and EFML?

A. No. There is an exemption for a business with fewer than 50 employees, but the only way to invoke the exemption is if an employee seeks EPSL or EFML for child-care, which is qualifying reason #5 under the EPSL. If your employee has any of the other qualifying reasons for EPSL, the employee can request paid leave.

You do not have to grant either EPSL or EFML (for the child-care reason only) to an employee if doing so would jeopardize the viability of your business as a going concern. You may claim this exemption if an authorized officer of your business has determined that: 1) the provision of EPSL or EFML would result in the business's expenses and financial obligations exceeding available business revenues and cause your business to cease operating at a minimal capacity; 2) the absence of the employee or employees requesting EPSL or EFML would entail a substantial risk to the financial health or operational capabilities of the business because of their specialized skills, knowledge of the business, or responsibilities; or 3) there are not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services provided by the employee or employees requesting EPSL or EFML, and these labor or services are needed for the small business to operate at a minimal capacity. You do not have to apply for an exemption with the Secretary of Labor.

Q. How do I determine the "regular rate" for an employee who is eligible for emergency paid leave?

A. For non-tipped, hourly paid employees, it is their regular hourly rate. For salaried, exempt employees, it is their weekly salary. For tipped employees, it is the full minimum wage of \$7.25 an hour. Overtime is included in the "regular rate" computation. To determine the average weekly "regular rate," perform a six-month "look back" and then pay the average weekly salary or rate that you paid the employee over the last six months.

Q. If I have salaried managers cooking, cleaning, and performing other non-management duties, are they exempt from overtime?

A. Probably not. A salaried, exempt employee must be paid a weekly salary of at least \$684 per week and also meet the "duties" test for an exempt employee under the FLSA. If you have managers performing non-managerial tasks for a majority of their work time during this public health emergency and temporary shutdown, they will likely be entitled to overtime compensation if they work over 40 hours in a workweek.

Q. If I want to pay my employees more than they are entitled to receive for EPSL or EFML, can I do so and claim a tax credit for the entire amount paid to them?

A. You can pay an employee in excess of FFCRA requirements. But you cannot claim, and will not receive tax credit for, those amounts in excess of the FFCRA's statutory limits.

Q. Do I have to restore an employee to his or her position after the emergency family and medical leave?

A. Generally, yes. For employers with 25 or more employees, you have the same obligation as under traditional FMLA to return any employee who has taken emergency FMLA to the same or equivalent position upon returning to work. Employers with fewer than 25 employees may be excluded from this requirement if the employee's position no longer exists due to an economic downturn or other circumstances caused by the public health emergency. This exclusion is subject to the employer making reasonable attempts to return the employee to an equivalent position and requires an employer to make efforts to return the employee to work for up to a year following the employee's leave.

Q. How do I know if an employee needs to take leave?

A. Employees should make a specific request to take emergency paid leave. If the need for leave is foreseeable, the employee should provide you as much notice as is practicable.

Q. Do I have to post notices in the workplace about the emergency paid leave?

A. Yes. The U.S. Department of Labor issued a poster on March 25, 2020 and the LRA has sent this poster to all LRA members. You should place the poster in a conspicuous place at your business. If you have employees who are currently not reporting to work because of lack of work, you should text or email the notice to those employees.

Q. Can an employee refuse to report to work even if the employee is not eligible for paid leave under the emergency law?

A. Generally, no. As long as your business remains open, you have the right to expect that employees who do not need to take emergency leave or who are not eligible to take emergency leave will continue to report to work. However, please note that OSHA and NLRA considerations may apply in this scenario.

Q. Can I allow employees to work from home (telework)?

A. Yes, where this is possible. If hourly paid employees are allowed to work from home, the employees must accurately record their work time. All employees who are allowed to work remotely should be informed that regular workplace policies apply to them. If an employee's job duties are such that they cannot work from home and perform their duties, you are under no obligation to allow the employee to work from home. Call your Fisher Phillips attorney to determine whether an employee should sign an "Emergency Remote Work" policy.

Q. Can an employee request to take EPSL or EFML intermittently rather than in full day blocks?

A. Generally, no. Unless an employee can telework, EPSL for qualifying reasons related to COVID-19 must be taken in full day increments (for qualifying reasons ##1, 2, 3, 4, and 6). For qualifying reason #5, the child-care reason, intermittent leave may be taken but only if the employer consents to the arrangement. For example, if an employee needs to take paid leave related to child care on Monday, Wednesday, and Friday, but can work on Tuesday and Thursday, the employer may allow this arrangement. The Department of Labor encourages employers and employees to collaborate to achieve flexibility and meet mutual needs, and the DOL will be supportive of voluntary arrangements that combine telework and intermittent leave for child care.

Q. How do I get reimbursed for this paid leave from the federal government?

A. Employers are entitled to a refundable tax credit against the employer portion of Social Security taxes equal to 100% of the qualified sick leave wages paid for each calendar quarter. Only covered employers with fewer than 500 employees are eligible for this tax credit. The IRS will be issuing rules and regulations as to the procedure for applying for the tax credit. Also, under the recently passed CARES Act, you may be entitled to federally backed loans in order to cover payroll and other expenses for a certain period of time. If you desire to apply for a loan under the CARES Act and need guidance, contact your Fisher Phillips attorney for additional information.

Q. Do I have to allow an employee to wear a mask or gloves while at work?

A. Generally, this is not required. As a practical matter, employers should consider allowing this type of personal protective equipment if doing so will not unduly interfere with your business operations.

Q. What should I do if an employee informs me that he/she is sick but they are not sure if they have the virus?

A. First, you should instruct the employee to stay home, consult with a healthcare professional when they can do so, and stay in communication with the restaurant. Second, to the extent the employee routinely works in close proximity to other employees, you can inform the other employees that someone (without specifically identifying the employee) is at home sick and the other employees may take off from work if they feel the need to do so.

Q. Can I take the temperature of an employee prior to allowing the employee to work at the facility?

A. Generally, yes, at least for now. We advise that employees should be presented with a notification form that contains a waiver. If you operate in a state other than Louisiana, that state's law will also apply and may restrict your ability to take temperature. Contact your Fisher Phillips attorney if you want to take the temperature of employees.

Q. What should I do if an employee reports that he/she has the virus or if he/she suspects he/she has the virus and is under a quarantine order?

A. This scenario elevates the notification requirements for other employees in the workplace. For other employees who routinely work in close proximity with the quarantined employee or who came into close contact with the employee during the previous 14 days, those employees should be informed and they should be instructed to stay at home for at least 14 days and consult with a healthcare provider when they can. For other employees who did not work in close proximity with the quarantined employee, those employees should likewise be informed but there is no requirement that those employees stay home unless they too are feeling sick. The quarantined employee's workspace should be shut down and disinfected or decontaminated, preferably with the use of an outside service.

Q. If an employee does not need to take paid leave, can I offer an incentive to an employee to come to work so I can stay open?

A. Probably yes. But, if an employee qualifies for EPSL or EFML, we do not advise offering an incentive for the employee to remain working in lieu of taking the paid leave that the employee is entitled to take. This could be viewed as coercion or interference with an employee's legal rights.

Q. What is the difference between a "furlough" and a "lay-off"?

A. A furlough means that an employee or employees will be instructed to work fewer hours during the workweek or take a certain amount of unpaid time off from work, such as two days a week. The thought is that all employees share the burden of an economic downturn. A lay-off is a temporary but complete separation from work with the expectation that the employee may return to work at a later time. A temporary lay-off can turn into a permanent lay-off based on business conditions.

Q. Can I furlough employees during this public health emergency?

A. Generally, yes. However, EPSL and EFML may still apply to these employees to some extent, particularly if the furlough occurs after April 1, 2020 and an employee had qualified for paid leave and was taking leave at the time of the furlough. In this case, the employee is only entitled to the paid leave up to the date the furlough occurs. Also, other laws will apply, such as Title VII and the Fair Labor Standards Act. Before you furlough employees, we recommend that you first consult with your Fisher Phillips attorney.

Q. Can I lay-off employees during this public health emergency?

A. Generally, yes. However, EPSL and EFML may still apply to these employees to some extent, particularly if the lay-off occurs after April 1, 2020 and an employee had qualified for paid leave and was taking paid leave at the time of the lay-off. In this case, the employee is only entitled to the paid leave up to the date the lay-off occurs. Also, other laws will apply, such as Title VII of the Civil Rights Act. Before you lay-off employees, we recommend that you first consult with your Fisher Phillips attorney.

Q. If an employee is laid off, what happens to their health insurance benefits?

A. The answer depends on the specific language of your health insurance plan. In general, coverage under a health insurance plan remains in place until the end of the month but it may be extended. Consult with your insurance broker to determine how long health insurance benefits can remain in effect if an employee is laid off from work.

Q. Do I have to provide a COBRA notice to an employee who is laid off?

A. Yes, a lay-off from work is a qualifying event under COBRA.

Q. If an employee is laid off or has reduced work hours, can the employee apply for unemployment compensation?

A. Yes. Unemployment compensation is governed by state law. Under the FFCRA and the recently passed CARES Act, Louisiana has relaxed certain rules and regulations so that affected workers will be eligible for unemployment benefits without having a waiting period. At this time, it is unclear if an employee will be eligible for unemployment benefits if your business has work available for the employee but the employee simply refuses to report to work.

Q. Do I have to comply with WARN notice obligations if I have a mass lay-off or business closure?

A. Probably not. The federal WARN law contains exceptions for unforeseeable business exigencies. However, if you are contemplating laying off large numbers of employees or closing down a work site completely during this public health emergency, consult with your Fisher Phillips attorney to determine whether the federal WARN law applies.

Q. If I elect to close completely after April 1, 2020, do I have to pay my employees for any length of time beyond the time of the closure of my business?

A. No. If employees have accrued paid time off, you will have to pay the employee for their accrued paid time off under Louisiana law. Also, if an employee had previously requested and was eligible for EPSL or EFML, then you will be obligated to comply with the emergency law for the period of time up to the closure of the business.

Q. Do I have to pay employees who are temporarily in lay-off status because the state government mandated a closure of the dine-in option at my restaurant?

A. Not likely. Recently updated information from the Department of Labor suggests that a government mandated closure or a "Stay at Home" order for non-essential employees will not trigger a qualifying reason for paid leave under the FFCRA. Keep in mind, however, that the DOL has not yet issued formal regulations and the answer to this question is subject to change.

Q. Will my business disruption insurance apply to protect me?

A. The answer depends on the specific language of your insurance policy or policies. This question should be directed to your insurance broker. Our collective experience is that most business disruption insurance policies contain exclusions for public health emergencies.

**THE FOLLOWING ARE QUESTIONS THAT WERE SUBMITTED
DURING THE LRA WEBINAR ON MARCH 25, 2020**

Q I have 25 employees. I heard that if an employee gets 2/3 of their pay, I will have to pay the difference to make them whole from their PTO, Sick, or Vacation ... is that true?

A. No. You are not required to allow an employee to use existing paid leave to supplement the amount your employee receives from EPSL or EFML. If, however, you elect to allow your employee to use their accrued PTO to supplement the paid leave, you will not be able to claim, and will not receive tax credit, for such supplemental amounts.

Q. Are employees who are paid via commission solely treated in the same manner as tipped employees? Would their leave pay be based on minimum wage?

A. No, commissioned employees are not treated the same as tipped employees. To determine the regular rate of a commissioned employee, look back over the last six months of the employee's employment and determine the average weekly pay during the six-month look back period. The average is the regular rate you should pay for the paid leave.

Q. What is our liability or exposure to delivery employees that we have that go into the field and may get sick with COVID-19 as a result of that work?

A. If an employee claims that he or she contracted COVID-19 at work or because of work, that claim should be immediately reported to your workers' compensation carrier for handling. Obviously, if an employee believes that he or she was exposed to COVID-19 or is experiencing symptoms related to COVID-19, that employee should stay home and consult with a health care provider as soon as possible.

Q. If an "essential business" chooses to close because they don't want to subject their employees to the risk of exposure, does that mean that their employees are not eligible for the benefits?

A. If you close your business and lay-off your employees prior to April 1, 2020, the employees will not be eligible for paid leave benefits under the FFCRA but they will be eligible to apply for unemployment. If employees remain in active status but the employees have no work to perform (furlough status), those employees will not be eligible for paid leave benefits under the FFCRA. Employees who remain active, but who cannot report to work because there is no work to perform, will be able to apply for unemployment benefits.

Q. Can you please provide more details about condition #1 as it relates to restaurants? For restaurants that are continuing to operate as To Go & Delivery only & since our state is under a "Stay at Home" mandate, does everyone in our workforce qualify for emergency paid sick leave under condition #1? Or, does our designation as an essential business, exempt us from condition #1? If operating restaurants are not exempt from condition #1, what is our wiggle room to require team members to work if everyone has the option to request emergency paid sick leave on April 1?

A. In FAQs recently published by the U.S. Department of Labor, the DOL clarified that employees who are in a state or locality that has implemented a "Stay at Home" order will not qualify under #1 if the employee is deemed "non-essential" and cannot report to work because of the "Stay at Home" order. This is subject to change when the DOL issues formal regulations.

Q. What are requirements for any new hires after April 1? Are the rules separate for brand new hires versus re-hires of existing team members?

A. New hires are basically treated the same with one exception as noted below. For example, a new hire who is hired on April 4 can request EPSL on April 5, as long as the new hire has a qualifying condition. For EFML, however, the new hire would not be able to request that expanded leave until the new hire has worked at least 30 days. And, keep in mind that the only qualifying reason for EFML is the child-care reason.

Q. Should restaurants go onto LWC website and submit Form 77 for each employee that is no longer working? Most have already applied for unemployment but restaurants have not submitted officially because they plan to take them back when work comes back.

A. If you have temporarily laid off an employee, then the answer is "yes," you should complete the LWC form. If you have not laid off the employee, and the employee remains in active status but with no work available, then wait until you receive information or a questionnaire from the LWC.

Q. Will there be implications for employers that may have already needed to lay off employees before the April 1st date?

A. No. Employers who laid off employees prior to April 1, 2020 are not subject to the FFCRA with respect to those employees. Keep in mind the FFCRA does not expire until December 31, 2020, so it is possible that you can re-hire an employee and then that employee qualifies for EPSL after the employee is rehired. That re-hired employee will also be able to count prior service with the employer for EFML purposes.

Q. Is there any reason or anything I might do that would disqualify me for the reimbursement?

A. There is no question that paying employees more than the statutory caps for EPSL and EFML will disqualify you from seeking reimbursement for the amounts that you pay over the statutory cap. We recommend that you direct this question to your tax attorney or CPA for further clarification.