



## **FAQ ON COVID-19 FOR LOUISIANA RESTAURANT ASSOCIATION MEMBERS**

*(as of March 20, 2020)*

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

This emergency law takes effect on April 2, 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>. Call your Fisher Phillips attorney if you need clarification on any topic discussed in this FAQ.

### **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” up to 80 hours at the employee’s regular rate or weekly salary and for 12 weeks of “emergency family and medical leave” 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 emergency paid sick leave?**

**A.** Any employee, regardless of the amount of time the employee has worked, qualifies for this leave if one 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 the emergency paid sick leave?**

**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 emergency paid sick leave?**

**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 emergency paid sick 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 emergency paid sick leave interact with other paid sick leave I provide to employees?**

**A.** The emergency paid sick leave is in addition to other paid sick leave you provide. You may not require an employee to use other paid sick leave or PTO prior to using the emergency paid sick leave. Nor can you require an employee to find someone to cover their shift in order to take paid sick leave. However, emergency paid sick leave 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 emergency FMLA and 12 weeks of traditional FMLA.

**Q. How does an employee qualify for emergency family and medical leave?**

**A.** This leave 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.

**Q. Are there limits or a cap on emergency family and medical leave?**

**A.** Yes. The first 10 days of emergency family and medical leave 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.

**Q. Can I apply for an exemption so I do not have to pay employees for either emergency paid sick leave or emergency family and medical leave?**

**A.** Yes, but only if you have fewer than 50 employees. An exemption will have to be requested from the Secretary of Labor of the U.S. Department of Labor. At this time, there is no official guidance regarding what documents or other information will need to be submitted in order to request an exemption.

**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.

**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. 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 will issue model notices to be posted in the workplace.

**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?**

**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. 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.

**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. 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 the paid emergency sick leave or emergency family and medical leave, 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, the emergency paid sick leave and emergency family and medical leave may still apply to these employees. 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, the emergency paid sick leave and emergency family and medical leave may still apply to these employees, particularly if an employee requested emergency paid leave prior to the announcement of the lay-off. 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. The best course of action is to 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, can the employee apply for unemployment compensation?**

**A.** Yes. Unemployment compensation is governed by state law. Under this emergency law, Louisiana has relaxed certain rules and regulations so that affected workers will be eligible for unemployment benefits without having a waiting period.

**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, do I have to pay my employees for any length of time beyond the time of the lay-off?**

**A.** No. If employees have accrued paid time, you will have to pay the employee for their accrued paid time off. Also, if an employee had previously requested emergency paid sick leave or emergency family and medical leave, then you may be obligated to comply with the emergency law for a certain period of time.

**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.** Unknown at this time. The emergency law does not address this specific scenario. A "state mandated closure" of the restaurant dine-in option is not currently listed as a qualifying reason for the emergency paid sick leave or the emergency family and medical leave. We are monitoring this issue and will supplement this response if clarification is issued or the law is amended.

**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.