



535 Grand Avenue, Grand Junction, CO 81501
PO Box 1449, Grand Junction, CO 81502
970-243-7789 ♦ www.lighthousehrs.net

Compliance Connection COVID-19 Special Edition March 2020

This truly is a time in our country of unprecedented change. It seems the quicker we collect information regarding COVID-19 and the impacts on employers and the workplace, the quicker the information changes.

We realize you must be inundated by information flowing from various resources. However, we will continue to try to keep you as informed as possible by gathering numerous resources in one place.

Please keep in mind that this information is as current as we can possibly offer.

Families First Coronavirus Response Act

The Families First Coronavirus Response Act was signed into law on March 18, 2020.

In the coming days and weeks, federal regulatory agencies, including the Department of Labor (DOL) and Health and Human Services (HHS), will provide guidance on how to execute or implement the new requirements. In the meantime, employers and advisors must rely on a good faith interpretation of the act's text.

Summary

Employees will be eligible for two weeks of sick leave (full pay for self, 2/3 pay for family care) and use of 12 weeks of Family and Medical Leave Act (FMLA) leave (10 days unpaid and then up to 10 weeks at 2/3 pay) for several circumstances related to COVID-19.

Effective Date of Law

- The FMLA and Paid Sick Leave sections discussed below will go into effect on April 2, 2020 and expire December 31, 2020.
- It appears there is no retroactive application.

Key Elements for Employers

- FMLA expansion
- Paid sick leave
- Payroll tax credit
- Group health plan benefit mandate

Emergency FMLA Expansion

- **Covered Employers:** Employers with fewer than 500 employees are covered.
- **Covered Employees:** Any employee who has been employed for at least 30 calendar days, though employers can choose to exclude employees who are health care providers or emergency responders.
- **Covered Leave Purposes:** To care for a child under 18 of an employee if the child's school or place of care has been closed, or the childcare provider is unavailable, due to a public health emergency, defined as an emergency with respect to the coronavirus declared by a federal, state, or local authority.
- **Duration:** Up to 12 weeks of job-protected leave.
- **Compensation:**
 - No pay for first 10 days of leave (employee can, but is not required, to use any other leave available to them, including the emergency sick leave discussed below). Employers may not require employees to use paid leave during this period.
 - After 10 days, employers must pay two thirds of the employee's regular rate of pay for the number of hours they would normally be scheduled to work, capped at \$200/day and \$10,000 total.
- **Reinstatement to Position after Leave:**
- The same reinstatement provisions apply as apply under the traditional FMLA. However, restoration to position does not apply to employers with **fewer than 25 employees** if certain conditions are met:
 - The job no longer exists because of changes affecting employment caused by an economic downturn or other operating conditions that affect employment caused by a public health emergency, subject to the following conditions:
 - The employer makes reasonable efforts to return the employee to an equivalent position, and
 - The employer makes efforts to contact a displaced employee if anything comes up within a year of when they would have returned to work.

Note: Employers covered here but not by the rest of the FMLA (i.e. those with fewer than 50 employees) are not subject to civil action by employees (only action by the Secretary of Labor). The act reserves the right for the Secretary to exclude certain care providers and first responders from the list of "eligible employees" and exempt small businesses with fewer than 50 employees if business viability was jeopardized.

Emergency Paid Sick Leave

- **Covered Employers:** Employers with fewer than 500 employees.
- **Covered Employees:** All employees (no matter how long they have been employed). Employees who are health care providers or emergency responders may be excluded.
- **Covered Leave Purposes:**
 1. When quarantined or isolated subject to federal, state, or local quarantine/isolation order;
 2. When advised by a health care provider to self-quarantine (due to concerns related to COVID-19);
 3. When experiencing symptoms of COVID-19 and seeking a medical diagnosis;
 4. When caring for an individual doing #1 or #2 (2/3 pay);
 5. When caring for a child whose school or place of care is closed due to COVID-19 (2/3 pay); or
 6. When the employee is experiencing any other substantially similar condition (2/3 pay).

Duration of Leave:

- Full time employees are entitled to 80 hours of paid sick leave.

- Part time employees are entitled to sick leave equal to the amount of hours worked on average over a typical two-week period.

Rate of Pay:

- Sick leave must be paid at the employee's regular rate of pay for leave used for the employee's own illness, quarantine, or care.
- Sick leave must be paid at two-thirds of the employee's regular rate if taken to care for a family member or to care for a child whose school has closed, or if the employee's childcare provider is unavailable due to the coronavirus.
- Pay is capped at \$511/day and \$5,110 total for reasons 1, 2, and 3 described above.
- Pay is capped at \$200/day and \$2,000 total for reasons 4, 5, and 6 described above.

Interaction with Other Employer-Provided Paid Sick Leave and other Paid Leave:

- This act does not pre-empt existing state and local paid sick leave requirements.
- Employers cannot require employees to use other leave first.
- Sick leave provided for under the act does not carry over from year to year, and the requirements expire December 31, 2020.

Notice Requirements:

- Employers must post a model notice, which will be provided by the federal government.

Note: The act reserves the right for the Secretary to exclude certain care providers and first responders from the list of "eligible employees" and exempt small businesses with fewer than 50 employees if business viability was jeopardized.

Payroll Tax Credit

- Applies to both the emergency FMLA expansion and the emergency sick leave.
- Dollar for dollar credit for sick leave and paid FMLA wages against the employer portion of Social Security taxes.
- Refund is possible for amounts that exceed what is available as a credit.
- Limits on what can be claimed mirror the caps for what must be paid.

Health Plan Benefit Mandate

- The act requires all insured and self-funded medical plans, including grandfathered plans, to cover diagnostic testing-related services for COVID-19 at 100 percent without any deductibles or co-pays.
- Examples include services provided by doctors, emergency rooms, and urgent care centers leading up to the decision that testing is needed, along with the actual lab-based testing.
- The mandate does not apply to treatment.

Read [US H.R. 6201](#)

Federal Information and Resources

CDC Materials

In response to the COVID-19 outbreak, the U.S. Centers for Disease Control and Prevention (CDC) has issued:

- [Interim Guidance for Businesses and Employers to Plan and Respond to Coronavirus Disease](#), which provides recommended workplace strategies for employers and guidance on how to

decrease COVID-19 spread, information on how to respond to outbreaks, and additional resources; and

- [Public Health Response to the Coronavirus Disease 2019 Outbreak](#), which provides a chronological timeline and summary of the virus, cases reported in the United States, and the agency's public health response to the illness.

The CDC has also created the following posters for download:

- What you need to know ([English](#), [Spanish](#), [Chinese](#))
- What to do if you are sick ([English](#), [Spanish](#), [Chinese](#))
- Stop the spread of germs ([English](#), [Spanish](#), [Chinese](#))
- Symptoms of coronavirus ([English](#), [Spanish](#))
- [President's Coronavirus Guidance: 15 Days to Slow the Spread](#)
- [Workplace, School and Home Guidance](#)

Keep up to date on CDC guidance for specific industries, latest updates, and resources on the [Coronavirus Disease 2019 \(COVID-19\)](#) main page.

DOL Materials

The U.S. Department of Labor (DOL) has created a [resource page](#) for workers and employers. The DOL's Wage and Hour Division has a [website](#) that explains how the Family and Medical Leave Act applies in cases of COVID-19 and other public health emergencies. [Fact Sheet #70](#) provides answers to frequently asked questions regarding furloughs and other reductions in pay or hours worked.

EEOC Materials

The U.S. Equal Employment Opportunity Commission (EEOC) has created a landing page entitled [What You Should Know About the ADA, the Rehabilitation Act, and COVID-19](#), which provides links to resources and guidance.

HHS Materials

In response to COVID-19, the Office of Civil Rights for the U.S. Department of Health and Human Services (HHS) issued a [bulletin](#) regarding HIPAA Privacy and COVID-19.

OSHA Materials

The U.S. Occupational Safety and Health Administration (OSHA) has created a COVID-19 [website](#) for workers and employers that addresses the disease and provides guidance and other resources for preventing exposure to and infection with the virus.

Topics covered include:

- [Background](#)
- [Hazard Recognition](#)
- [Medical Information](#)
- [Standards](#)
- [Control and Prevention](#)
- [Additional Resources](#)

Small Business Administration Materials

The U.S. Small Business Administration has issued guidance entitled [SBA Disaster Assistance in Response to the Coronavirus](#), explaining how the SBA is offering designated states and territories low-interest federal disaster loans for working capital to small businesses suffering substantial economic injury as a result of the coronavirus (COVID-19). Also see [Coronavirus \(COVID-19\): Small Business Guidance & Loan Resources](#).

Frequently Asked Questions (FAQs)

In addition, here are some additional FAQs for your consideration. Please remember the answers to these questions are based on the date they were submitted. Information may have changed and you are encouraged to seek legal counsel or read updates from the resources provided:

Question (originally requested March 17, 2020):

Can we send employees home if they are symptomatic?

Answer:

Yes. The Centers for Disease Control and Prevention (CDC) has advised employers that employees who appear to have symptoms of COVID-19 (e.g., cough, shortness of breath) should be separated from other employees and sent home immediately. If the employee feels well enough to work, consider whether they can effectively telecommute.

Question (originally requested March 18, 2020):

What should we do if an employee says their symptoms are not related to COVID-19?

Answer:

The Equal Employment Opportunity Commission (EEOC) and the Centers for Disease Control and Prevention (CDC) advise employers to send employees home when they have COVID-19 symptoms (fever, cough, shortness of breath). Employees should not return until they are symptom free for at least 24 hours without symptom-altering medication (e.g., Tylenol, cough suppressants). The **CDC is asking employers not to request a doctor's note** because of the current strain on our healthcare system due to the pandemic.

If an employee claims that their symptoms are attributed to another cause (e.g., allergies, asthma), the most risk-adverse response would be to send employees home when they have COVID-19 symptoms, with pay. We understand that providing paid leave for all employees is not feasible for every business, but paid leave will incentivize employees to be honest and help you keep your workplace safe.

The CDC has a risk assessment tool available (**listed above under Resources**), which might be helpful. We would also note that, based on news reports, some people have tested positive for COVID-19 without any known exposure.

Question (originally requested March 17, 2020):

Can we require or allow certain groups of employees, but not others, to work from home?

Answer:

Yes. Employers may offer different benefits or terms of employment to different groups of employees as long as the distinction is based on nondiscriminatory criteria. For instance, a telecommuting option or requirement can be based on the type of work performed, employee classification (exempt v. nonexempt), or location of the office or the employee. Employers should be able to support the business justification for allowing or requiring certain groups to telecommute.

Question (originally requested March 17, 2020):

Do any leaves apply for missing work due to COVID-19?

Answer:

Whether Family and Medical Leave Act (FMLA) leave or a state family and medical leave or insurance program will apply to a particular case of COVID-19 will be fact-specific. Even if FMLA or state leaves do not apply, though, we would recommend that employers treat leaves related to this illness as job-protected, both for legal reasons and because it's the right thing to do. If you're in a state with a sick leave law, that will apply if the employee is sick, a family member is sick, or (in many states) when an employee is told to stay home by a public health authority.

Question (originally requested March 17, 2020):

If we choose to close temporarily, do we need to pay employees?

Answer:

It depends on the employee's classification.

Nonexempt employees only need to be paid only for actual hours worked. For these employees, you may:

- Pay the employee for the time, even though they did not work;
- Require they take the time off unpaid;
- Require they use any available vacation time or paid time off (PTO); or
- Allow employees to choose between taking an unpaid day or using vacation or PTO.
- All four (4) options are compliant with state and federal law. We generally recommend option four (4) — allowing but not requiring employees to use vacation time or PTO. If your office is required to close by health authorities and your state has a sick leave law, employees may be able to use accrued paid sick leave during the closure.

Exempt employees must be paid their regular workweek salary unless the office is closed for an entire workweek **and they do no work at all from home**. You can, however, require them to use accrued vacation or PTO during a closure if you have a policy that indicates you will do so, or if this has been your past practice. When it comes to accrued vacation or PTO, it is safest to give employees advance notice if there are situations where you will use their accrued hours whether they like it or not.

Question (originally requested March 17, 2020):

What if my employee discloses that their family member or roommate has COVID-19?

Answer:

Our recommendation is to follow guidance from the Centers for Disease Control and Prevention (CDC). Employers should ask employees who live with someone confirmed to have COVID-19 to notify a designated HR representative or their supervisor as soon as possible. The employer and employee should then refer to CDC guidance to assess risk and determine next steps — see Tables 1 and 2 in the CDC's Interim US Guidance for Risk Assessment and Public Health Management (**listed above under Resources**).

Question (originally requested March 17, 2020):

If we close temporarily, will employees be able to file for unemployment insurance?

Answer:

Depending on the length of the closure, employees may be able to file for unemployment insurance. Waiting periods range from 1 – 3 weeks and are determined by state law. Be prepared to respond to requests for verification or information from the state unemployment insurance department if you close for longer than the mandatory waiting period. (Colorado requires a 1 week waiting period.)

Question (originally requested March 17, 2020):

How do I make a telecommuting policy?

Answer:

Although some employers will be comfortable sending everyone home with their laptop and saying “go forth and be productive,” most will want to be a little more specific. A good telecommuting policy will generally address productivity standards, hours of work, how and when employees should be in contact with their manager or subordinates, and office expenses.

For instance, your policy might require that employees are available by phone and messaging app during their regular in-office hours, that they meet all deadlines and maintain client contacts per usual, and that they check in with their manager at the close of each workday to report what they have accomplished. Be sure to let employees know whom to contact if they run into technical difficulties at home.

You’ll also want to specify how expenses related to working from home will be dealt with. If you don’t expect there to be any additional expenses involved, communicate this. You don’t want employees thinking this is their chance to purchase a standing desk and fancy ergonomic chair on your dime. That said, you should consider whether employees will incur reasonable and necessary expenses while working from home. Some states mandate reimbursement for these kinds of expenses, but it’s a good practice to cover such costs even if it’s not required by law.

Question (originally requested March 17, 2020):

Given COVID-19, if an employee is out of the office due to sickness, can we ask them about their symptoms?

Answer:

Yes, but there are correct ways to do this. In most circumstances, employers shouldn’t ask about an employee’s symptoms, as that could be construed as a disability-related inquiry. Under the circumstances, however — and in line with an employer’s responsibility to provide a safe workplace — we recommend asking specifically about the symptoms of COVID-19 and making it clear that this is the extent of the information you’re looking for.

Here’s a suggested communication: “Thank you for staying home while sick. In the interest of keeping all employees as safe as possible, we’d like to know if you are having any of the symptoms of COVID-19. Are you experiencing a fever, cough, and/or shortness of breath?”

Remember that medical information must be kept confidential as required by the Americans with Disabilities Act (ADA). If the employee does reveal that they have symptoms of COVID-19, or has a confirmed case, you should see the CDC’s Interim Guidance to determine next steps. Tables 1 and 2 will help you assess risk and determine what steps, if any, should be taken.

Question (originally requested March 17, 2020):

What if I have a fearful employee who refuses to come to work because of COVID-19?

Answer:

Generally, employees do not have a right to refuse to work based only on a generalized fear of becoming ill. If their fear is not based on objective evidence of possible exposure, you can enforce your attendance policies.

You should be prepared for employees who express anxiety about coming to work and evaluate any request on a case-by-case basis. Consider alternative arrangements such as telecommuting if possible. Employees who are immunocompromised or have other relevant disabilities may be entitled to a reasonable accommodation, such as working from home or taking a leave if working from home is not possible.

If the nature of the employee's position does not allow telecommuting, and there is no legitimate threat, reiterate the steps they can take to keep themselves safe from contracting the virus and explain the proactive steps you are taking to keep infection risk low in the workplace.

Please keep in mind that multiple employees expressing concerns regarding safe workplaces may be protected under the National Labor Relations Act as concerted activity.

Question (originally requested March 18, 2020):

Can we reduce pay because of economic slowdown due to COVID-19?

Answer:

You can reduce an employee's rate of pay based on business or economic slowdown, provided that this is not done retroactively. For instance, if you give employees notice that their pay will change on the 10th, and your payroll period runs from the 1st through the 15th, make sure that their next check still reflects the higher rate of pay for the first 9 days of the payroll period.

Nonexempt employees (those entitled to overtime):

A nonexempt employee's new rate of pay must still meet the applicable federal, state, or local minimum wage. Employees must be given notice of the change to their rate of pay, and some states require advance notice.

Exempt employees (those not entitled to overtime):

An exempt employee's new salary must still be at or above the federal or state minimum for exempt employees. The federal minimum salary is \$684 per week. Several states have weekly minimums that are higher than that (California and New York, for instance, are in the \$1,000 per week range). The minimum may not be prorated based on hours worked.

Exempt employee reclassification:

If an exempt employee has so little work to do that it does not make sense to pay them the federal or state minimum (or you simply cannot afford to), **they can be reclassified as nonexempt and be paid by the hour instead.** This must not be done on a **very short-term basis.** Although there are no hard and fast rules about how long you can reclassify someone, we would recommend not changing their classification unless you expect the slowdown to last for more than three weeks. Changing them back and forth frequently could cause you to lose their exemption retroactively and potentially owe years of overtime.

Employees with contracts or CBAs:

If employees have employment contracts or are subject to collective-bargaining agreements (CBAs), you should consult with an attorney before makes any changes to pay.

Question (originally requested March 17, 2020):

Can employees refuse to travel to areas considered safe from COVID-19?

Answer:

You can require employees to travel as long as you meet your general duty under the Occupational Safety and Health Administration (OSHA) to provide a workplace (including any travel location) that is free from recognized hazards that are causing or are likely to cause death or serious physical harm to employees.

To ensure that you are not subjecting an employee to excessive risk, check the CDC's Traveler's Health Notices for the latest guidance and recommendations for each country where the employee is traveling.

Perhaps more important than whether you can force an employee to travel is whether you should. Requiring a fearful employee to travel will erode trust and confidence and likely cause them significant anxiety. Consider video calls or videoconferencing as an (inexpensive!) alternative to traveling for the next few weeks or months.

Also keep in mind that employees who are immunocompromised or have other relevant disabilities may be entitled to an accommodation (such as not traveling, given current conditions) under the Americans with Disabilities Act (ADA).

Question (originally requested March 18, 2020):

What's the difference between a furlough and a layoff?

Answer:

First, you should note that the language used when sending employees home for a period of time is less important than communicating your actual intent. Since temporary layoffs and furloughs are only used regularly in certain industries (usually seasonal), you should not assume that employees will know what the different terms mean. Be sure to communicate your plans for the future, even if they feel quite uncertain or are only short-term. Transparency is best practice.

Furlough:

A furlough continues employment but reduces scheduled hours or requires a period of unpaid leave. The thought process is that having all employees incur a bit of hardship is better than some losing their jobs completely. For example, a company may reduce hours to 20 per week for a period of time as a cost-saving measure, or they may place everyone on a two-week unpaid leave. This is typically not considered termination; however, you may still need to provide certain notices to employees about the change in the relationship, and they would likely still be eligible for unemployment.

If the entire company won't be furloughed, but only certain employees, it is important to be able to show that staff selection is not being done for a discriminatory reason. You'll want to document the nondiscriminatory business reasons that support the decision to furlough certain employees and not others, such as those that perform essential services.

Layoff:

A layoff involves terminating employment during a period when no work is available. This may be temporary or permanent. If you close down completely, but you intend to reopen in the relatively near future or have an expected reopening date — at which time you will rehire an employee, or all employees — this would be considered a temporary layoff. Temporary layoffs are appropriate for relatively short-term slowdowns or closures. A layoff is generally considered permanent if there are no plans to rehire the employee or employees because the slowdown or closure is expected to be lengthy or permanent.

Pay for exempt employees (those not entitled to overtime):

Exempt employees do not have to be paid if they ***do no work at all for an entire workweek***. However, if work is not available for a partial week for an exempt employee, they must be paid their full salary for that week, regardless of the fact that they have done less work. If the point is to save money (and it usually is), it's best to ensure that the layoff covers the company's established seven-day workweek for exempt employees. Make it very clear to exempt employees that they should do absolutely no work during any week you're shut down. If exempt employees do any work during that time, they will need to be paid their normal weekly salary.

Pay for nonexempt employees (those entitled to overtime):

Nonexempt employees only need to be paid for actual hours worked, so single day or partial-week furloughs can be applied to them without worrying about pay implications.

We recommend that you engage in open communication with the affected employees before and during the furlough or temporary layoff period.

State Information and Resources

Colorado Department of Labor and Employment

Information and resources regarding COVID-19, including information for workers and employers, may be found at the following website. Information for the employer includes: alternatives for laying off employees, rapid response for consultations, among other resources.

- [Information and Resources on Coronavirus](#)
- [Emergency Rules on Paid Sick Leave for COVID-19](#)

Disclaimer:

Lighthouse HR Support (LHRS) provides practical human resource information and guidance based upon our knowledge and experience in the industry and with our clients. LHRS services are not intended to be a substitute for legal advice. LHRS services are designed to provide general information to human resources and/or business professionals regarding human resource concerns commonly encountered. Given the changing nature of federal, state and local legislation and the changing nature of court decisions, LHRS cannot and will not guarantee that the information is completely current or accurate. LHRS services do not include or constitute legal, business, international, regulatory, insurance, tax or financial advice. Use of our services, whether by phone, email or in person shall indicate your acceptance of this knowledge.