RESOURCES FOR SMALL BUSINESSES
re: the FFCRA and the CARES Act

INTRODUCTION
Small businesses have had and continue to have many questions about how to manage during the COVID-19 pandemic, the provisions of the Families First Coronavirus Response Act (FFCRA), and the provisions of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act).

The following includes information regarding the issues and identifies multiple resources to help small businesses. Note that, at this time, small businesses continue to have more questions than there are answers.

The articles cited below are available using the Dropbox links that follow.

HELP FOR SMALL BUSINESS, SET #1: https://www.dropbox.com/sh/cab9k77s36evuxv/AACLqw-tIDQLiRYIx3U6-PuMa?dl=0
HELP FOR SMALL BUSINESS, SET #2: https://www.dropbox.com/sh/cwc04qdaicxpu9c/AADtZPB-rEK6lwRFPWPrHyQa?dl=0
HELP FOR SMALL BUSINESS, SET #3: https://www.dropbox.com/sh/iz33oligy9ql8bx/AAAc7QxeRv6JHmtU63_Q0irra?dl=0

A list of all the articles in the three Sets in Dropbox is printed on page 7.

GENERAL RESOURCES FOR SMALL BUSINESSES
U.S. Department of Labor, Wage and Hour Division
https://www.dol.gov/agencies/whd/pandemic

Fact Sheets
- Families First Coronavirus Response Act: Employee Paid Leave Rights (PDF)
  - Spanish (PDF)
- Families First Coronavirus Response Act: Employer Paid Leave Requirements (PDF)
  - Spanish (PDF)

Questions and Answers
- Families First Coronavirus Response Act: Questions and Answers
  [NOTE: there are 79 Questions & Answers. It is recommended that every employer go to the website and either print or download the document as a resource.]
- COVID-19 and the Family and Medical Leave Act: Questions and Answers

Posters
- Employee Rights: Paid Sick Leave and Expanded Family and Medical Leave under The Families First Coronavirus Response Act (FFCRA)
  - Spanish
• Federal Employee Rights: Paid Sick Leave and Expanded Family and Medical Leave under The Families First Coronavirus Response Act (FFCRA)
  ○ Spanish
• Families First Coronavirus Response Act Notice – Frequently Asked Questions

HEALTH & SAFETY
See articles 01 & 02 in Set 1 in Dropbox.

DOL NOTICE re EMPLOYEE RIGHTS UNDER THE FFCRA

I am a small business owner. Do I have to post this notice?
Yes. All employers covered by the paid sick leave and expanded family and medical leave provisions of the FFCRA (i.e., certain public sector employers and private sector employers with fewer than 500 employees) were required to post this notice AS OF WEDNESDAY, APRIL 1.
See articles 03 & 04 in Set 1 in Dropbox.

LAYOFFS, FURLoughS, UNEMPLOYMENT BENEFITS, and the federal WARN Act

Layoffs/furloughs/downsizing/reductions-in-force ... ALL of those terms are synonymous in that they all mean that an employee is not working because the employer does not have work for the employee to perform.
See articles 05, 06, & 07 in Set 1 in Dropbox.

EMPLOYEE BENEFITS DURING A LAYOFF/FURLough

NOTE: Lay-offs/Furloughs are “qualifying events” per federal COBRA and the Mini-COBRA statutes many states have

Q: The COVID-19 Pandemic has had a significant negative impact on our business, but we hope it is temporary and are considering a “furlough.” Under the furlough, employees will not be terminated. However, they will not work and will not be paid, or will have their hours and pay reduced. We do, however, want to continue to provide medical insurance during the furlough. For medical insurance purposes, can we just continue to treat the furloughed employees as active employees, or must we offer COBRA?

A: It depends.

First, you must review your plan documents. If your employees are required to work a minimum number of hours in order to stay benefits-eligible, and they will not meet those requirements during the furlough, then they will presumptively lose coverage. The employer then has two options:

1. Do not treat the furlough as a COBRA qualifying event, but rather keep the employees on the plan as if they were active employees. The issue here is that the medical insurance provider (or the stop loss provider, in the case of a self-funded plan) may not agree with this waiver of the plan’s eligibility requirements, and could refuse to cover benefits expenses of employees who are not working sufficient hours. The employer should preemptively manage this concern by discussing the matter with the insurer or stop loss carrier and obtaining a written waiver of the eligibility requirements.
2. Treat the furlough as a COBRA qualifying event (i.e. a loss of coverage due to a reduction in hours) and offer COBRA coverage to the employee. The COBRA coverage can be subsidized by the employer in its discretion.


When an employee who is enrolled for group health insurance is furloughed or laid-off, that most likely is a COBRA "qualifying event" both under federal COBRA (employers with 20+ employees) and under the Mini-COBRA statutes that many states have that apply to employers with fewer than 20 employees. The "qualifying event" is: reduction in hours such that the employee is no longer eligible for benefits. All group health insurance plans define eligible employees as those who are regularly scheduled to work XX hours/week. XX is typically 30 hours/week. Thus, furloughed employees are no longer "actively at work" (the insurance term) because their hours have been reduced.

Thus, if you have not already done so, you (as the employer) are responsible for notifying the COBRA administrator for your group health insurance plan that a "qualifying event" has occurred for those employees who have been furloughed or laid-off.

- Don’t assume coverage continues during leaves or furloughs or automatically ends immediately upon termination of employment. Plan terms typically dictate whether active coverage can continue during short-term leaves of absence [this is known as “actively at work"], whether paid or unpaid, and many plans have minimum hour requirements to maintain active coverage. Employers that expand coverage for ineligible employees outside the terms of the plan or policy without consent from the insurer or stop loss carrier face significant financial exposure.

[A client of HRHelp once continued coverage for an employee who was not “actively at work”. When the employee requested pre-authorization for heart surgery and the carrier determined the employee had not been “actively at work” for a period of 6 weeks, the carrier declined to authorize the procedure. For some while it seemed that the employer would be financially responsible for the cost of the surgery.]

- COBRA continuation coverage (or state continuation coverage, if applicable) generally must be offered for all group health plans when there is a loss of coverage because of a termination of employment or reduction in hours.[Reduction of hours such that the employee’s hours are below the threshold for him/her to be eligible per the Certificate of Coverage.] An increase in the employee’s share of the premium because of his or her reduction in hours (including to zero, as in a furlough) is a loss of coverage for this purpose.

See articles 08 & 08A in Set 2 in Dropbox.

FAMILIES FIRST CORONAVIRUS RESPONSE ACT (FFCRA)

The FFCRA includes the PAID SICK LEAVE Act and the EMERGENCY FAMILY AND MEDICAL LEAVE Act. Both apply only to employers with fewer than 500 employees (i.e., small businesses). Both become effective as of Wednesday, April 1. Neither apply to employees laid off or on furlough prior to April 1.

EMERGENCY PAID SICK LEAVE ACT

Covered Employer is A private employer with fewer than 500 employees.

Eligible Employee: Unlike the emergency FMLA requirements, an employee is immediately eligible for paid sick leave (there is no 30 calendar day requirement)

Reasons for Sick Leave: Employers are required to provide paid sick leave to an employee who is unable to work or telework because:

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1. the employee is subject to a federal, state, or local quarantine or isolation order related to COVID-19;
2. the employee has been advised by a health care provider to self-quarantine because of COVID-19;
3. the employee is experiencing symptoms of COVID-19 and is seeking a medical diagnosis;
4. the employee is caring for an individual subject or advised to quarantine or isolation;
5. the employee is caring for a son or daughter whose school or place of care is closed, or child care provider is unavailable, due to COVID-19 precautions; or
6. the employee is experiencing substantially similar conditions as specified by the Secretary of Health and Human Services, in consultation with the Secretaries of Labor and Treasury.

How Much Paid Leave is Required? Employees are entitled to the following:

- **Full-time employees**: 80 hours at their regular rate of pay. However, when caring for a family member (for reasons 4, 5, and 6 above), sick leave is paid at two-thirds the employee’s regular rate.
- **Part-time employees**: the number of hours that the employee works, on average, over a 2-week period

The law limits paid leave to $511 per day ($5,110 in total) where leave is taken for reasons (1), (2), and (3) noted above (generally, an employee’s own illness or quarantine); and $200 per day ($2,000 in total) where leave is taken for reasons (4), (5), or (6) (care for others or school closures).

**Tax Credits**: As above with the emergency FMLA, the new paid sick leave law offers employers to be reimbursed for sick leave:

- A refundable tax credit for employers equal to 100 percent of qualified paid sick leave wages required to be paid by the Emergency Paid Sick Leave Act that are paid by an employer for each calendar quarter. The tax credit is allowed against the tax imposed by section 3111(a) of the Internal Revenue Code (the employer portion of Social Security taxes).

EMERGENCY FAMILY AND MEDICAL LEAVE ACT (E-FMLA)

**Covered Employer**: An employer with fewer than 500 employees. **[NOTE: employers with fewer than 50 employees may be exempt from E-FMLA; see the next section + article 12B.]**

**Eligible Employee**: Any full-time or part-time employee that has been on the employer’s payroll for 30 calendar days.

However, the law allows employers to exclude employees who are health care providers or emergency responders from this emergency FMLA entitlement.

**Reasons for FMLA Leave**: Eligible employees are entitled to take up to 12 weeks of FMLA leave for “a qualifying need related to a public health emergency.” This “qualifying need” is limited to circumstances where an employee is unable to work (or telework) to care for a minor child if the child’s school or place of child care has been closed or is unavailable due to a public health emergency.

**How Much Pay is Required during FMLA Leave?**

- The first 10 days (two weeks) are unpaid, but an employee can substitute accrued paid leave, including emergency paid sick leave (which I detail below). It is unclear whether an employer can require the employee to use accrued paid leave during the 10-day period. The law is silent on this latter issue, though it cites back to a provision of the FMLA that allows the employer to require the use of accrued paid leave.
• The remaining 10 weeks are paid at 2/3 of the employee’s regular rate, for the number of hours the employee would otherwise be scheduled to work (with a maximum payment of $200 per day and $10,000 total)

**Small Employers Can’t Be Sued:** The law exempts employers with fewer than 50 employees from civil FMLA damages in an FMLA lawsuit, thereby shielding smaller employers from being liable for back pay or liquidated damages.

**Tax credits:** The new law provides for a series of refundable tax credits for employers providing paid emergency sick leave or paid FMLA, including tax relief for self-employed individuals. Specifically, the bill as passed by the House provides for:

• A refundable tax credit for employers equal to 100 percent of qualified family leave wages required to be paid by the Emergency Family and Medical Leave Expansion Act that are paid by an employer for each calendar quarter. The tax credit is allowed against the tax imposed by section 3111(a) (the employer portion of Social Security taxes). The amount of qualified family leave wages taken into account for each employee is capped at $200 per day and $10,000 for all calendar quarters. If the credit exceeds the employer’s total liability under section 3111(a) for all employees for any calendar quarter, the excess credit is refundable to the employer.

See articles 09 – 17 in Sets 2 & 3 in Dropbox.

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**SMALL BUSINESS EXEMPTIONS FROM PAID SICK LEAVE and E-FMLA**

From the DOL web page: [https://www.dol.gov/agencies/whd/pandemic/ffcra-questions](https://www.dol.gov/agencies/whd/pandemic/ffcra-questions)

[It is recommended that you go to the web site and print or download ALL of the Questions and Answers provided by the DOL.]

**58. When does the small business exemption apply to exclude a small business from the provisions of the Emergency Paid Sick Leave Act and Emergency Family and Medical Leave Expansion Act?**

An employer, including a religious or nonprofit organization, with fewer than 50 employees (small business) is exempt from providing (a) paid sick leave due to school or place of care closures or child care provider unavailability for COVID-19 related reasons and (b) expanded family and medical leave due to school or place of care closures or child care provider unavailability for COVID-19 related reasons when doing so would jeopardize the viability of the small business as a going concern.

A small business may claim this exemption if an authorized officer of the business has determined that:

1. The provision of paid sick leave or expanded family and medical leave would result in the small business’s expenses and financial obligations exceeding available business revenues and cause the small business to cease operating at a minimal capacity;

2. The absence of the employee or employees requesting paid sick leave or expanded family and medical leave would entail a substantial risk to the financial health or operational capabilities of the small 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 paid sick leave or expanded family and medical leave, and these labor or services are needed for the small business to operate at a minimal capacity.
59. **If I am a small business with fewer than 50 employees, am I exempt from the requirements to provide paid sick leave or expanded family and medical leave?**

A small business is exempt from certain paid sick leave and expanded family and medical leave requirements if providing an employee such leave would jeopardize the viability of the business as a going concern. This means a small business is exempt from mandated paid sick leave or expanded family and medical leave requirements only if the:

- employer employs fewer than 50 employees;
- leave is requested because the child’s school or place of care is closed, or child care provider is unavailable, due to COVID-19 related reasons; and
- an authorized officer of the business has determined that at least one of the three conditions described in Question 58 is satisfied.

The Department encourages employers and employees to collaborate to reach the best solution for maintaining the business and ensuring employee safety.

See articles 12, 12A, and 12B in Set 2 AND 18 & 19 in Set 3 in Dropbox.

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**TAX CREDITS**

See articles 20 and 20A in Set 3 in Dropbox.

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**OTHER**

Article 22 in Set 3 in Dropbox is a publication of the U.S. Chamber of Commerce and is titled: *Coronavirus Emergency Loans Small Business Guide and Checklist.*

Article 23 in Set 3 in Dropbox includes additional information regarding the FFCRA and the CARES Act.

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