

FAQs regarding COVID-19 Related Employment Updates

These FAQs are intended as a summary of current guidance, and not as legal advice. Before implementing policy, you should read the full language of the referenced law or guidance and review the same with your attorney. These FAQs are current up to June 29, 2020, but state and federal guidance is changing frequently, so please contact your attorney to ensure you have the most up-to-date information.

Which employers have to provide paid sick leave and expanded family and medical leave under the Families First Coronavirus Response Act (FFCRA)?

Generally, employers with fewer than 500 employees are covered employers under the FFCRA, and therefore must provide paid sick leave and expanded family and medical leave. Certain employers with fewer than 50 employees may be exempt from the Act's requirements to provide certain paid sick leave and expanded family and medical leave, if, for example, providing an employee such leave would jeopardize the viability of the business as a going concern.

If my employee is home with their child because their school or childcare provider is closed, do they get paid sick leave, expanded family and medical leave, or both? How do they interact?

Employees may be eligible for both types of leave, but only for a total of 12 weeks of paid leave. Employees may take both paid sick leave and expanded family and medical leave to care for a child whose school or place of care is closed due to COVID-19 related reasons. The Emergency Paid Sick Leave Act provides for an initial two weeks of paid leave. This period thus covers the first 10 workdays of expanded family and medical leave, which are otherwise unpaid under the Emergency Family and Medical Leave Expansion Act (EFMLEA), unless the employee elects to use existing vacation, personal, or medical or sick leave under the employer's policy. After the first 10 workdays have elapsed, employees are eligible for two-thirds of their regular rate of pay for the hours they would have been scheduled to work in the subsequent 10 weeks under the Emergency Family and Medical Leave Expansion Act.

What if my employee has been out for six weeks on expanded family and medical leave to care for their child and then gets sick?

It depends on what type of leave the employee has left. During the first two weeks of unpaid expanded family and medical leave, employers may (but do not have to) allow employees to simultaneously take paid sick leave under the Emergency Paid Sick Leave Act and preexisting paid leave, therefore supplementing the amount the employee receives from paid sick leave with their preexisting paid leave, up to their normal earnings. After the first two workweeks (usually 10 workdays) of expanded family and medical leave under the EFMLEA, employees may elect to take, or employers may require them to take, their remaining expanded family and medical

leave at the same time as any existing paid leave that, under their employer's policies, would be available to them in that circumstance. This would likely include personal leave or paid time off, but not medical or sick leave if they are not ill. If the employee then became ill, they would be entitled to exhaust any remaining emergency paid sick leave time (capped at 80 hours) as well as any remaining state mandated sick time or any other sick time under the employer's policy. If the employer requires employees to take existing employer-provided leave concurrently with their expanded family and medical leave, the employer must pay the employee the full amount to which they are entitled under the existing paid leave policy for the period of leave taken.

How do I count hours worked by a part-time employee for purposes of paid sick leave or expanded family and medical leave?

A part-time employee is entitled to leave for their average number of work hours in a two-week period. Therefore, you calculate hours of leave based on the number of hours the employee is normally scheduled to work. If the normal hours scheduled are unknown, or if the part-time employee's schedule varies, you may use a six-month average to calculate the average daily hours. Such a part-time employee may take paid sick leave for this number of hours per day for up to a two-week period, and may take expanded family and medical leave for the same number of hours per day up to ten weeks after that.

If this calculation cannot be made because the employee has not been employed for at least six months, use the number of hours that you and your employee agreed that the employee would work upon hiring. If there is no such agreement, you may calculate the appropriate number of hours of leave based on the average hours per day the employee was scheduled to work over the entire term of his or her employment.

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

Regardless of whether employers grant or deny a request for paid sick leave or expanded family and medical leave, employers must document the following:

- The name of the employee requesting leave;
- The date(s) for which leave is requested;
- A statement of the COVID-19 related reason the employee is requesting leave and written support for the reason; and
- A statement from the employee that they are unable to work, including telework, because of the reason.

If the employee requests leave because they are subject to a quarantine or isolation order or because they must care for an individual subject to such an order, the employer should additionally document the name of the government entity that issued the order. If the employee requests leave to self-quarantine based on the advice of a health care provider or to care for an

individual who is self-quarantining based on such advice, the employer should additionally document the name of the health care provider who gave this advice.

If an employee requests leave to care for his or her child whose school or place of care is closed, or whose childcare provider is unavailable, the employer must also document:

- The name and age of the child being cared for;
- The name of the school, place of care, or childcare provider that has closed or become unavailable; and
- A statement from the employee that no other suitable person is available to care for the child during the time for which the employee is receiving family and medical leave; and with respect to the employee's inability to work or telework because of a need to provide care for a child older than 14 during daylight hours, a statement that special circumstances exist requiring the employee to provide care.

Employers that provide paid sick leave and expanded family and medical leave required by the FFCRA are eligible for reimbursement of the costs of that leave through refundable tax credits. If the employer intends to claim a tax credit under the FFCRA for payment of the sick leave or expanded family and medical leave wages, the employer should retain appropriate documentation in its records. Employers 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. This information includes:

- Documentation to show how the employer determined the amount of qualified sick and family leave wages paid to employees who are eligible for the credit, including records of work, telework, and qualified sick leave and qualified family leave;
- Documentation to show the employer determined the amount of qualified health plan expenses that the employer allocated to wages;
- Copies of any completed Forms 7200, Advance of Employer Credits Due To COVID-19, that the employer submitted to the IRS;
- Copies of the completed Forms 941, Employer's Quarterly Federal Tax Return, which the employer submitted to the IRS.

The IRS recommends that employers keep all records of employment taxes for at least four years after the date the tax becomes due or is paid, whichever comes later.

Under what conditions can states (Oregon or Washington) access increased emergency unemployment funds?

The CARES Act, signed into law on March 27, 2020, establishes three programs related to unemployment insurance benefits: (1)

the Emergency Increase in Unemployment Compensation Benefits program; (2) the Pandemic Emergency Unemployment Compensation program; and (3) the Pandemic Unemployment Assistance program. States that voluntarily choose to implement the programs through their existing unemployment insurance systems must agree to provide certain substantive benefits to workers in order to receive the federal funds. Both Oregon and Washington have chosen to implement the federal programs and expand emergency unemployment compensation.

Have there been any changes in requirements for workers to receive unemployment compensation?

Yes. In states that have expanded emergency unemployment funds, workers may qualify for the expanded emergency unemployment assistance for reasons including unemployment, reduced employment, or being unable or unavailable to work if that unemployment, inability, or unavailability is because the worker has COVID-19 or is experiencing COVID-19 symptoms and seeking a diagnosis, a member of the worker’s household has been diagnosed with COVID-19, the worker is caring for a family or household member who has been diagnosed with COVID-19, the worker is caring for a child or other household member whose school or place of care has been closed due to COVID-19, the worker is unable to reach the workplace due to a quarantine imposed because of COVID-19, the worker has received a medical recommendation to self-quarantine due to COVID-19 concerns, or the worker’s place of employment is closed due to COVID-19.

Remember, employers should avoid telling workers whether they will or will not be able to receive unemployment compensation, as this is a fact-based decision made by the unemployment department.

Do Oregon and Washington require employers to notify terminated workers of available unemployment compensation?

No. Unlike certain health care benefits such as COBRA, employers are not required to notify terminated workers regarding the availability of unemployment compensation. Furthermore, whether or not a worker receives unemployment compensation is a fact-based decision made by the state unemployment department. Employers should not tell an employee if, when, or how much an employee is likely to receive in unemployment compensation, as this decision is made by the unemployment department (not the employer). Employers may suggest that employees file for unemployment if they so choose.

What are the three key unemployment provisions of the CARES Act?

The CARES Act provides:

- Expanded eligibility for unemployment assistance
- Weekly unemployment benefits may be increased by up to \$600.00
- Benefits may be extended by 13 weeks for eligible workers

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Again, decisions regarding unemployment compensation eligibility are decided by the unemployment department. Aside from referring employees to the unemployment department, employers are not involved in deciding whether, when, or how much a worker may receive in unemployment benefits.

What does the CARES Act do to incentivize employers to retain employees?

The CARES Act includes a number of programs aimed at incentivizing employers to retain employees. These include:

- Paycheck Protection Program: This expands on the Small Business Administration's loan program for small businesses to cover certain costs such as payroll and employer group health care costs incurred in the first eight weeks after the loan origination date.
- Emergency Economic Injury Disaster Loans: The CARES Act allows these funds to be used to cover the costs of providing paid sick leave to employees due to COVID-19.
- Employee Retention Credit: Employers whose operations are fully or partially suspended during the COVID-19 pandemic or whose quarterly receipts dropped by more than 50% may be eligible to receive a refundable payroll tax credit for 50% of wages paid during each calendar quarter during the COVID-19 pandemic.

Are workers eligible for unemployment benefits while receiving paid sick leave and/or family and medical leave?

No. If an employer is paying a worker paid sick leave or family and medical leave, the worker is not eligible for unemployment insurance. However, each state has its own unique set of rules to extend partial unemployment benefits to workers whose hours or pay have been reduced. Workers should contact their state unemployment insurance office for specific questions about eligibility.

Is there an easy way to confirm if my workers are *not* eligible for unemployment benefits even under these expanded programs?

Employers should avoid attempting to tell workers whether they are or are not eligible for unemployment benefits; rather, employers should send workers with eligibility questions to their state unemployment insurance office.

Are workers eligible for paid sick leave to self-quarantine?

Workers are eligible for paid sick leave if a health care provider directs or advises them to stay home or otherwise quarantine themselves because the health care provider believes that the worker may have COVID-19 or that the worker is particularly vulnerable to COVID-19, and if the recommended quarantine prevents the worker from working (or teleworking).

When do I have to give my employee their final paycheck?

In Oregon, employers are generally required to give employees their final paycheck by the end of the business day following termination. However, due to COVID-19 uncertainty, many employers have “furloughed” or “temporarily laid off” workers, planning to bring them back when hours become available. Oregon BOLI has taken the position that employers must pay workers by the close of the next business day if a layoff is “expected to last more than 35 days.” In order to minimize risks of wage claims, employers should carefully comply with technical wage and hour rules governing final paychecks.

If a “furlough” or “temporary layoff” turns into a termination, are workers entitled to back pay for the time that they were “furloughed” or “laid off”?

Generally, no. Employers must pay employees for hours worked. For non-exempt employees, this means any time worked. For exempt employees, employers must generally pay employees their salary for any week in which any work was performed.

As a reminder, employers may still owe workers sick time, vacation time, or other forms of PTO balances at termination unless the employer has a clear policy that such PTO is not paid out upon termination.

Has Oregon really waived the one-week wait period? I have employees who are entering their third week and still have not heard or seen anything.

On April 15, 2020, in a letter addressed to Oregon legislators, Governor Brown stated that she is working with the Oregon Employment Department on waiving the one-week waiting period. In this letter, Governor Brown also noted that the Employment Department is receiving an unprecedented number of claims for unemployment, there is a backlog of claims, the department is increasing its staff in order to process claims at a higher rate, and it will take time and program updates to waive the waiting week.

What should I do if an employee comes to work with COVID-19 symptoms (fever, cough, or shortness of breath)?

Employees who have symptoms when they arrive at work or become sick during the day should immediately be separated from other employees, customers, and visitors and sent home. Employees who develop symptoms outside of work should notify their supervisor and stay home. Sick employees should follow [CDC-recommended steps](#). Employees should not return to work until they have met the criteria to [discontinue home isolation](#) and have consulted with a healthcare provider and state or local health department.

If employees have been exposed but are not showing symptoms, should I allow them to work?

Employees may have been exposed if they are a “close contact” of someone who infected, which is defined as being within approximately 6 feet (2 meters) of a person with COVID-19 for a prolonged period of time:

- Potentially exposed employees who **have** symptoms of COVID-19 should self-isolate and follow [CDC recommended steps](#).
- Potentially exposed employees who **do not have** symptoms should remain at home or in a comparable setting and practice social distancing for 14 days.

All other employees should self-monitor for symptoms such as fever, cough, or shortness of breath. If they develop symptoms, they should notify their supervisor and stay home.

May I administer a COVID-19 test (a test to detect the presence of the COVID-19 virus) before permitting employees to enter the workplace?

Yes, an employer may choose to administer COVID-19 testing to employees before they enter the workplace to determine if they have the virus. The EEOC has stated that employers may take steps to determine if employees entering the workplace have COVID-19 because an individual with the virus will pose a direct threat of health to others.

Consistent with the ADA standard, employers should ensure that the tests are accurate and reliable. For example, employers may review [guidance](#) from the U.S. Food and Drug Administration about what may or may not be considered safe and accurate testing, as well as guidance from CDC or other public health authorities, and check for updates. Employers may wish to consider the incidence of false-positives or false-negatives associated with a particular test. Finally, note that accurate testing only reveals if the virus is currently present; a negative test does not mean the employee will not acquire the virus later.

Based on guidance from medical and public health authorities, employers should still require – to the greatest extent possible – that employees observe infection control practices (such as social distancing, regular handwashing, and other measures) in the workplace to prevent transmission of COVID-19.

In light of current CDC guidance, may an employer antibody testing before permitting employees to re-enter the workplace?

No. An antibody test constitutes a medical examination under the ADA. In light of CDC’s [Interim Guidelines](#) that antibody test results “should not be used to make decisions about returning persons to the workplace,” an antibody test at this time does not meet the ADA’s “job related and consistent with business necessity” standard for medical examinations or inquiries for current employees. Therefore, requiring antibody testing before allowing employees to re-enter

the workplace is not allowed under the ADA. Please note that an antibody test is different from a test to determine if someone has an active case of COVID-19 (i.e., a viral test). As discussed above, the EEOC has already stated that COVID-19 viral tests are permissible under the ADA.

The EEOC will continue to closely monitor CDC's recommendations, and could update this guidance in response to changes in CDC's recommendations, so be sure to check both EEOC and CDC guidance for an up to date answer.

Do my employees need to wear cloth face coverings or personal protective equipment (PPE) (such as N95 respirators, gloves) to protect themselves while working?

In Oregon, effective July 1, 2020, Oregonians statewide will be [required to wear face coverings](#) in indoor public spaces. Businesses with indoor public spaces must require employees, contractors, volunteers, customers and visitors to wear a mask, face shield, or face covering, unless an accommodation or exemption is required. These businesses are required to provide masks, face shields, or face coverings for employees and encouraged to provide face coverings for visitors. Businesses are also required to post [signs](#) about the mask, face shield, or face covering requirements. For more details, please review the Governor's guidance [here](#), which has been extended to all indoor public spaces. Remember, there may be additional face covering requirements and recommendations that apply to your businesses via the Governor's [sector guidance](#) or via county specific mandates.

In Washington effective June 26, 2020, all individuals statewide [must wear a face covering](#) when in any indoor or outdoor public setting. With few exceptions, employers must require employees in Washington to wear a cloth facial covering, except when working alone in an office, vehicle, or when the job has no in-person interaction. You can find more details in Governor Inslee's [Safe Start Washington](#) guidance. Employers must provide cloth facial coverings to employees, unless their exposure dictates a higher level of protection under the Department of Labor and Industries' safety and health rules and guidance. Refer to the [Coronavirus Facial Covering and Mask Requirements](#) for additional details. Employees may choose to wear their own facial coverings at work, provided it meets the minimum requirements.

CDC recommends [wearing cloth face coverings](#) in public settings where other social distancing measures are difficult to maintain. Cloth face coverings may prevent people who do not know they have the virus from transmitting it to others. These face coverings are not surgical masks or respirators and are not appropriate substitutes for them in workplaces where masks or respirators are recommended or required.

Employees should continue to follow their routine policies and procedures for PPE (if any) that they would ordinarily use for their job tasks. When cleaning and disinfecting, employees should always wear gloves and gowns appropriate for the chemicals being used. Additional personal protective equipment (PPE) may be needed based on setting and product. CDC does not recommend the use of PPE in workplaces where it is not routinely recommended.

Has OSHA issued any guidance specific to the construction industry?

Yes, federal OSHA continues to provide guidance for the construction workforce, which may be found [here](#).

Oregon OSHA has also published guidance related to Construction Contractors, which may be found [here](#).

Washington OSHA has provided guidance for the construction industry, which may be found [here](#). Washington OSHA also directs employers in the construction industry to the [Center for Construction Research and Training](#) COVID-19 resources.