

One important item to note, is that the new Federal law goes into effect **April 1, 2020** and not April 2, 2020, as previously believed. This is addressed below but wanted to highlight to ensure you are all aware of this.

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California Unemployment Benefits

Employees may file for unemployment [here](#), whether they have been laid off, or if there hours have been cut. There is no waiting period.

San Francisco Paid Sick Leave (“SFPSL”)

SFPSL can be used for COVID-19 related time-off, including taking time off for their own related illness, self-quarantine required by a health care provider or because the employee’s business or a work location temporarily ceases operations in response to a public health order, among other reasons.

SF OLSE has clarified [rules](#) regarding eligibility for Paid Sick Leave which are as follows:

- Workers that have been laid off by their employer are no longer eligible for paid sick leave.
- Employees who have their hours reduced or eliminated are not entitled to use accrued paid sick leave to account for such reductions or eliminations.
- Employees who remain scheduled to work may continue to use their accrued paid sick leave for any qualifying reason for any portion of their scheduled hours they are unable to work.

SF OLSE has issued [guidance](#) related to its paid sick leave which it has been updating on a regular basis.

Federal Laws

On March 18, 2020, President Trump signed the Federal Emergency Paid Sick Leave Act (“FPSLA”), and the Federal Emergency Family & Medical Leave Expansion Act (“Emergency FMLA”), requiring employers to provide paid and unpaid time off for COVID-19 crisis related uses. Both new laws apply to employers with 1 to 499 employees.

Federal Emergency Paid Sick Leave Act

The U.S. Department of Labor published [guidance](#) regarding FPSLA and Emergency FMLA Acts which clarify some questions about the law. I have highlighted some of the questions below but you can review the full text [here](#). Employers are required to post the model [notice](#) and can email the notice to employees working remotely.

Effective Date

The FFCRA’s paid leave provisions are effective on *April 1, 2020*, and apply to leave taken between April 1, 2020, and December 31, 2020. The effective date is not April 2, 2020 which was calculated based upon the statutory language that the laws would take effect “no later than 15 days after the date of enactment” on March 18, 2020.

- If your business closed prior to April 1, 2020, you are not required to pay FPSL.
- If your business closes after April 1, 2020, but before an employee can request FPSL, you are not required to pay FPSL.

- If you cut hours or reduce work schedule after April 1, 2020, employees are not entitled to take paid sick leave.

Reasons for Paid Sick Leave Usage

An employer shall provide to each employee employed by the employer paid sick time to the extent that the employee is *unable to work* (or telework) due to a need for leave because:

· *“Unable to work” means that your employer has work for you and one of the COVID-19 qualifying reasons, prevents you from being able to perform the work.*

(1) The employee is subject to a Federal, State, or local quarantine or isolation order related to COVID-19.

* This does not apply to a worksite closure due to a federal, state or local ordinance.

(2) The employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19.

(3) The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis.

* If an employee is concerned about coming to work and decides to self-quarantine, it does not appear that they would be entitled to FPSL.

(4) The employee is caring for an individual who is subject to an order as described in subparagraph (1) or has been advised as described in paragraph (2).

(5) The employee is caring for a son or daughter of such employee if the school or place of care of the son or daughter has been closed, or the child care provider of such son or daughter is unavailable, due to COVID-19 precautions.

Small Business Exemption Applies Only to No. 5

- To exempt small businesses with fewer than 50 employees from leave to care for a son or daughter if school or child care is closed/unavailable when the imposition of such requirement would jeopardize the viability of the business as a going concern. The Secretary of Labor will, but has not yet, issued regulations on this issue.
- *Per the DOL: You should not send any materials to the Department of Labor when seeking a small business exemption for paid sick leave and expanded family and medical leave.*

(6) The employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services in consultation with the Secretary of the Treasury and the Secretary of Labor.

· *No guidance has been provided to define what a substantially similar condition is.*

Amount of Hours for Paid Sick Leave

- (1) For full-time employees, 80 hours.
- (2) For part-time employees, a number of hours equal to the number of hours that such employee works, on average, over a 2-week period.
 - Paid Sick Leave under FPSLA does not carry over from 1 year to the next year.
 - Paid Sick Leave does not need to be paid out upon termination.
 - Paid Sick Leave under FPSLA may be used first prior to using your company's other paid sick leave. Employers cannot require an employee to use other paid leave provided by the employer before the employee uses FPSL.

FPSLA Benefit Amounts

- Generally FPSL is paid out at the greater of the employee's regular rate (includes commission, bonus, etc. as defined by the Fair Labor Standards Act), or the highest applicable minimum wage (i.e., among federal, state, and local minimum wage rates).
- \$511 per day (no more than \$5,110 in total) for an employee's own quarantine or isolation order, the employee's self-quarantine under advice of health care provider, or if the employee is symptomatic and seeking medical diagnosis
- \$200 per day (no more than \$2,000 in total) for caring for someone who is subject to a federal, state or local quarantine or isolation order; caring for an employee's child if school or place of care is closed or childcare provider is unavailable due to COVID-19 precautions; or the employee is experiencing a similar condition as specified by the Secretary of Health and Human Services.
- Remember, that these amounts may be pro-rated if your employee works on a part-time basis.

Maintain Documentation

Employers "must require" appropriate documentation in support of the reason for leave, Including:

- Employee Name
- Qualifying reason for leave
- Statement that the employee is unable to work, including telework, for that reason
- Dates of requested leave
- Documentation of reason for leave, such as:
 - Quarantine or isolation order
 - Name of health care provider advising employee to self-quarantine
 - Posted notice of closure on website of school or child care provider, or e-mail notice of such closure.

Per DOL: If you intend to claim a tax credit under the FFCRA for your payment of the sick leave wages, you should retain this 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.

Employer Tax Credit

Employers will receive a quarterly refundable payroll tax credit to cover 100% of the cost of wages, up to the applicable caps.

- Many clients have concerns regarding paying out significant amounts of money for paid sick leave. The IRS and Treasury Department will issue guidance regarding the tax credit process but such guidance has not been published. An overview of how this may work is [here](#).
- To take immediate advantage of the paid leave credits, businesses can retain and access funds that they would otherwise pay to the IRS in payroll taxes. If those amounts are not sufficient to cover the cost of paid leave, employers can seek an expedited advance from the IRS by submitting a streamlined claim form that will be released next week.
- Example: Employer is to pay \$8000 in payroll taxes to the IRS but Employer has paid \$5000 in paid sick leave. Under new law, Employers will be allowed to offset the \$5000 in paid sick leave in anticipation of tax credit and pay \$3000 for payroll taxes to IRS. *This is an example of how it might work and has not been confirmed by the IRS.*

FPSL Is Not Retroactive

Per the DOL, FPSL is not retroactive which means that employers do not receive credit for paid sick leave provided to employee before April 1, 2020. This means that employers must provide the full entitlements starting April 1, regardless of any leave provided previously.

** You should be sure that your paystubs reflects FPSL balances, usage and pay rates. This should be a separate line item for your regular paid sick leave balance and usage.

** California may issue its own expansion of California's paid sick leave laws.

Federal Emergency Family & Medical Leave Expansion Act

While FMLA usually only applies to companies with 50 or more employees, the Emergency FMLA covers **all** employers with fewer than 500 employees.

- This covers employees who have been employed for the previous 30 days and cannot work because they are caring for a child under the age of 18, whose school or place of care has been closed (or child care provider is unavailable) due to an emergency related to COVID-19.
- Unlike regular FMLA, most of this leave is paid.
- The first ten days may be unpaid, and employees may use accrued paid time off (e.g., sick, vacation or PTO).
- After the first ten days, you must pay employees no less than 2/3 of their regular rate of pay for their normally scheduled hours. Please calculate hours for part-time employees who work *irregular* schedules based on the average number of hours they work over a six-month period.
- Paid leave is capped at \$200/day and \$10,000 total, per person.

Tax Credit

As under FPSL, employers will receive a quarterly refundable payroll tax credit to cover 100% of the cost of wages which should operate in the same way that FPSL does.

Small Business Exemption

As with FPSL, businesses with less than 50 employees may qualify for an exemption if the imposition of such requirements would jeopardize the viability of the business as a going concern.”

How Does FPSLA and Emergency FMLA Work

Example 1:

Luisa has been employed full-time for 20 days for a manufacturing company which employs 40 people. Luisa is not eligible to receive any paid time off under her employer’s policies.

Luisa has a sore throat and a fever of 100.7 and cannot report to work. Luisa is waiting to be seen by her doctor.

What benefits is Luisa entitled to while she is not working?

- Emergency Paid Sick Leave – 80 hours at her regular rate
- Sally would not be entitled to EFMLA because she was not employed for at least 30 days prior to the first day of her leave

Example 2:

Joanna has been employed full-time for 45 days at a call center which employs 40 people. As of today, Joanna has accrued three (3) days of Paid Time Off under the employer’s Policies. The school where Joanna’s fourth-grade daughter attends is closed until the end of May. Joanna is unable to work from home during this time.

What benefits is Joanna entitled to receive during this time?

- Emergency Paid Sick Leave – 80 hours at 2/3 her regular rate of pay
- Emergency Family and Medical Leave Act – up to 12 weeks of job protected leave
- The first ten (10) days is unpaid (but could be paid at 2/3 her regular rate of pay under Emergency Sick Leave).
- After the 10 days, Joanna is paid at 2/3 her regular rate of pay
- Joanna may elect use her 3 days of PTO, but she cannot be required to do so.

Flexibility in Compliance with I-9 Rules

On March 20, the Department of Homeland Security (DHS) and U.S. Immigration and Customs Enforcement (ICE) announced flexibility in complying with requirements related to Form I-9, Employment Eligibility Verification, due to COVID-19.

Employers with employees taking physical proximity precautions due to COVID-19 will not be required to review the employee’s identity and employment authorization documents in the employee’s physical presence.

- Employers must inspect the Section 2 documents remotely (e.g., over video link, fax or email, etc.) and obtain, inspect, and retain copies of the documents, within three business days for purposes of completing Section 2.
- Employers should enter “COVID-19” as the reason for the physical inspection delay in the Section 2 Additional Information field **once physical inspection takes place after normal operations resume.**
- Once the documents have been physically inspected, the employer should add “documents physically examined” with the date of inspection to the Section 2 additional information field on the Form I-9, or to section 3 as appropriate.

These provisions may be implemented by employers for a period of 60 days from the date of this notice OR within 3 business days after the termination of the National Emergency, whichever comes first.

This provision only applies to employers and workplaces that are operating remotely. done so, and the date, in Section 2.

California WARN ACT

On March 17, 2020 , Governor Newsom temporarily suspended the portion of WARN that requires 60 days of pay and benefits, in addition to liabilities for failure to provide those things. *And, keep in mind, layoffs, terminations, and relocation orders must be directly related to COVID-19.*

If you are a business outside of California, the Federal WARN Act or your local WARN Act may apply. Under the Federal WARN Act, there is an unforeseeable business circumstances exception, which relieves employers of their obligation to provide 60 days notice, which may apply.

Related Issues

Telecommuting Policy: Many of you may have staff that are working from home. Depending on the size of your team and job requirements, you may want to implement a telecommuting agreement.

- * Keep in mind that employers are legally responsible to reimburse employees for expenses, which may include cell phone, Internet or other home office supplies and equipment.

Rent Abatement and Negotiation: Since businesses are unable to operate, this is an opportunity to try to renegotiate your rent. Many of my clients are having success negotiating a rent abatement or reduction. In addition, if you are unable to pay your rent,

Maintaining Relationships With Your Employees: Many of you are temporarily laying off your staff but plan to re-hire your team when you are able to open again. Be sure to stay in touch with your staff to streamline the hiring process later on.

Financial Support

San Francisco has some financial assistance programs that may be helpful to you.

Also attached is information regarding the federal law Keeping American Workers Paid and Employed Act. Additional information to follow regarding the new legislation.

As I said at the beginning, this is a lot of information, and it is constantly changing and evolving. Be sure to check the DOL, IRS, SF OLSE and other agency websites for updates. You can also reach out to me to discuss.

All the best,

Leiann Laiks

Be advised that the information contained herein does not constitute legal advice and does not create an attorney-client relationship; instead, all information, content, and materials for general informational purposes only.



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