



## Labor Issues Frequently Asked Questions *Answered by your Labor Lawyers*

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**1. I believe that my company is not an essential business and I have to close. Should I furlough my employees or lay them off?**

A furlough carries the expectation that an employee will be brought back to work at some point. A layoff does not carry an equivalent expectations

The Families First Coronavirus Response Act (“FFCRA”) provides for emergency paid sick leave and expanded FMLA rights for workers affected by COVID-19 / Coronavirus or related conditions such as school closures and quarantines. If a business has to close because it is non-essential and subject to a quarantine or isolation act, employees may be eligible for emergency sick leave and expanded FMLA leave under the Act.

**2. How should I communicate our decision (to continue as usual, furlough, terminate) and to remain open/closed under essential designation. Anything I should say, avoid?**

Communication of any of these decisions should be made through both official workplace communication channels, and, if possible, personally through phone, email, mail, or text message. Communication that a business is going to remain open should explain that it is an essential business which is excepted from any otherwise applicable quarantine or stay-at-home orders. An employer may wish to include a brief statement assuring workers that the Company will follow CDC and other applicable protocols for insuring safety in the workplace, and will implement social distancing measures to the greatest extent possible.

Communication of layoff or termination should not state that employees will be ineligible for leave. Any such message should communicate that the decision is based solely on business necessity at this time and may wish to include a statement that all employees affected by this decision will be considered for rehire if circumstances allow the Company to do so.

**3. What are my requirements to maintain a safe workplace and am I liable if an employee later finds they have COVID-19 and have exposed other workers? Is there a difference in my liability if I am an essential vs. non-essential business?**

Employers who are able to remain open and in production during this time should follow the guidance issued by the CDC and should take steps to remain abreast of any future changes that are communicated to business owners. A link to the recent CDC guidance is included here:

<https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html>

Employers who remain in operation during this time should also be aware that employees may be entitled to leave under the FFCRA.

If steps are taken to ensure worker safety, CDC guidance is followed, workers are not knowingly exposed to Coronavirus, liability should not be increased.

**4. Should I/can I require all who enter the facility, employee or visitor, to take a temperature check?**

During this time of Coronavirus pandemic, the EEOC has made it clear that employers may take the otherwise prohibited step of requiring employers to take employees' temperatures. Because fever is a symptom of the Coronavirus, taking employees' temperatures is one means of preventing the spread of Coronavirus in the workplace. However, it is crucial to note that an individual may have Coronavirus without a fever, and should also be aware of other symptoms, including cough, fatigue, and flu-like ache. Any employee found to have a fever should be sent home and not allowed to return to work until a suitable waiting period has passed without development of further symptoms, or until the employee is cleared by a medical professional to return to work. Finally, employers wishing to take their employees' temperature should ideally look into non-invasive methods of taking temperature such as a temperature scanner.

**5. How does an employee prove to me they have COVID-19 symptoms if they call in "sick"? Can I ask them to send me a list of symptoms, image of a thermometer?**

The FFCRA does not require an employee to verify that he or she has Coronavirus. This is likely due to the belief that the risk of falsification is outweighed by the risk of sick employees in the workplace. Additionally, access to medical diagnosis may be extremely difficult or impossible in some areas. You should not require proof that an employee is sick prior to granting emergency sick leave under the FFCRA.

**6. What if my employees do not want to go to work because of the risk of catching the virus? How do we handle this?**

This has become an increasingly common problem in workplaces since the outbreak of this pandemic. Generally, an employee may qualify for two weeks of emergency sick leave under the FFCRA for a number of qualifying reasons.

Simply not wishing to work is *not* a qualifying reason for sick leave under the FFCRA. Employers have some leeway in how they wish to handle that situation. While it might be possible to terminate an employee who refuses to work but does not otherwise qualify for leave, doing so may also come with significant legal risk. Employers are considering varied responses at this time. Employers can allow employees to utilize accrued leave. Employers are not required to pay an employee who is not working and who either is ineligible for leave or has exhausted their

leave. Consult and coordinate with human resources and legal help as possible in these situations.

**7. Are there samples of statements I should provide customers, suppliers, vendors if I am shutdown or deemed essential?**

If you determine that you are an essential business under the terms of any applicable stay-at-home order, you may wish to inform your business partners that you are an essential business and that you plan to remain in operation to the extent it remains possible to do so. You may also wish to advise any vendors, customers, or partners with whom you physically interact of any steps you wish to take in order to minimize in-person contact with staff from their company. Lastly, you may wish to inform them of any additional steps you are taking to minimize the risk of Coronavirus transmission.

If you are discontinuing operations, you should inform all necessary parties of your decision, and, to the extent possible, of your plan to reinstate operations upon notification or determination that you are able to do so.

**8. Where do I find information about what constitutes an “Essential Business” permitted to continue operations?**

In order to determine whether you are an essential business permitted to continue operations you should first look to see whether your municipality, county, or state has issued any kind of order requiring individuals to remain at home or businesses to close. The text of any such order will likely include a description of essential businesses which are permitted to remain in operation during the time that order is in effect. If you are still uncertain, you may wish to seek legal assistance for clarification.

**9. I believe that my company is an essential business, and plan to remain open. How should I explain this to my employees? Also, if we are in a state or locality with a shelter-in-place order, is there anything I need to give to my employees as proof that they are leaving home to work as an essential business?**

Communication that you are going to remain open as an essential business should explain that your company is an essential business which is excepted from any otherwise applicable quarantine or stay-at-home orders. An employer may wish to include a brief statement assuring workers that the Company will follow CDC and other applicable protocols for insuring safety in the workplace, and will implement social distancing measures to the greatest extent possible.

It may be advisable or necessary to provide your employees with a letter explaining why they are exempt from any applicable stay-at-home order. It is advisable to consult with a lawyer to ensure that such letters are prepared in an appropriate form.

**10. If I am in a Stay at Home state with mandatory closures, are my workers covered by the new expanded Paid Sick Leave and FMLA law?**

Generally, yes. Employees unable to work due to a federal, state, or local stay-at-home order would be eligible for two weeks of paid leave under the FFCRA. Note that if a business is an essential business, the employees are therefore able to work. Those employees may not be eligible for sick leave because of the stay-at-home order, but are still covered under the FFCRA. The FFCRA provides other reasons for which an employee can be entitled to paid sick leave including their own Coronavirus symptoms or illness, providing care for another who is subject to a stay-at-home order or illness, an order of quarantine from a healthcare provider, or the need to care for a child whose school or daycare is closed due to Coronavirus.

**11. My company has the resources to cover two payrolls or more during the current mandated closing in my state. Are we still better off furloughing our employees or keep them all on paid sick leave?**

The result may be exactly the same whether the employees are furloughed or kept on paid sick leave. Either way, the employees are likely eligible for two weeks of pay under the FFCRA and employer provided healthcare.

Note that the FFCRA provides that employers with fewer than 50 employees may apply for an exemption to the FFCRA if compliance would threaten the viability of the business. The exact requirements and procedure for application has not yet been determined.

**12. I'm at risk of not making the next payroll, with little to no revenue coming in, should I furlough my employees or terminate them and let them take unemployment? What are the downsides of rehiring workers after unemployment?**

The decision to terminate employees or lay them off may well depend on such factors as the likelihood that you can restart operations and the difficulty of finding and training new employees. However, note that that employees who are on furlough or laid off will be eligible for unemployment as well.

**13. If I lay off employees, what are the implications for employer-sponsored health insurance?**

You should contact your plan directly and review your most recent plan documents in order to determine what your obligations will be under your employer-sponsored healthcare plan. We advise doing so in advance of making any decisions regarding layoffs or terminations.

**14. Will my Workers Compensation Insurance increase if I have to lay off employees due to Covid-19? If an employee is confirmed as having COVID-19, does it fall under worker's comp?**

In order for an illness to be compensable under workers compensation insurance, it must be an occupational illness as defined by law. It is questionable that Coronavirus is an occupational illness unless exposure to that illness is peculiar to the specifics of the job in question.