

What Every Employer Needs to Know During COVID-19

Maine State Chamber of Commerce

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Extreme Public Health Emergency Leave - Maine

26 M.R.S. section 875

Requires “reasonable and necessary” leave, with or without pay if needed:

- Because employee is under investigation, supervision or treatment;
- Employee is acting in accordance with an extreme public health emergency order;
- Employee is in quarantine or isolation;
- Employer has asked employee not to work to avoid exposing others;
- Employee is needed to provide care or assistance to spouse, domestic partner, parent, or child.

Exceptions

- Undue hardship, including need to downsize.
- Employee fails to communicate need for leave within a reasonable time.
- Public employee's services are necessary to protect public's health and safety



Families First Coronavirus Response Act

Families First Coronavirus Response Act (FFCRA)

- Effective April 1, 2020
- Applies to employers with fewer than 500 employees
 - Joint employer / integrated enterprise tests apply, but be careful of taking a position you might regret in another context.
- Provides up to 2 weeks of Emergency Paid Sick Leave (at full or 2/3 pay, depending on reason for leave, with caps)
- Expands the FMLA to cover individual who is unable to work because caring for a child whose school / child care is closed due to COVID-19 (with 2/3 pay, subject to cap).
- Amounts paid pursuant to FFCRA are reimbursed through a payroll tax credit.

Paid Sick Leave - Reasons

- Employee subject to a government isolation or quarantine order;
- Employee has been advised by a health care provider (HCP) to self-quarantine;
- Employee is experiencing symptoms and is seeking diagnosis;
- Employee is caring for an individual subject to a government order or who has been advised by a HCP to self quarantine;
- Employee is caring for child whose school / child care has closed;
- Employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services (none yet exist).

Paid Sick Leave – Eligible Employees

- All employees are eligible, regardless of length of service (or FT / PT status), except:
 - Employers may exclude employees who are HCPs or emergency responders
 - HCP in this exception context broadly defined to include all employees of a doctor's office, hospital, health care center, nursing home, home health care provider, pharmacy [and many others named]
 - HCP who can advise self-isolation sufficient to support leave is much narrower, consistent with FMLA regulations.

Paid Sick Leave – Amount of Leave

- Full time employees (those scheduled to work at least 40 hours per week) get 80 hours.
- Part time employees get leave equal to the number of hours they are normally scheduled to work over 2 workweeks
 - If erratic, calculate average daily hours over past 6 months (or length of employment if shorter).

Paid Sick Leave – Amount of Pay

- If taken for self (reasons 1-3), hours paid at regular rate, but capped at \$511 per day (\$5,110 in the aggregate)
- If taken to care for another (reasons 4-6), hours paid at 2/3 regular rate, but capped at \$200 per day (\$2,000 in the aggregate).
- “Regular rate” – compute looking at six month period leading up to leave, or employee’s entire employment (whichever is shorter)
 - Note rules around calculating regular rate for tipped employees and need to include non-discretionary bonuses.

Expanded FMLA –

- Available for **1 reason only: To care for a child whose school / child care is closed due to COVID-19**
- Notwithstanding normal FMLA eligibility rules, employee eligible if on payroll for the 30 calendar days before leave
 - Note if employee laid off on or after 3/1/20 and rehired before 12/31/20, they qualify.
- Like with Paid Sick Leave, HCPs can be excluded
- First 10 days unpaid (employee will get Paid Sick Leave if not already used), remainder paid at 2/3 regular rate.
- FMLA leave already taken will reduce amount to which employee is entitled under Expanded FMLA.

Small Business Exception

- Employers with fewer than 50 employees may be exempt from child-care-related leave if an authorized officer of the business has determined and documented:
 - Providing the leave would cause expenses / obligations to exceed available business revenues and cause business to stop operating, even at minimal capacity;
 - Absence of employees on leave would entail a substantial risk to business's financial health because of their specialized skills, business knowledge or responsibilities;
 - There are insufficient workers able to provide the services that are needed for the business to operate at a minimal capacity.

Posting Requirements

- All covered employers (even those qualifying for small business exception) must:
 - Post poster / notice in physical workplace (if open);
 - Mail / email it; or
 - Post it on the employer's website.
- Notice available at www.dol.gov/whd.
- Need not post in any language but English.



When is an employee not entitled to leave?

Employee furloughed

Business has been partially or completely shut down as a result of a government order (and employee can't telework)

Employee can telework

Employee laid off

Employee and employer agree that employee will work normal number of hours outside regularly scheduled hours

FFCRA Tax Credits

- Employers will be reimbursed for the cost of providing paid sick leave and expanded FMLA--including qualified health plan expenses and employer's share of Medicare tax--through tax credits.
 - Amounts not required to be paid presumably will not be credited.
- Employers may hold back OASDI on all wages and compensation paid to all employees, until they are reimbursed.
- If the credit exceeds the offset taxes, employer will be refunded the difference.

Documentation Requirements

- To support the tax credit, employers must obtain:
 - Written request from employee for leave, including name, dates of leave requested, statement of qualifying reason, and statement that employee is unable to work as a result.
 - If leave based on quarantine, statement should include name of gov. entity or HCP advising.
 - If leave to care for another, the name and relation of that person.
 - If leave for child care, name and age of child(ren), name of school closed, and a representation that no other person will be providing care.
 - If child over 14 years old and need for leave during daylight hours, a statement that special circumstances exist requiring the employee to render care.

FFCRA Common Q & A

Is the FFCRA retroactive?

- No, an employer that provided paid leave before April 1 out of the goodness of its heart:
 - Must still provide the leave in the statute; and
 - Will not receive a tax credit for the leave voluntarily provided.

Can I require employee to use PTO?

- Paid Sick Leave – no, employee may elect to use PTO concurrently if they wish (to receive 100% pay), but may not be required to do so.
- Expanded FMLA – unclear – regulations are inconsistent. Some state employer may require concurrent use of PTO (not sick) and one states neither employer or employee may insist, but they can agree to supplement.

Is intermittent leave available?

- Not if work can only be done at worksite and employee needs leave for a reason other than child care (*e.g.* self-isolation, symptoms / diagnosis).
- Yes, if employee can telework or if the need for leave is child-care related, as long as employer and employee agree.

How does prior use of FMLA affect leave entitlement under FFCRA?

- An employee will be eligible for paid sick leave, even if they have no FMLA available.
- Employee's entitlement to expanded FMLA will be reduced by any time already taken in the leave year, however.
- Note this means an employee hired 45 days ago gets the full 12 weeks, while a long term employee who took 3 weeks of leave in December for a SHC will only have 9 weeks available.



Unemployment (Maine and CARES Act expansions)

Maine Expansion

- Benefits paid to an individual temporarily laid off or dislocated as a result of state of emergency will not be charged against employer's experience rating.
 - Stay tuned direct reimbursers, something for you too in a few slides.
- Eligibility expanded to include:
 - Employees under medical quarantine, temporarily laid off due to lack of work, or on a temporary LOA due to quarantine, risk of exposure, or need to care for a family member as a result of COVID-19.
 - Employees must remain in contact with employer and able and available to return to work when appropriate.

CARES Act Expansion

Two key components:

- **Pandemic Unemployment Assistance** – base benefits and enhancement available to individuals who are not otherwise eligible under state law.
- **Federal Pandemic Unemployment Compensation** – enhancement available to individuals who are eligible to receive a benefit under state law.

Pandemic Unemployment Assistance

- Applies from 1/27/20 – 12/31/20.
- Capped at 39 weeks.
- Covers workers ineligible for unemployment under state law (because they have exhausted, are self-employed, etc.) and who certify they are unable to work due to one of many articulated COVID-19-related reasons.
- Amount as would be determined under state law, plus an additional \$600 (in Federal Pandemic Unemployment Compensation)
- Available for full and partial unemployment.

Pandemic Unemployment Assistance – Expanded Bases

Workers must “self certify” that they are capable of and available to work but unable or unavailable to work or telework for an enumerated reason:

- Diagnosis / experiencing symptoms;
- Family / household member diagnosed;
- Providing care to family member with COVID-19;
- Has primary caregiving responsibility for a child unable to attend school;
- Cannot reach workplace because of quarantine or advice of health care provider
- Has become breadwinner after head of household died from COVID-19;
- Has had to quit working as a direct result of COVID-19; or
- Has a work location that is closed as a direct result of COVID-19.

Federal Pandemic Unemployment Compensation

- Available to all individuals on unemployment, regardless of whether for reasons related to COVID-19.
- Additional **\$600** per week, **through July 31, 2020**, for anyone collecting state unemployment, full or partial.
- Additional 13 weeks of benefits (ending 12/31/20) on top of amount available under state law.
 - Requires active pursuit of work.
- First week of unemployment covered.

Relief for the Direct Reimbursing Employer

- Federal government will pay state 50% of all claims paid to employees / former employees of direct reimbursement employers between 3/13/20 and 12/31/20.
- State, in turn, is required to use this money to pay the employer back for amounts paid into the unemployment fund in lieu of contributions during this period.
- CARES Act provides that the \$600 add-on will be paid directly to the states by the federal government, so this additional cost should not be passed along to direct payers.

Practical Impact of CARES Act Expansion

- Many employees will earn more on unemployment than they would earn working.
 - Ex: Full time employee earning \$15
 - Gross wages are \$600 / week.
 - If laid off, employee's benefit under state law would be approx. \$355 per week (without dependents).
 - Add \$600 and this employee will earn \$955 on unemployment.
- Recall Pandemic Unemployment Assistance available to employee who "has had to quit working as a direct result of COVID-19."

Unemployment Common Q & A

Will all employees get the \$600 add on, regardless of reason they are on unemployment?

- Yes, once Maine enters into an agreement with the federal government, all employees will get this benefit, regardless of whether they collecting for a COVID-related reason.

This benefit is so generous, how can I prevent employees from self-selecting unemployment?

- Same general rules (no unemployment if there is work available to employee and employee can perform it) apply, but self certification is a low bar.
- For some, job security and health benefits will be incentive enough to continue teleworking or working in essential business.
- For others, employers might need to consider hazard or risk premium pay, to keep employees incentivized to work notwithstanding the risks.

What do I need to do to ensure my employees are able to take advantage of the \$600 add on?

- Any employee, whether laid off due to lack of work or whether temporarily unable to work because of a business shut down, will qualify for the \$600 add on, once they start collecting unemployment.



CARES Act Relief to Consider

Paycheck Protection Program

- Loans available to employers with fewer than 500 employees and some with over 500.
- To be used on payroll, mortgage interest, rent, utilities.
- If used for these purposes in the 8 week period after loan origination with at least 75% spent on payroll costs, eligible to be forgiven
 - Note: forgiveness discounted by reductions in FTEs or salaries more than 25%

Paycheck Protection Loans cont.

- Maximum loan = 2.5 x average monthly payroll costs
- “Payroll costs” include wages, cost of providing health benefits, retirement contributions, severance, and state taxes.
- “Payroll costs” exclude compensation paid over \$100K in salary, FICA taxes, and leave required to be paid under FFCRA.
- Loan terms extraordinarily advantageous, even if forgiveness not an option.

Employee Retention Tax Credit

- Available to businesses operating in 2020 who are:
 - Partially or completely shut down per government order;
 - Experience a 50% decline in quarterly receipts compared to prior year
- Credit on 50% of employee wages up to \$5K credit per employee
- If over 100 employees, credit only applies to the extent wages are paid to employees who are not working

Presenter

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