



Labor & Employment COVID-19 Updates as of March 27, 2020

The below is issued as a general guide only, and does not constitute legal advice. Laws, regulations, and guidance are changing rapidly. Specific questions should be addressed to an employment attorney.

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WAGE AND HOUR ISSUES

1. During a pandemic event, can we order an employee with symptoms to be sent home? **YES. The employer should also contact the local health agency, and take any steps to clean the worksite as necessary.**

Note: In this situation, the employee must be allowed to take paid sick leave/PTO, at the employee's discretion.

2. If the employee is sent home and is exempt, can the employer charge that employee's time to PTO or comp time, or do does the employer have to pay that employee?

If the exempt employee who is sent home will be performing work during a payroll week, they must be paid their salary. This is true regardless of the level of performance. However, if they do not perform any work during a given week, they need not be paid for that week, and the employer may deduct the salary for that week. The employee may elect to take PTO/Sick Leave to the extent it is accrued, but cannot be forced to do so.

If the employee becomes seriously ill, the employee would be eligible for other non-employer provided benefits, such as paid medical leave.

3. Can we refuse to allow an employee to report to work if the employee has a sick family member but the employee does not exhibit any symptoms?

If the employee is in direct contact with the family member, YES. They should be sent home to self-quarantine for at least 14 days per CDC guidelines. If the employee displays any flu-like symptoms during that period, other employees who have been in direct contact with the symptomatic employee should be informed of the contact, and the employer should consider sending home all employees who worked with the now-symptomatic employee until they are cleared from infection.

4. If that employee is exempt, can we charge that employee's time to PTO or comp time, or do we have to pay that employee?

If they perform any work during a workweek, they must be paid for that time. If they perform no work for a full week, they need not be paid for that week. Again, the employee could choose to take PTO/comp time for a full week and thus continue to receive full pay. This is true both if they are in contact with a sick family member, or must provide care to the sick family member.

5. If we turn an exempt employee away after screening, can we charge that employee's time to PTO or comp time, or do we have to pay that employee?

If an exempt employee comes in to work that day and are turned away, they must be paid for that day . An hourly employee should be paid for the time spent in furtherance of their duties, including the time spent in screening.

If either an exempt or non-exempt employee is turned away due to illness, they would be eligible to take sick/leave PTO, and may be eligible to take paid medical leave (the current guidance

6. If, in any of these scenarios, the employee is hourly, do we have to pay the employee for unworked hours?

No, unless the employee is using some other earned benefit (PTO/Sick Leave)

7. If we allow only emergency personnel to report to work, do we have to pay the hourly employees who are required to stay home?

No. But again these employees could elect to use benefits.

8. If an employee refuses to come in to work due to self-distancing, and is not working from home, does the employer have to provide paid leave, pay, or other benefits.

No. However, the employer should consider whether allowing an employee to work from home would be reasonable. If the employee is not performing any work, the employee is not entitled to pay (or any paid benefits).

9. Can non-exempt employees be asked to work from home?

Generally, Yes, if the employer's business provides this flexibility. However, the employer should ensure the non-exempt employees accurately keep time for all hours worked, comply with meal and rest break requirements under Washington law, and reimburse employees for business expenses incurred.

WASHINGTON PAID SICK LEAVE

Washington employers are required to provide paid sick leave to employees, at a rate of one hour for every 40 hours worked. Employees are entitled to carry over 40 hours per year. The below chart shows an agency specific list of scenarios in which an employee would be entitled to various types of leave in the present circumstances. **PLEASE NOTE: The recently enacted FFCRA provides expanded FMLA leave and paid sick leave not covered in the below chart.**

COVID-19 SCENARIOS		Paid Sick Leave (employer paid)	Unemployment Insurance		Paid Family & Medical Leave	Industrial Insurance (L&I)
		Current Law	Current Law	Emergency Rule	Current Law	Current Law
1	Worker is mildly ill with COVID-19.	✓	✗	✓	?	?
2	Worker is severely ill with COVID-19.	✓	✗	✗	✓	?
3	Worker was exposed and quarantined. Business remains open.	✓	✗	✓	✗	?
4	Worker is caring for sick family member.	✓	✗	?	✓	✗
5	Schools are closed by a public official because of COVID-19 and worker has no childcare.	✓	✗	✗	✗	✗
6	Worker is immune-compromised and advised to self-quarantine.	?	✗	✓	?	✗
7	Worker is afraid of gathering in a group and refuses to go to work (self-distancing).	✗	✗	✗	✗	✗
8	Employer must shut down due to a quarantine by a public official.	✓	✓	✓	✗	✗
9	Employer shuts down due to a business slowdown or lack of demand.	✗	✓	✓	✗	✗
10	Employer reduces available hours due to business slowdown or lack of demand.	✗	✓	✓	✗	✗
11	Employer stays open in defiance of public health urging to close.	✗	?	?	✗	✗
12	Health care workers and first responder are under quarantine.	✓	✗	✗	✗	✓



The Employment Security Department is an equal opportunity employer/program. Auxiliary aids and services are available upon request to individuals with disabilities. Language assistance services for limited English proficient individuals are available free of charge. Washington Relay Service: 711

YES
 NO
 MAYBE (ask by mail)

ESD.WA.GOV

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If an employer is forced to close due to a government-mandated shut-down, the employer MUST allow the employee to take paid sick leave. This will obviously place a huge strain on small businesses and businesses with low margins, such as restaurants and other services. Tax credits and other measures to ease the burden on employers are forthcoming, but the immediate impact may be severe. We have seen some indication that employers are advising employees that they cannot take leave, and must claim unemployment benefits instead. This is incorrect, and it could expose an employer to potential liability while denying employees their legal benefits.

The most important issue that will affect many employers is whether employees may claim sick leave if the employer is forced to shut its doors due to a public health order. The simple answer is YES. As of March 24, 2020, Washington is subject to a state-wide “shelter in place” order with only limited businesses open. Under the Paid Sick Leave law, every employer is now required to provide its employees their paid sick leave (if the employee chooses) if the business has been forced to close.

What if a business drastically reduces operations, but stays open with a reduced staff and hours?

Scenario #10 in the above chart appears to address this situation, but current guidance from the Washington ESD/ Dept. L&I suggests this is incorrect. The department has mandated that an employer who is forced to reduce hours dramatically and only provide work for essential staff (which may include grocery stores, restaurants providing take-out only, etc.) MUST provide paid sick leave to the employees who are not working, paid out at the rate commensurate with the hours the employee would have been scheduled to work. Under a precise reading of the law, the business has not been “closed due to a public health order.” A reduced-operations scenario is not directly contemplated in the law. The department’s guidance therefore provides broad coverage to employees who are unable to work, even if the business is not entirely closed.

A list of other commonly asked questions and answers can be found here:
<https://lni.wa.gov/agency/outreach/paid-sick-leave-and-coronavirus-covid-19-common-questions>

FEDERAL PAID LEAVE

Families First Coronavirus Response Act: Employer Expanded Family and Medical Leave Requirements

The below information is obtained from the Department of Labor, and supplemented with additional guidance and rulemaking currently being developed.

The **Families First Coronavirus Response Act (FFCRA or Act)** requires certain employers to provide their employees with expanded family and medical leave for specified reasons (“qualifying needs related to a public health emergency) related to COVID-19. The law goes into effect no later than April 2, 2020. These provisions will apply from the effective date through December 31, 2020.

NOTE: Wage and Hour Division notes that every dollar of expanded family and medical leave (plus the cost of the employer’s health insurance premiums during leave) will be **100%** covered by a dollar-for-dollar refundable tax credit available to the employer. However, the tax-credit will require the employer to expend funds upfront for covered paid leave, and rely on a future credit for reimbursement. Information regarding tax implications is beyond the scope of this writing, and more information can be found at the Department of the Treasury’s website. The Department of Labor’s Wage and Hour Division (WHD) administers and enforces the new law’s paid leave requirements (but does not administer the employer tax credits).

Generally, the Act provides that covered employers must provide to **all employees**:

Paid Sick Leave

- Two weeks (up to 80 hours) of **expanded family and medical leave** at the employee’s regular rate of pay where the employee is unable to work because the employee is quarantined (pursuant to Federal, State, or local government order or advice of a health care provider), and/or experiencing COVID-19 symptoms and seeking a medical diagnosis; or
- Two weeks (up to 80 hours) of **expanded family and medical leave** at two-thirds the employee’s regular rate of pay because the employee is unable to work because of a bona fide need to care for an individual subject to quarantine (pursuant to Federal, State, or local government order or advice of a health care provider), or care for a child (under 18 years of age) whose school or child care provider is closed or unavailable for reasons related to COVID-19, and/or the employee is experiencing a substantially similar condition as specified by the Secretary of Health and Human Services, in consultation with the Secretaries of the Treasury and Labor.

Paid FMLA Leave

A covered employer must provide to **employees that it has employed for at least 30 days**:

- Up to an additional 10 weeks of **expanded family and medical leave** at two-thirds the employee’s regular rate of pay where an employee is unable to work due to a bona fide need for leave to care for a child whose school or child care provider is closed or unavailable for reasons related to COVID-19.
- First 10 days unpaid: The first 10 days leave may be unpaid, but the employee would be allowed to use accrued leave. Washington employees would be eligible for WA Paid Sick Leave.

Covered Employers: The expanded family and medical leave provisions of the FFCRA apply to certain public employers, and private employers with fewer than 500 employees. Most employees of the federal government are covered by Title II of the Family and Medical Leave Act, which was not amended by this Act, and are therefore not covered by the expanded family and medical leave provisions of the FFCRA. However, federal employees covered by Title II of the Family and Medical Leave Act are covered by the paid sick leave provision.

Small businesses with fewer than 50 employees may qualify for exemption from the requirement to provide leave due to school closings or child care unavailability if the leave requirements would jeopardize the viability of the business as a going concern.

Qualifying Reasons for Leave:

Under the FFCRA, an employee qualifies for expanded family and medical leave if the employee is unable to work (**or unable to telework**) due to a need for leave because the employee:

1. is subject to a Federal, State, or local quarantine or isolation order related to COVID-19;
2. has been advised by a health care provider to self-quarantine related to COVID-19;
3. is experiencing COVID-19 symptoms and is seeking a medical diagnosis;
4. is caring for an individual subject to an order described in (1) or self-quarantine as described in (2);
5. is caring for a child whose school or place of care is closed (or child care provider is unavailable) for reasons related to COVID-19; or
6. is experiencing any other substantially-similar condition specified by the Secretary of Health and Human Services, in consultation with the Secretaries of Labor and Treasury.

Under the FFCRA, an employee qualifies for expanded family and medical leave if the employee is caring for a child whose school or place of care is closed (or child care provider is unavailable) for reasons related to COVID-19.

Duration of Leave:

For reasons (1)-(4) and (6): A full-time employee is eligible for up to 80 hours of leave, and a part-time employee is eligible for the number of hours of leave that the employee works on average over a two-week period.

For reason (5): A full-time employee is eligible for up to 12 weeks of leave at 40 hours a week, and a part-time employee is eligible for leave for the number of hours that the employee is normally scheduled to work over that period.

Calculation of Pay:

For leave reasons (1), (2), or (3) (Paid Sick Leave): employees taking leave shall be paid at either their regular rate or the applicable minimum wage, whichever is higher, up to \$511 per day and \$5,110 in the aggregate (over a 2-week period).

For leave reasons (4) or (6) (Paid Sick Leave): employees taking leave shall be paid at 2/3 their regular rate or 2/3 the applicable minimum wage, whichever is higher, up to \$200 per day and \$2,000 in the aggregate (over a 2-week period).

For leave reason (5) (Paid FMLA Leave): employees taking leave shall be paid at 2/3 their regular rate or 2/3 the applicable minimum wage, whichever is higher, up to \$200 per day and \$12,000 in the aggregate (over a 12-week period—two weeks of paid sick leave followed by up to 10 weeks of paid expanded family and medical leave).

Tax Credits: Covered employers qualify for dollar-for-dollar reimbursement through tax credits for all qualifying wages paid under the FFCRA. Qualifying wages are those paid to an employee who takes leave under the Act for a qualifying reason, up to the appropriate per diem and aggregate payment caps. Applicable tax credits also extend to amounts paid or incurred to maintain health insurance coverage. For more information, please see the Department of the Treasury’s website.

Employer Notice: Each covered employer must post in a conspicuous place on its premises a notice of FFCRA requirements. The notice shall be made available on March 25, 2020.

Non-Discrimination: Employers may not discharge, discipline, or otherwise discriminate against any employee who takes expanded family and medical leave under the FFCRA and files a complaint or institutes a proceeding under or related to the FFCRA.

Penalties and Enforcement: Employers in violation of the first two weeks’ expanded family and medical leave or unlawful termination provisions of the FFCRA will be subject to the penalties and enforcement described in Sections 16 and 17 of the Fair Labor Standards Act. 29 U.S.C. 216; 217.

Employers in violation of the provisions providing for up to an additional 10 weeks of expanded family and medical leave to care for a child whose school or place of care is closed (or child care provider is unavailable) are subject to the enforcement provisions of the Family and Medical Leave Act.

The Department will observe a temporary period of non-enforcement for the first 30 days after the Act takes effect, so long as the employer has acted reasonably and in good faith to comply with the Act. For purposes of this non-enforcement position, “good faith” exists when violations are remedied and the employee is made whole as soon as practicable by the employer, the violations were not willful, and the Department receives a written commitment from the employer to comply with the Act in the future.

ANTICIPATED QUESTIONS

An employee refuses to work, claiming symptoms of COVID-19. Is the employee covered under the FFCRA?

Likely, yes. However, the law requires that the employee must be seeking a medical diagnosis. Therefore, the employer should provide coverage, but likewise permit a reasonable time for diagnosis. If the employee does not receive a diagnosis, the employer likely could refuse to continue to pay leave.

Is the FFCRA retroactive to cover time missed from work prior to the effective date?

No.

Does the Emergency Sick Leave Act allow employers to require employees first exhaust other leave, including paid time off, before they can use the Emergency Sick Leave Act Benefit?

No. The Emergency Paid Sick Leave Act includes an express provision that an employer may not require an employee to use other paid leave provided by the employer to the employee before the employee uses the paid sick time under this Act. The employee can therefore take leave consecutively.

For Washington employer, this results in employees being afforded both their paid sick leave under Washington law, and Federal paid sick leave, and Paid FMLA leave in some situations (provided the employee qualifies).

We are also available for you should you have any questions or concerns related to the many issues which may arise. Please feel free to reach out to attorneys here at Williams Kastner should you need any legal guidance or assistance

Thank you for your continued trust in us.



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