

FAQs from Coronavirus Employment Webinar (Part 2)

April 02, 2020

Below are the questions and topics from last week's "[Coronavirus: Bring Your Employment Questions, Part 2](#)" webinar on March 27, presented in a Q&A format. You should speak with an attorney to clarify these topics, as every situation is unique, but as an initial guideline, we're happy to present the information below. We hope you find it useful.

What is the Paycheck Protection Program?

It's part of the **Coronavirus Aid, Relief, and Economic Security (CARES) Act**. It's a \$350 billion program intended to provide American small businesses affected by the COVID-19 pandemic with financial support and assistance through federally guaranteed loans.

How does it work?

It's an opportunity to get a loan through the Small Business Administration (SBA), which can become a grant, for eight weeks of your businesses' operating expenses. You apply through a financial institution that is authorized to process SBA loans and are eligible for up to 2.5 times an amount that is roughly equal to your average monthly payroll (but ignoring annual pay of over \$100,000), up to \$10,000,000. Unlike regular SBA loans, you don't have to provide collateral or guarantee the loan, and additional SBA disaster loans are permissible.

What are the terms of the loan?

Long-term, for a maximum of 10 years, and low-interest, with a maximum rate of 4%. There is also a deferment period of six to 12 months, depending on the lender.

Who does the actual lending?

One of the over 1,800 banks, credit unions, and financial institutions who partner with the SBA.

What can the funds be used for?

- Payroll and commission payments and the associated health plan premiums incurred any time from 2/15/2020 through 6/30/2020
- Rent payments on leases in place by 2/15/2020
- Mortgage interest payments on loans in place by 2/15/2020

- Utility expenses incurred from 2/15/2020 through 6/30/2020

What portion of the loan can be forgiven?

The SBA will forgive all expenses both incurred and paid during the eight weeks following loan origination for:

- Payroll, including salaries, wages, vacation, parental, family, medical, or sick leave, and health benefits (including additional wages paid to tipped employees)
- Mortgage interest on pre-existing loans
- Rent on pre-existing leases
- Utilities

How does forgiveness work?

Loan proceeds used for the approved expenses in the first eight weeks of the loan are eligible for forgiveness; however, the loan forgiveness is cut dollar-for-dollar for each pay reduction of more than 25% from the last full quarter for employees who were employed in 2019 but did not receive pay of more than \$100,000 on an annualized basis for any payroll period in 2019. In addition, the loan forgiveness is reduced by a fraction that compares the average number of full-time equivalent employees on payroll during the eight week period with the average of full-time equivalent employees on payroll in one of two optional measuring periods: 2/15/2019 to 6/30/2020 or 1/1/2020 to 2/29/2020. Neither of these reductions apply if an employer restores the same number of full-time employees on payroll on 2/15/2020 and eliminates all pay reductions from the pay levels in effect on 2/15/2020 by a date that is no later than 6/30/2020.

What companies are eligible for the program?

Any private employer (including non-profits) with 500 or fewer employees, including both full- and part-time workers. Importantly, this includes employees who are on leave and day laborers provided through staffing agencies. It does not include independent contractors or ex-pat employees. The 500-employee count is applied on a location-by-location basis for franchisees and for companies in the foodservice and lodging industries (NAICS code 72). Otherwise, SBA affiliation rules apply to combine related companies in the employee count.

Could employees combine paid sick leave and their paid leave under the FMLA?

Yes. For example, an employee is entitled to twelve weeks of paid leave under the FMLA, the first two weeks of which are unpaid. If they wish, they can take those first two weeks as paid sick leave, then switch over to their paid FMLA leave, thus effectively avoiding unpaid leave.

Are terminated or furloughed employees entitled to leave?

No – whether it's before or after April 1, if employees are terminated because the work for them isn't there, the Act doesn't apply.

What about employees who can telework – are they entitled to sick leave or emergency FMLA leave?

If an employee is unable to work from home because they're caring for a child, they're entitled to FMLA leave. The same is not true of sick leave, but there are six other separate categories under which sick leave may apply.

Do you have to be solely responsible for a child to take FMLA leave? Or can you still take it if your spouse or other childcare is home and could potentially watch over a child?

As long as they're home and unable to work, an employee is entitled to leave.

Can you pay, hypothetically, a weekly bonus to employees, based on the number of days worked, to incent them to work if possible?

Yes, but you'd have to consider that pay as part of overtime, as well as for other calculations.

If employees have the ability to report to work remotely, can they still go out on sick leave or FMLA leave?

They're entitled to sick leave if their situation fits into one of the six qualifying categories, but not FMLA leave because they can telework.

Can reimbursement be received for time taken by employees prior to April 1?

No.

Are furloughed employees eligible for company health insurance while receiving unemployment benefits?

It's a function of the company's plan document, and whether employees are entitled to be covered even though they're not working 30 hours a week.

Are employers with fewer than 20 employees exempt from the law and the noticing requirements for employees?

No – every company with under 500 employees is subject to the law. Notice has to be posted where other employment-related information is made available and to be thorough, we'd also recommend emailing the notice to employees as well.

Do you have to provide the notice in different languages?

Not under federal law as of now, but state laws may require it – in California, for example, you're required to provide a Spanish translation.

Is there any relief available for retirees?

There isn't in any of the new legislation – it's designed to support working people. That being said, there have been several changes intended to make it easier for retirees to access their funds in this situation. A few of them are:

- Plans can be amended to raise loan limits from \$50,000 to \$100,000.
- Plans can be amended to permit an in-service COVID-19 distribution of up to \$100,000 with no early distribution tax and have up to three years to pay the income tax or repay the advance and avoid the income tax.
- Minimum required distributions are suspended for 2020.
- Employers are receiving some relief for pension plan contributions for 2020.

Are there any restrictions on terminating an employee during this pandemic?

There are no new restrictions, but employers still need to comply with all the existing regulations and laws, including the WARN Act, the ADA, Title VII, and so on. The Families First Act does have language prohibiting termination as retaliation for taking leave, but it's very narrowly written. However, it looks as if employers can terminate employees for economic necessity or a behavioral or disciplinary reason.

What about collective bargaining agreements? Employee contracts?

Those are still in effect, however, the General Counsel of the National Labor Relations Board (NLRB) has issued [Memorandum GC 20-04](#), which recognizes the unprecedented situation presented by COVID-19 may impact the customary obligation to bargain the terms and conditions of employment as contracted in a collective bargaining agreement where economic exigencies beyond the employers' control or not reasonably foreseeable compel prompt action. This is a narrow holding and legal consultation should be obtained before engaging in this behavior.

How are employees who have already been laid off or furloughed before April 1 handled? Some companies have had to begin doing this immediately.

The CARES Act has expanded the Families First Coronavirus Response Act's (FFCRA) original indications on this topic. The new Act provides application of leave under the FFCRA at rehire for those employees laid off after March 1, 2020. Employers also need to be careful that the furlough can't be construed as retaliation. To handle this, make sure you document in writing that they're being furloughed because of economic necessity or performance issues. We'd also recommend performing a disparate impact analysis of the group, to avoid a Title VII lawsuit down the road.

What about employees who work from home and live in a different state than their workplace? Which state's law controls for purposes of worker's comp, unemployment benefits, and so on?

Which state's laws apply is determined by where the work is physically being performed. If they're working remotely from Mississippi, that law controls and so on.

Are there any exemptions from these laws for healthcare providers?

Under the sick leave provision, the employer has the ability to decide whether they are going to offer sick leave for certain healthcare providers or emergency responders. “Healthcare provider” is typically defined as someone with licensure, but that’s subject to change.

Can an employee refuse to go to work simply because of their age and feared susceptibility to the virus?

No. There has to be a quarantine order in place or an actual documented medical diagnosis. Anxiety is not a valid basis for refusing to work.

If the hours employees work have been cut across the board due to a reduction in business, do employers still have to pay 2/3 of the original salary under the FMLA to someone who takes leave?

It depends on the employee’s status. If they’re salaried exempt, they get 2/3 of their agreed-upon salary. If they’re hourly non-exempt, you review their average hourly rate and hours worked over a two-year period and do the calculation based on that. If those hours were cut, that would affect the calculation.

Is an employee who’s been on extended unpaid leave subject to the benefits under the Families First Act?

The CARES Act modifies FFCRA’s FMLA employee coverage rule to provide that employees who were “laid off” by an employer on or after March 1, 2020, may potentially qualify for emergency paid FMLA leave if they are later rehired by the same employer. Layoff, however, is an undefined term. To be eligible for this exception, a re-hired employee must have worked for the employer for at least 30 of the last 60 calendar days prior to layoff.

Do you think any distinction will be drawn between a physician’s office and, say, workers in an emergency room under the new legislation? In other words, will exemptions be available for any kind of healthcare worker, or just those on the front lines?

We’re waiting for guidance from the Department of Labor on this, but it seems likely that all healthcare workers will be treated alike. The goal is to lessen the burden on hospital emergency services and everyone helps with that.

If you have any questions, please do not hesitate to contact any member of McGlinchey’s Labor and Employment team or visit our [COVID-19 Resource Center](#).

Related people

Magdalen Blessey Bickford
Camille R. Bryant
Kathy Conklin
Kyle A. Ferachi