



Reopening Your Business

A Guide For Businesses

1. **Families First Coronavirus Response Act (FFCRA)**

The federal government's initial response to the COVID-19 pandemic was to enact two laws expanding the type of leave that employers must offer their employees who are experiencing specific impacts from the pandemic. The FFCRA became effective on April 1st and enforcement began on April 17th. The FFCRA remains in effect until December 31, 2020, thus all businesses that will be open and retaining eligible employees during this period must comply with the below.

The two laws are meant to be read in concert where it is contemplated that an employee would use available EPLA before using EFMLA. However, this leave is in addition to any current employer policies, and, generally, an employer can not force an employee to use one type of leave over another.

a. Emergency Paid Leave Act (EPLA)

- **Employers:** Employers who employ "fewer than 500 employees" are subject to the requirements
- **Employees:** Eligible employees are all employees of an employer, regardless of the amount of time employed
- **Leave:** 1. *Two weeks (up to 80 hours) of **paid sick 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 2. *Two weeks (up to 80 hours) of **paid sick 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 with some exceptions) 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.

b. Extended Emergency Family Medical Leave Act (EFMLA)

- **Employers:** Employers with "fewer than 500 employees" in 20 or more calendar weeks in 2020 or 2019 are now subject to the FMLA extension
- **Employees:** Eligible employees are now those that were employed for 30 calendar days or more

- Leave: Up to an additional 10 weeks of **paid 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 two weeks unpaid unless using EPLA or other accrued leave)
- Intermittent Leave: Employer and employee can agree to allow an employee to use FFCRA EFMLA on an intermittent basis. Either employer or employee may decline the use of FFCRA EFMLA on an intermittent basis.

c. Reading the Two Acts Together

Under the FFCRA, an employee qualifies for paid sick time (EPLA) 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 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 leave 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, using up to a 6-month sample period when needed.

For leave reason (5) (triggers both EPLA and EFMLA): 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): 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): 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): 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 (EPLA) followed by up to 10 weeks of paid expanded family and medical leave (EFMLA)).

d. Important Reminders

- Leave is only available to those employees who cannot work in-person **AND** who cannot work remotely while experiencing a qualifying need for leave

- Employers will be able to recoup the cost of the leave paid to their employees by not depositing payroll taxes to the IRS, which include withheld federal income taxes, as well as both the employee and employer share of Social Security and Medicare taxes with respect to all employees. If the amount of payroll taxes is not enough to cover the cost of the paid leave, employers can file a request for an accelerated payment for the additional amount from the IRS (see [here](#)).
- Employer's must [post a notice](#) to inform employees of their rights
- Employers may not discharge, discipline, or otherwise discriminate against any employee who takes leave under the FFCRA
- Employers of [Health Care Providers or Emergency Responders](#) may elect to exclude such employees from eligibility
- Employers with under 50 employees [may be exempt](#) from these requirements only if the need for the exemption is caused by the childcare provisions of the Acts
- Documentation of elections, leave taken, justification for leave, and the employer's response is paramount for compliance and receiving full reimbursement
- For EPLA, employers can allow an employee to use any accrued paid leave to bring the employee's paid leave to 100%. For EFMLA, first two-weeks at employee's option.
- The FFCRA's 12 weeks of COVID-19 FMLA leave is **not in addition to** the FMLA's standard entitlement of 12 weeks' leave in a 12-month period
- Leave provided under these Acts does not carry-over from year to year, nor is a departing employee eligible for a payout of accrued leave, unless an employer policy
- Answers to frequently asked questions can be found [here](#)

2. The Americans with Disability Act and EEOC Guidance

- a. An employer may make disability related inquiries that are related to COVID-19. By way of example, an employer may ask all employees before they report to work if they have any symptoms of COVID-19, including fever, chills, cough, sore throat, etc. An employer can also require employees to have their temperatures taken before entering the job site or the employer's premises.
- b. An employer can and should require any employee who reports symptoms or shows symptoms of COVID-19 to not report to work or, if the employee is at work, to go home.
- c. An employer should not inquire with employees if they have a compromised immune system or any underlying disabilities. This would be a disability related inquiry that is unrelated to COVID-19 and therefore not permissible.
- d. However, if an employee puts an employer on notice that they are at high risk, such as a compromised immune system or an underlying health condition such as asthma or diabetes, that employee may be entitled to a reasonable accommodation. An employer should engage in the interactive process with these employees to determine if a reasonable accommodation, such as telework or time off, may be appropriate.
- e. Employers need to remember that they will need to continue to follow the requirements of the ADA as it relates to non-COVID-19 disabilities and illnesses.

3. Family Medical Leave Act (for employers with more than 50 employees)

- a. Employers should follow their existing FMLA policies and procedures.

- b. An employee who meets the eligibility standards for FMLA will be entitled to FMLA to care for themselves, or a child or parent who has a serious health condition. This includes serious health conditions that arise from COVID-19 as well as any other serious health condition.
- c. An employee is entitled to 12 weeks of FMLA within a 12-month period. An employee who has used FFCRA mandated EFMLA (for childcare) is not entitled to more than 12 weeks total FMLA-this includes FFCRA EFMLA. Example: an employee uses 6 weeks of FFCRA EFMLA, the employee has 6 weeks of available FMLA remaining.
- d. Remember that an employee who has used their full 12 weeks of FMLA, may be entitled to additional leave pursuant to the ADA as a reasonable accommodation.

4. Coronavirus Aid, Relief, and Economic Security (CARES) Act

a. Payroll Protection Program (PPP) Loans

- Employers must use 75% of the loan for payroll. Payroll includes salaries, wages, commissions, or tips (\$100,000 max per employee—gross earnings); Employee benefits (vacation, sick leave, health care benefits, retirement benefits) and state and local taxes
- Additional allowable expenses (no more than 25% of the loan) include interest on mortgages, rent, and utilities
- Loans that are used for permissible expenses will be forgiven
- Employers should consult with their financial advisors and legal counsel prior to utilizing PPP funds

b. Pandemic Unemployment Assistance (PUA)

- Employer UC Accounts: Employers are eligible to apply for relief from charges for certain COVID-19 related unemployment claims by filing a request within 21 days of notice indicating a claimant's eligibility.
- Employee UC Benefits:
 1. Waiting week is waived—An employee can jump back and forth between being employed and being unemployed with no waiting week.
 2. The PUA provides an additional \$600 a week in unemployment compensation benefits (regardless of the amount of state unemployment compensation).
 3. An employee may collect up to 39 weeks of unemployment compensation benefits through January 27, 2020 and December 31, 2020.
 4. Employee Eligibility—An individual has been diagnosed with COVID-19 or is experiencing COVID-19 symptoms and seeking diagnosis; A member of the individual's household has been diagnosed with COVID-19; An individual is caring for a family or household member diagnosed with COVID-19; An individual is the primary caregiver of a child or household member who is unable to attend school or another facility that is closed due to COVID-19; An individual is unable to reach their place of employment due to an imposed quarantine or was advised by a medical provider to self-quarantine due to COVID-19; An individual was scheduled to commence new employment and does not have a job or cannot reach the job as a direct result of COVID-19; An

individual became the breadwinner or major support for a household because the head of the household died from COVID-19; An individual has to quit a job as a direct result of COVID-19; or An individual's place of employment closed as a direct result of COVID-19.

- **Reimbursable Non-Profits:** The federal government will reimburse certain non-profits 50% of unemployment compensation paid.
- **Return to Work:** An employer can require an employee to return to work once operations resume (regardless of whether the employee is making more on unemployment compensation). An employee who refuses suitable work should be reported to the UC Service Center (note the discussion above regarding FMLA and ADA considerations). The form for refusal of suitable work is at: https://www.uc.pa.gov/Documents/UC_Forms/UC-1921%20Interactive.pdf

5. Health and Safety Orders

a. Businesses that are Still Closed

Businesses that did not receive a waiver, are not on the list of life-sustaining businesses, or are not in the Yellow Phase are still not permitted to conduct in-person operations. However, those business may maintain certain essential functions.

These functions include: work remotely or telework, process payroll, insurance claims, and mail, maintain security and maintenance measures, complete mail, phone, and online orders (so long as delivery is made to the customer), construction, one-person, in-home operations, infrequent visits to the business location to support any of the above.

b. Businesses Who have Waivers or are Life-Sustaining

Businesses that are subject to an exemption or on the [list of life-sustaining](#) businesses may continue their in-person operations but must do so under the requirements found in the new [Yellow Phase Guidelines](#), described below.

These Yellow Phase Guidelines are in addition to and/or include the [Employee/Customer Health and Safety Order Requirements](#) that businesses operating in-person have been subject to since April 15, 2020. Some helpful answers to frequently asked questions can be found [here](#).

c. Construction/Real Estate/Car Sales

On April 20, 2020, Governor Wolf modified certain provisions of the shutdown order, allowing construction to continue on May 1, and signed into law SB 841, allowing for online automobile sales. The construction industry must follow industry specific standards, which can be found [here](#), and guidance for the automobile industry can be found [here](#).

The state has also modified some of its restrictions on real estate transactions, which can be found [here](#).

Remember, all in-person operations, regardless of the justification for those operations, are subject to the [Yellow Phase Guidelines](#).

d. Yellow Phase Businesses

On May 1, 2020, Governor Wolf announced that, based on the state's [reopening plan](#), 24 counties would move from the red phase of business shutdown restrictions, which the entire state is currently under, to the yellow phase, beginning May 8.

All businesses, excluding Indoor Recreation, Health and Wellness Facilities (including gyms, spas, hair and nail salons, and massage facilities) and all Entertainment businesses, may conduct in-person operations, but all must do so under the new [Yellow Phase Guidelines](#).

Important takeaways from the yellow phase, in-person operation requirements are:

- All remote work or telework must continue where feasible, even if the business is operating partially in-person
- The [Employee/Customer Health and Safety Order Requirements](#), namely protocols for cleaning, virus exposure planning, social distancing, and serving customers remain in full force and comprise the bulk of the yellow phase requirements
- Updated measures for communicating the above requirements to employees and customers, including posting a specific [one](#) or [two](#) page flyer affirming compliance and designating a [“Pandemic Safety Officer”](#)
- A business that is unable to comply with these requirements may still offer curbside pickup and delivery, so long as social distancing is maintained, but businesses that cannot maintain social distancing may not perform in-person operations in anyway
- Additional answers to questions about the Employee/Customer Health and Safety Order Requirements can be found [here](#)

e. Healthcare and Childcare

Healthcare providers and facilities should continue to monitor the [PA Health Alert Network](#) and [industry specific guidance](#).

Childcare providers, whether operating under an exemption or subject to Yellow Phase Guidelines, should continue to follow [industry specific guidelines](#) and [check provider resources](#) and state agency contacts frequently.

6. Moving Forward

As the federal and state governments commit to reopening plans and begin allowing people and businesses to conduct themselves more freely, the direction of the next several months is becoming clearer. However, if the state of the COVID-19 pandemic persists or devolves to the levels seen earlier this year, these federal laws may be expanded, and the state has indicated that if things change for the worse, rollbacks on reopenings, with expanded restrictions, can be expected. Using the resources provided above, in close consultation with legal counsel, will help businesses prepare during these more certain, but still potentially fraught, weeks and months ahead.