

# **NEW COVID-19 FEDERAL POLICY:**

# **ANSWERS TO YOUR MOST PRESSING QUESTIONS**

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# EMERGENCY PAID SICK LEAVE REQUIREMENTS

## 1. Is fear of contracting COVID-19 an eligible reason for emergency paid sick leave?

No, an employee's concern for contracting the virus is not included within the six allowable reasons for leave. The employee, however, may be eligible for leave under another employer policy (such as a leave of absence, accrued vacation, etc.) as per the requirements of that policy. If an employee's fear, however, is related to a serious health condition, they may be eligible for traditional Family and Medical Leave Act (FMLA) leave. Normal notice and certification procedures would be followed for that determination.

Click [here](#) for more information on qualifying reasons from the U.S. Department of Labor (DOL).

## 2. How and when do employers apply for the tax credit?

Employers pay the paid leave up front and take a dollar-for-dollar tax credit (on a quarterly basis) by retaining the amount of payroll taxes equal to the amount of qualifying leave that it paid, rather than deposit them with the IRS. As the new paid leave took effect April 1, 2020, the first credits can be taken when filing second quarter taxes.

The payroll taxes that are available for retention include withheld federal income taxes, the employee share of Social Security and Medicare taxes, and the employer share of Social Security and Medicare taxes with respect to all employees.

For example, if an eligible employer paid \$5,000 in sick leave and is otherwise required to deposit \$8,000 in payroll taxes, the employer would only be

required under the law to deposit \$3,000 on its next regular deposit date.

If an eligible employer paid \$10,000 in sick leave and was required to deposit \$8,000 in taxes, the employer could use the entire \$8,000 of taxes in order to make qualified leave payments and file a request for an accelerated credit for the remaining \$2,000.

Equivalent sick leave credit amounts are available to self-employed individuals under similar circumstances. These credits will be claimed on their income tax return and will reduce estimated tax payments. More guidance on this is expected from the Internal Revenue Service (IRS).

Please see [extensive guidance](#) including Q&As from the IRS for more information.

## 3. Who qualifies as an "individual" being cared for under the emergency paid sick leave requirement?

"Individual" means an immediate family member, roommate or a similar person with whom the employee has a relationship that creates an expectation that the employee would care for the person if he or she self-quarantined or was quarantined. Additionally, the individual being cared for must: (a) be subject to a federal, state or local quarantine or isolation order as described above; or (b) have been advised by a health care provider to self-quarantine based on a belief that he or she has COVID-19, may have COVID-19 or is particularly vulnerable to COVID-19.

See the answer to question 63 on this U.S.DOL [FAQ](#).

#### 4. Must nonprofits comply with the emergency paid sick leave requirements?

Yes. Private, nonprofit employers with fewer than 500 employees are included as covered employers under the requirements.

Click [here](#) for more information on employer requirements from the U.S. DOL, and click here for a more detailed Q&A from the U.S. DOL.

#### 5. Can an employee self-quarantining after self-diagnosing symptoms of COVID-19 use emergency paid sick leave?

No. Emergency paid sick leave only becomes available for this reason when the employee is unable to work because he or she is taking affirmative steps to obtain a diagnosis. He or she becomes ineligible once a negative test result is received.

See the answer to question 62 on this U.S.DOL [FAQ](#).

#### 6. What notice and/or documentation does an employee have to provide to take advantage of emergency paid sick leave?

According to the U.S. DOL, an employee must provide an employer either orally or in writing the following information: his/her name; the date(s) for which leave is requested; the reason for leave; and a statement that he/she is unable to work because of the given reason.

For additional requirements, see the answer to question 16 on this U.S.DOL [FAQ](#).

#### 7. Are employees entitled to intermittent emergency paid sick leave?

Yes. Please see the answers to questions 20 – 22 on this U.S. DOL [FAQ](#) for detailed requirements.



## EMERGENCY FAMILY AND MEDICAL LEAVE EXPANSION REQUIREMENTS

#### 1. Do the traditional FMLA location requirements for leave due to school and child care closings apply to FMLA expansion leave?

No, the new expanded rules do not require this. Employees taking FMLA for any other reason must still meet this requirement.

See slides 25 – 31 of this [U.S. DOL presentation](#) for more on FMLA expansion leave.

#### 2. Must nonprofits comply with the FMLA expansion requirements?

Yes. Private, nonprofit employers with fewer than 500 employees are included as covered employers under the requirements.

See the answer to question 2 on this U.S.DOL [FAQ](#).

#### 3. How and when do employers apply for the tax credit?

Employers pay the paid leave up front and take a dollar-for-dollar tax credit (on a quarterly basis) by retaining the amount of payroll taxes equal to the amount of qualifying leave that it paid, rather than

deposit them with the IRS. As the new paid leave took effect April 1, 2020, the first credits can be taken when filing second quarter taxes.

The payroll taxes that are available for retention include withheld federal income taxes, the employee share of Social Security and Medicare taxes, and the employer share of Social Security and Medicare taxes with respect to all employees.

Equivalent child care leave credit amounts are available to self-employed individuals under similar circumstances. These credits will be claimed on their income tax return and will reduce estimated tax payments. More guidance on this is expected from the IRS.

Please see **extensive guidance**, including Q&As, from the IRS for more information.

#### **4. Can an employee use FMLA expansion leave for his or her own COVID-19 health condition?**

No. The FMLA expansion requirement is for one reason only—to care for a child whose school or place of care is closed or whose caregiver is unavailable due to COVID-19-related issues.

Such an employee would, however, likely be eligible for up to 10 days of emergency paid sick leave if:

- The employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19.
- The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis.

See the answer to question 10 on this U.S.DOL **FAQ**.

#### **5. Are absences due to the coronavirus covered by traditional FMLA?**

Infection with the coronavirus would likely qualify as a “serious health condition” under the FMLA, allowing an employee to take FMLA protected leave. See **How does the Families First Coronavirus Response Act (H.R. 6201) impact employers?** (*SHRM members only*).

The FMLA expansion leave only allows an employee to take paid FMLA leave if he or she can’t work (or telework) because his or her minor child’s school or child care service is closed due to COVID-19. See **How do I know if an employee’s medical absence qualifies for FMLA leave?** (*SHRM members only*).

#### **6. May an employee take 12 weeks of FMLA expansion leave in addition to the traditional 12 weeks of FMLA leave?**

No. An employee is entitled to a total of 12 weeks of FMLA and/or FMLA expansion leave during a 12-month period.

See the answer to question 44 on this U.S.DOL **FAQ**.

#### **7. What notice and/or documentation does an employee have to provide to take advantage of FMLA expansion leave?**

According to the U.S. DOL, an employee must provide an employer either orally or in writing the following information: his/her name; the date(s) for which leave is requested; the reason for leave; and a statement that he/she is unable to work because of the given reason.

For additional requirements, see the answer to question 16 on this U.S.DOL **FAQ**.

#### **8. Does an employer have to retain any records relating to the FMLA expansion leave?**

Yes. According to the U.S. DOL, an employer must document the following, regardless of whether the leave is granted: the name of the employee requesting leave; the date(s) for which leave is requested; the reason for leave; and a statement from the employee that he or she is unable to work because of the reason. Private-sector employers that intend to claim a tax credit for their payment of the expanded FMLA leave, should retain appropriate documentation.

For additional requirements, see the answer to question 15 on this U.S.DOL **FAQ**.

**9. How can a closed business post notice of the FMLA expansion leave as the U.S. DOL requires?**

Emailing, direct mailing or posting notice on an employee information website will satisfy the requirement.

Click **here** for a U.S. DOL FAQ on notice requirements.

**10. Are employees entitled to intermittent FMLA expansion leave?**

Yes. Please see the answers to questions 20 – 22 on this U.S. DOL **FAQ** for detailed requirements.



## **WORKPLACE IMMIGRATION REQUIREMENTS**

**1. Do I still have to conduct I-9 employment verifications in-person?**

It depends. If your organization is working remotely, remote identity and employment eligibility document verifications (e.g., over video link, email or fax, etc.) are being accepted. Once normal operations resume, all employees who were onboarded using remote identity and employment eligibility document verifications must report to their employer within three business days for in-person verification of identity and employment eligibility documentation for Form I-9.

Employers may implement these provisions for a period of 60 days from March 30, 2020, OR within 3 business days after the termination of the National Emergency, whichever comes first. Employers who avail themselves of this option must provide written documentation of their remote onboarding and telework policy for each employee.

If there are employees who are physically present at a work location, then remote verification is not an option.

Click **here** for the U.S. Department of Homeland Security (DHS) announcement.

**2. Is there any flexibility in responding to a request for evidence (RFE)?**

Yes. For applicants and petitioners who receive a RFE between March 1 and May 1, 2020, U.S. Citizenship and Immigration Services (USCIS) will consider any responses submitted within 60 calendar days after the response deadline set forth in the RFE before taking action.

Click **here** for the USCIS announcement.

**3. Is there any flexibility in responding to a notice of intent to deny (NOID)?**

Yes. For applicants and petitioners who receive a NOID dated between March 1 and May 1, 2020, USCIS will consider any responses submitted within 60 calendar days after the response deadline set forth in the NOID before taking action.

Click **here** for the USCIS announcement.

**4. Will USCIS accept electronically reproduced original signatures now?**

Yes. USCIS will accept all benefit forms and docu-

ments with reproduced original signatures, including the Form I-129, Petition for Nonimmigrant Worker, for submissions dated March 21, 2020, and beyond.

Click [here](#) for the USCIS announcement.

### **5. Can PERM labor certifications be submitted via email now?**

Yes. Beginning March 25, 2020, and through June 30, 2020, the U.S. DOL Office of Foreign Labor Certification will send approved permanent labor certifications by email, in response to the COVID-19 pandemic. After receiving the certified Form ETA-9089 by email, the form must be printed and then signed and dated by each of the following prior to filing the Form I-140 with USCIS: the foreign worker, preparer (if applicable) and employer. USCIS may consider this printed Form ETA-9089, containing all signatures, as satisfying the requirement that petitioners provide evidence of an original labor certification issued by the U.S. DOL.

Click [here](#) for the U.S. DOL announcement.

### **6. Is the U.S. DOL offering any flexibility for Notice of Filings of PERM labor certifications?**

Yes. DOL extended the 180-day Notice of Filings of PERM recruitment window by 60 days for applications filed (Form ETA-9089) by May 12, 2020. Notice of Filings of Recruitments initiated between September 15, 2019, and March 13, 2020, fall under this new 240-day window.

See the answer to question 6 in this [U.S. DOL guidance](#) for more details.

### **7. Does a new Labor Condition Application (LCA) need to be filed if an H-1B, H-1B1 and/or E-3 worker moves to an unintended worksite if that worksite is still located in the same area of intended employment? If not, what notice is required for moving the worker?**

If an employer's H-1B employee is simply moving to a new job location within the same area of intended

employment, and there are no changes in the terms and conditions of employment that may affect the validity of the existing LCA, employers do not need to file a new LCA. Notice is required to be provided on or before the date any worker on an H-1B, H-1B1 or E-3 visa employed under the approved LCA begins work at the new worksite locations. Because the COVID-19 pandemic may cause various service disruptions, the notice will be considered timely when placed as soon as practical and no later than 30 calendar days after the worker begins work at the new worksite location.

See the answer to question 4 in this [U.S. DOL guidance](#) for more details.

### **8. How should notice of an LCA filing for the H-1B, H-1B1 or E-3 be provided when it's not possible to file a hard copy?**

During this pandemic, and in general, employers can provide electronic notice of an LCA filing. For electronic notice, employers may use any means ordinarily used to communicate with employees about job vacancies or promotion opportunities, including a website, electronic newsletter, intranet or email. If employees are provided individual direct notice, such as by email, notification is only required once and does not have to be provided for 10 calendar days.

The notice must be readily available to the affected employees. The employer must document and retain evidence of the notice that it provided in its public access file and must provide a copy of the certified LCA to the H-1B, H-1B1 or E-3 worker(s) no later than the date the nonimmigrant worker reports to work at the worksite location.

See the answer to question 5 in this [U.S. DOL guidance](#) for more details.

### **9. Where can I find country-by-country travel restrictions due to COVID-19 that could impact immigration?**

The U.S. Department of State has a state-by-state listing. Click [here](#) for more.



# EMPLOYEE BENEFIT PLANS

## 1. Can employees now make 401(k) withdrawals for COVID-related expenses?

Yes. Through the end of 2020, hardship withdrawals are available for participants in 401(k)-type defined contribution plans or individual retirement accounts (IRAs) who are affected by COVID-19. The new coronavirus-related distribution (CRD) is not subject to the 10 percent early-distribution penalty and may be repaid over three years. Distributions may not exceed \$100,000 per eligible participant. Income taxes will still be owed on withdrawn amounts, but the law also lets individuals pay tax on the CRD income over a three-year period. Those repayments would not be subject to annual retirement plan contribution limits. The waiving of the 10 percent penalty applies retroactively to withdrawals beginning January 1, 2020, for account holders if: (1) they have received a diagnosis of COVID-19; (2) a spouse or dependent has received a diagnosis of COVID-19; and/or (3) they experience, due to COVID-19, adverse financial consequences as a result of being quarantined, furloughed or laid off; having work hours reduced; or being unable to work due to lack of child care; or other factors as determined by the Treasury secretary.

Click [here](#) for more information from SHRM.

## 2. Is the waiver on retirement plan distributions of up to \$100,000 for each plan?

No. The \$100,000 limit is per eligible participant. It is the aggregate of distributions from all qualified employer-sponsored retirement plans.

Click [here](#) for more information from SHRM.

## 3. Are distributions from retirement plans subject to withholdings?

No. Distributions will not be subject to withholding, and income tax on a qualified coronavirus-related distribution may be spread ratably over a three-year period. Employees are required to sign a certification of the reason for the distribution. Plan administrators are not required to verify the reason.

Click [here](#) for more information from the National Law Review.

## 4. Have there been any changes to loan rules from qualified retirement plans?

Yes. Through December 31, 2020, the current retirement plan loan limits have been doubled to the lesser of \$100,000 or 100 percent of the participant's vested account balance for the next six months. Generally, loans are limited to the lesser of \$50,000 or 50 percent of the participant's vested balance and must be paid back within five years. Individuals with an outstanding loan from their plan with a repayment due between March 27 and December 31, 2020, can delay their loan repayments for up to one year. Repaying a loan from 401(k) savings generally is a better alternative to permanent withdrawals, financial advisors say.

Click [here](#) for more information from SHRM.

## 5. Must retirees still make minimum distributions?

No. The required minimum distributions (RMDs) that account holders must take from tax-deferred 401(k)s and IRAs starting at either age 70 1/2 or 72 have been

suspended in 2020. The 2020 RMD suspension is not limited to participants affected by the coronavirus.

Click [here](#) for more information from SHRM.

**6. Can an employee use a health savings account (HSA) paired with a high-deductible health plan to cover telehealth expenses prior to meeting the deductible?**

Yes. HSAs can now be used for telehealth services and over-the-counter medical products. Specifically, high-deductible health plans can now be paired with HSAs to cover telehealth services before a patient has met the plan deductible. Normal cost-sharing can still be imposed for telehealth visits, such as through co-pays that the plan may require after the deductible is paid. This provision is temporary and will sunset December 31, 2021, unless Congress extends it or makes it permanent.

The law also lets account holders use their HSAs, health reimbursement arrangements (HRAs) or flexible spending accounts (FSAs) to buy over-the-counter medical products, such as drugs and surgical masks,

without a prescription. Further, it allows HSAs, HRAs and FSAs to pay for certain menstrual care products, such as tampons and pads, as eligible medical expenses. These are permanent changes and apply retroactively to purchases beginning January 1, 2020.

Click [here](#) for more information from SHRM.

**7. Have any changes been made to employer-provided education assistance?**

Yes. The law allows employers to provide up to \$5,250 annually per employee towards student loan repayment, and such payment would be excluded from the employee's taxable income. The \$5,250 cap applies to both the new student loan repayment benefit as well as other educational assistance (e.g., tuition, fees, books) provided by the employer under current law. The provision is temporary and applies to any student loan payments made by an employer on behalf of an employee between March 27 and December 31, 2020, unless Congress takes future action to extend or make permanent.

Click [here](#) for more information from SHRM.



# UNEMPLOYMENT INSURANCE

**1. Who can apply for the new unemployment insurance (UI) programs?**

The federal government has provided an estimated \$260 billion in enhanced and expanded UI to people being furloughed, laid off or finding themselves without work through no fault of their own because of the COVID-19 pandemic.

Click [here](#) for more information from the National Employment Law Project.

**2. What is Pandemic Unemployment Assistance (PUA)?**

Through December 31, 2020, PUA provides emergency unemployment assistance to workers who are left

out of regular state UI or who have exhausted their state UI benefits (including any Extended Benefits that might become available in the future). Up to 39 weeks of PUA are available to workers who might include: self-employed, independent contractors, freelancers, workers seeking part-time work and those who do not have a long enough work history to qualify for state UI benefits.

Click **here** for more information from SHRM.

### **3. Can workers eligible for UI also claim PUA?**

No. Employees eligible for state UI are not eligible for the PUA program.

Click **here** for more information from the National Employment Law Project.

### **4. What additional programs are now available for employees who have lost their jobs or are out of work?**

Three new UI programs have been created: Pandemic Unemployment Compensation, Pandemic Emergency Unemployment Compensation and Pan-

demical Unemployment Assistance. All three programs are fully federally funded.

Click **here** for more information from the National Employment Law Project.

### **5. Can UI recipients get checks that are more than their actual paychecks while employed?**

Some low-income and jobless workers could receive more once they have the extra \$600 a week in benefits through July 31, 2020, that the federal government is providing.

This **CNBC news report** provides an example.

### **6. What if I want to retain my employees?**

The federal government has created the Employee Retention Tax Credit and the Paycheck Protection Program, a loan opportunity through the Small Business Administration to encourage eligible employers to maintain employment levels, despite experiencing economic hardship due to COVID-19.

This **FAQ from the IRS** can answer your questions.