

How Small Businesses Can Navigate Paid Sick Time and Leave Amid COVID-19

By Emily P. Crowley



As COVID-19 rapidly changes the economic landscape throughout the country, small businesses are facing new and evolving challenges. To address these challenges, federal and state governments are quickly drafting laws and regulations that are profoundly impacting small businesses.

On April 1, 2020, the Families First Coronavirus Response Act (the Act) took effect after being hastily signed into law on March 18, 2020. The Act entitles some employees to paid sick time and leave for issues arising directly from the COVID-19 outbreak.

Strategies for Addressing Changing Workforce Demands

Most fundamentally, small businesses should understand their wage and hour obligations for non-exempt and exempt employees under the Fair Labor Standards Act (FLSA). Employers are under no obligation to pay non-exempt employees for time not worked, subject to

potential exceptions based on the new federal legislation discussed below. This means businesses forced to temporarily close or scale back hours due to COVID-19 do not have to pay non-exempt employees for hours they may have been scheduled to work prospectively—only those that they do work. In contrast, employers must pay exempt employees their full week's salary if they perform *any* work during that workweek, including work from home. If an exempt employee does no work during a workweek, then the employer need not pay them for that week.

For both non-exempt and exempt employees, their employers have options short of layoffs for dealing with financial and personnel struggles brought on by COVID-19:

Reduce hours: Employers may reduce the working hours of non-exempt employees, including moving full-time employees to part-time. Employers may also reduce hours for exempt employees (and reduce their salaries

proportionally) but should remember that an exempt employee's salary must remain above \$684/week for the employee to remain exempt under the FLSA and not be subject to the requirement of premium pay for hours worked in excess of 40 in a workweek.

In some cases, employees can bridge the financial gap created by the reduction in hours with unemployment benefits, which will depend on existing state law. For example, employers can consult with their state unemployment offices about the availability of worksharing plans, where employees with reduced hours simultaneously obtain partial unemployment insurance benefits. To be eligible, employers usually must submit proposed worksharing plans for approval.

Reduce pay: Small businesses may also decrease pay rates prospectively for non-exempt employees, subject to the applicable state or federal minimum wage, and for exempt employees who do not have an employment contract that sets forth a guaranteed salary. Note that an exempt employee could lose their exempt status if their salary falls below \$684/week. This may be less of a concern if there is no likelihood that an exempt employee will work over 40 hours in a workweek during this period. Employers should give employees notice of impending pay decreases, in writing, so employees can plan.

Furlough: Employers also have the option of putting some or all employees on furlough, which is mandatory time off without pay. Furloughs can be a preferable alternative to layoffs, as the small business reduces its payroll expenses while keeping its workforce in place, and furloughed employees may be eligible to receive unemployment benefits. Furloughs should always have a defined return-to-work date, to avoid being categorized as a termination. For exempt employees, the furlough should coincide with the beginning of a workweek, to avoid entitling exempt employees to a full week's salary when they have only worked part of the workweek.

Employers who reduce wages or hours or furlough employees should perform an analysis to see if these changes cause a disproportionate impact on a protected category of workers, cognizant of the risk of a discrimination claim if there is indeed a disproportionate impact.

Families First Coronavirus Response Act

The Act, which went into effect on April 1, 2020, has two primary provisions relevant to small businesses: emergency paid sick time (PST) and emergency partially paid Family and Medical Leave (EFML). These provisions apply only to private employers with less than 500 employees and some public sector employers (covered employers). Covered employers may exempt health care providers and emergency responders (as those terms are very broadly defined under the Act) from PST or EFML eligibility. All covered employers must display a poster explaining PST and EFML, which is available on the Department of Labor's website.

Employers required to offer PST or EFML under the Act will be eligible for refundable tax credits for benefits given to their employees. In addition, an employer may not require an employee to use other employer-provided paid leave before using the PST granted by the Act.

Emergency Paid Sick Time

The Act requires covered employers to provide up to 80 hours of PST to an employee unable to work or telework because:

1. The employee is subject to a federal, state, or local quarantine or isolation order (including shelter-in-place or stay-at-home orders) related to COVID-19;
2. The employee has been advised by a health care provider to self-quarantine because of COVID-19;
3. The employee is experiencing symptoms of COVID-19 and is seeking a medical diagnosis;
4. The employee is caring for an individual subject or advised to quarantine or isolation;

5. The employee is caring for a minor child whose school or place of care is closed, or childcare provider is unavailable, due to COVID-19 precautions; or
6. The employee is experiencing any other substantially similar conditions as specified by the Secretary of Health and Human Services, in consultation with the Secretaries of Labor and Treasury.

PST used for reasons 1 – 3 above must be paid at 100% of the employee’s usual rate but is capped at \$511/day and \$5,110 in the aggregate. Covered reasons 4 – 6 above can be paid at two-thirds of the employee’s regular rate and is capped at \$200/day and \$2,000 in the aggregate. Employees are eligible for PST regardless of how long they have been on the payroll.

Emergency Family and Medical Leave

The Act requires covered employers provide up to 12 weeks of job protected EFML to an employee unable to work (or telework) because their minor child’s school or childcare service is closed due to a public health emergency (i.e., the fifth covered reason for PST). Only employees who have been on the payroll for 30 calendar days as of the date of the leave request are eligible for EFML.

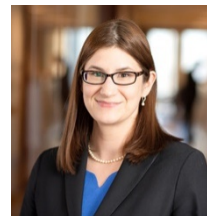
The first two weeks of EFML are unpaid, though an employee may use PST during this period (see above). Employers must pay eligible employees for the remaining 10 weeks of EFML based on the number of hours the employee would otherwise be scheduled to work, and generally at two-thirds of the employee’s regular rate. However, the act caps EFML benefits at \$200/day and \$10,000 in the aggregate for each eligible employee.

Exemption for Certain Businesses with Less than Fifty Employees

The Act exempts small businesses with fewer than 50 employees from providing employees with PST due to closure of a minor child’s school or childcare service, or EFML, if the small business meets one of the following criteria:

1. Providing PST or EFML would result in the small business’s expenses and financial obligations exceeding available business revenues and cause the small business to cease operating at a minimal capacity;
2. The absence of the employee(s) requesting PST or EFML would entail a substantial risk to the financial health or operational capabilities of the small business because of their specialized skills, knowledge of the business, or responsibilities; or
3. There are insufficient workers who are able, willing, qualified and available to perform the labor or services provided by the employee(s) requesting PST or EFML, and these labor or services are needed for the small business to operate at a minimal capacity.

Small businesses that elect this exemption must document their justification under one of the above criteria and retain the justifying records in their files, as opposed to sending documentation to the Department of Labor.



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