

# **The Coronavirus: How Employers Can Manage the Outbreak**

*Prepared for Members of the Illinois Valley SHRM*

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# Emergency Paid Sick Leave Act

- **Effective date:**
  - April 1, 2020
- **Covered employers:**
  - Private employers with less than 500 employees (full-time, part-time, on leave, temporary, and day laborers)
  - All public employers
- **Health care provider employees and first responders are exempt**

# Emergency Paid Sick Leave Act

- **Small Business Exception:**

- Employs less than 50 employees; and
- Leave is requested to care for a child whose school/daycare is closed for reasons related to COVID-19; and
- Authorized officer of the business has determined that *at least **one** of the following applies:*
  - » Providing paid sick leave or expanded FMLA leave would result in the expenses and financial obligations of the business exceeding available business revenues and cause the small business to cease operating at a minimal capacity; or
  - » Employees' absences from work for either of these leaves 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
  - » There are not sufficient workers who are able, willing and qualified to perform the work provided by the employee(s) requesting paid sick leave or expanded FMLA leave, and this work is needed for the business to operate at a minimal capacity.

# Emergency Paid Sick Leave Act

- **Joint Employment: (when will two separate entities be considered a single employer?)**
- Fair Labor Standards Act provisions likely govern – **Focus is on Control.**
  - Hires or fires the employee;
  - Supervises and controls the employee's work schedule or conditions of employment to a substantial degree;
  - Determines the employee's rate and method of payment; and
  - Maintains the employee's employment records.
- No single factor is dispositive
- Second employer must *actually* exercise — directly or indirectly — one or more of the four control factors.

# Qualifying Reasons for Leave

Employee is **unable to work or telework** due to a need for leave because:

- (1) The employee is subject to a Federal, State, or local quarantine or isolation order related to COVID-19.
    - **This does not include Governor Pritzker’s (or other States’) Shelter in Place orders**
  - (2) The employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19.
  - (3) The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis.
- **The amount is capped at \$511 per day and \$5,110 in the aggregate for each employee taking leave for these reasons.**

# Qualifying Reasons for Leave

- (4) The employee is caring for an individual who is subject to a quarantine order as described above or has been advised by a health care provider to self-quarantine.
- (5) The employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services in consultation with the Secretary of the Treasury and the Secretary of Labor.
- (6) The employee is caring for a son or daughter whose school or place of daycare has been closed or the child's child care provider is unavailable due to COVID-19 precautions.
- **The amount is capped at \$200 per day and \$2,000 in the aggregate for each employee taking leave for these reasons**

# Unable to Work or Telework

- What does it mean to be unable to work, including telework for COVID-19 related reasons?
- Employees are unable to work if the employer has work for the employee and one of the six COVID-19 qualifying reasons prevents the employee from being able to perform that work, either under normal circumstances at the employee's place of work or by means of telework.
- If an employee is **able to work or telework**, paid sick leave and expanded family and medical leave, **is not available.**

# Amount of Leave

- **Full-time employees (works 40 or more hours per week):**  
80 hours (capped, can't double dip)
- **Part time employees (works less than 40 hours per week):**  
Number of hours employee works on average over a 2-week period, includes overtime hours
- **Variable Schedules** (*i.e.* hours differ from week to week): Use the average number of hours that the employee was scheduled per day over a 6-month period ending on the day the employee takes sick leave.
- **New(er) employees:** use the “reasonable expectation of the employee at the time of hiring.”



# Amount of Leave

- If the employee no longer has a qualifying reason for taking paid sick leave before exhausting the paid sick leave, the employee can take any remaining leave at a later time, until December 31, 2020.
- Unless the employee is teleworking (which permits intermittent leave), once an employee begins taking paid sick leave for qualifying reasons 1-6, the employee must continue to take paid sick leave each day thereafter, until either:
  - The employee uses the full amount of paid sick leave; or
  - No longer has a qualifying reason for taking paid sick leave.

# Intermittent Leave (teleworking)

- The employer and employee may agree that the employee may take paid sick leave intermittently while teleworking.
- Intermittent leave may be taken in any increments, so long as the employer and employee agree.
- For example, if the employer/employee agree on a 90-minute increment, the employee could telework from 1:00 PM to 2:30 PM, take leave from 2:30 PM to 4:00 PM, and then return to teleworking.

# Intermittent Leave (Workplace)

- Cannot take intermittent EPSL for qualifying reasons 1-5. Must be taken in full-day increments.
- However, if the employee and the employer agree, the employee may take paid sick leave and FMLA paid leave intermittently to care for the employee's child whose school or place of care is closed, or whose child care provider is unavailable, because of COVID-19 related reasons.
- For example, if the employee's child is at home because the child's school or place of care is closed, or child care provider is unavailable, because of COVID-19 related reasons, the employee may take paid sick leave on Mondays, Wednesdays, and Fridays to care for the employee's child, but work at the employee's normal worksite on Tuesdays and Thursdays.

# Rate of Pay

- **Employee who is sick or directed to isolate, (1-3) *greater of:***
  - Regular Rate of Pay: total non-overtime rate of pay, which includes base pay, tips, non-discretionary bonuses, shift premiums, commissions, and incentive compensation; or
  - FLSA Minimum Wage (\$7.25/hour); or
  - State (Illinois \$8.25) or local (Chicago \$13.00) minimum wage
- **Caring for a child/another individual (4-6) –**
  - 2/3 regular rate of pay or applicable minimum wage.
- Employer and employee can agree to permit the employee to supplement paid sick leave or FMLA leave with employer provided paid leave, up to the employee's normal earnings.

# Emergency Paid Sick Leave Act

- Employees are immediately eligible as of April 1, 2020.
- Paid leave, *in addition* to any other leave provided by employers (e.g. PTO, vacation, sick leave, etc.)
- Employers cannot reduce existing leave policies following April 1, 2020.
- Employees may first use paid sick time, but employers may not require employees to use other paid leave **before** the employee uses paid sick time under the Act
- No payout on termination; no carryover to next year
- Expires December 31, 2020

# Employer Prohibitions

- No discrimination or retaliation.
  - **Be careful – \*constructive notice\***
- Employers may not require employees who take leave to find a replacement for their shifts
- Enforced under the FLSA
  - Employee lawsuits
  - DOL action
  - Back wages, liquidated damages, attorney fees
  - Statutory penalties

# Employee Notice Requirements

- **Employee Notice Requirements under PSLA:**
  - When seeking leave under PSL, employees are required to provide appropriate documentation, including:
    - The employee's name; **and**
    - Qualifying reason for the requesting leave; **and**
    - Statement that the employee is unable to work, including telework, for that reason; **and**
    - The dates for which leave is requested; **and**
    - A copy of the federal, state or local quarantine or isolation order related to COVID-19; **or**
    - A copy of the directive from the healthcare provider advising the employee to self-quarantine due to COVID-19; **or**
    - A copy of the note stating that employee is experiencing symptoms and is seeking or has sought a diagnosis; **and**
    - Whether any reasonable accommodation is necessary upon employee's return.

# Employer Notice Requirements

## Employer:

- DOL has published required workplace poster in English and Spanish.
- Must be posted in the workplace by April 1, 2020.
- Also recommended that it be emailed to employees working remotely and posted on the company intranet.
- Even employers under 50 employees must post.
- Must be provided to all new hires through December 31, 2020



# Emergency Family and Medical Leave Expansion Act

- **Effective date:**
  - April 1, 2020
- **Covered employees:** (not the 12-month, 1,250 hour rule)
  - Employed for **30 calendar days prior to April 1, 2020**. Also includes an employee who was “laid off” by that employer not earlier than March 1, 2020, had worked for the employer for not less than 30 of the last 60 calendar days prior to the employee’s layoff, and was rehired by the employer.”
- **Covered employers:**
  - Private employers with less than 500 employees
  - All public employers
- Health care provider employees and first responders are exempt.
- Small business exemption the same as EPSL
- Joint Employment (multiple entities/single employer) – FMLA rules likely govern, focus on “control” factors

# Reason for the Leave

- The employee is **unable to work or telework** due to a need for leave to care for the employee's son or daughter under 18 years of age, if the child's school or place of care has been closed **for COVID-19 related reasons**; or
- The child care provider of such son or daughter is unavailable, due to a COVID-19 emergency declared by a federal, state, or local authority.

# Amount of Leave and Pay

- 12 weeks of job protected leave, from April 1, 2020, until December 31, 2020.
  - Question as to whether it expands the 12-week FMLA entitlement for an employee who has exhausted prior to April 1.
- First 10 days of FMLA leave are unpaid. Employer may substitute paid leave, **but employer cannot require substitution.**
- After the first 10 days, 2/3 regular rate (or minimum wage) multiplied by the number of hours the employee would ordinarily be scheduled to work, including overtime.
- For variable schedule, use the 6-month average, or newer employees, the “reasonable expectation of the employee at the time of hiring.”
- Amount for each employee is capped at \$200/day; \$10K total.

# Reinstatement Rights

- **Same as regular FMLA**
  - Reinstated to same or equivalent position with respect to pay, benefits, terms and conditions)
  - Not job protected from a layoff that would have affected the employee regardless of whether the employee took the FMLA leave (e.g. plant closure).
- **Small employer exception:** Fewer than 25 employees, but only if:
  - Position is eliminated due to economic or operating conditions that effect employment and due to COVID-related reasons.
  - Employer makes reasonable efforts to reinstate employee to same or equivalent position; and
  - Employer makes a reasonable effort to contact a displaced employee about an equivalent position if such position becomes available within 1 year after employee's need for leave ends (or 12 weeks after start of leave).

# Emergency Family and Medical Leave Act Expansion

- **Employer Prohibitions**
  - No discrimination or retaliation
  - Employers may not require employees who take leave to find a replacement for shifts
  - Employee lawsuits (if over 50 employees); DOL action; Back wages, liquidated damages, attorney fees
- **Employer Notice Requirements**
  - DOL published poster.
- **Employee Notice Requirements**
  - When need for leave is foreseeable, the employee must provide as much notice as is practicable. (i.e. constructive notice).

# Emergency Family and Medical Leave Act Expansion

- **Employee Notice Requirements under FMLA:**
  - Employees are required to provide documentation supporting the need for leave under the FMLA to care for a child whose school or daycare is closed for COVID-related reasons.
  - For example, this could include a notice that has been posted on a government, school, or day care website, or published in a newspaper, or an email from an employee or official of the school, place of care, or child care provider.

# Non-enforcement Period

- DOL has issued a temporary non-enforcement policy that provides a 30-day window, from **March 18, 2020 through April 17, 2020**, for employers to come into compliance with the Act.
- DOL will not file a lawsuit against an employer for violations of the Act, so long as the employer has acted *reasonably and in good faith* to comply with the Act.
- DOL will instead focus on *compliance assistance* during this time period.
- Employer must commit to make “all effected employees whole as soon as practicable” and make a “written commitment . . . to comply with the act in the future.”

# Tax Credits for Paid Sick and Paid Family and Medical Leave

- Tax credits – Employers receive a quarterly tax credit against the employer portion of Social Security Tax for amounts paid
- Tax credit up to cap amounts.
- Any excess credit will be treated as an overpayment and refunded to the employer.



# Tax Credits for Paid Sick and Paid Family and Medical Leave

- If an eligible employer paid \$5,000 in sick leave and is otherwise required to deposit \$8,000 in payroll taxes, including taxes withheld from all its employees, the employer could use up to \$5,000 of the \$8,000 of taxes it was going to deposit for making qualified leave payments. The employer would only be required under the law to deposit the remaining \$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.

# Wage and Hour Considerations

- **Non-exempt (hourly workers)**
  - Must be paid for all time worked, but only for time worked.
  - Does not matter where the work is performed – home or office
  - Must be paid at least the minimum wage and are entitled to overtime.
  - Still entitled to a meal period: 7/12 continuous hours, permitted to take a meal period of 20 minutes – which may be unpaid. **If they do not, must notify you in writing, potential overtime issues!!**
  - Must still track hours!!! (**non-exempt and exempt** [as of 2/19/19]).
  - Consider specific, written instructions as to when non-exempt employees are permitted to start/end day (e.g. 9-5).

# Wage and Hour Considerations

## Exempt (salaried workers)

- Exempt employees entitled to full salary so long as they perform a *de minimus* amount of substantive work.
- Courts have held just checking work email likely not considered work requiring payment.

# Wage and Hour Considerations

- **Reduction in Exempt Employee's Salary**
  - Has to be prospective and in writing *i.e.* the next pay period, not the existing period.
  - Has to be for a “bona fide” reason. An economic downturn likely qualifies.
  - Most importantly, it CANNOT reduce the employee below the exempt salary threshold of \$684/week. If the reduction brings the employee BELOW \$684/week, the employee is now non-exempt.
  - Duties must remain the same.

# Wage and Hour Considerations

- **Reducing an Exempt Employee's Days of Work**
  - Exempt employees who work less than an entire work week because of a furlough or reduction of work still must be paid a guaranteed salary.
  - However, an employer can require that the exempt employee use vacation/PTO **on days when the employee does not work.**
  - For example, an exempt employee works Monday and Tuesday, but not Wednesday through Friday. An employer would still comply with the salary requirement by paying the exempt employee for Monday and Tuesday and “dock” the employee's vacation/PTO bank to pay them for Wednesday through Friday.

# Wage and Hour Considerations

- **Temporary Reclassification of Pay Status**
  - An employer can reclassify the exempt employee to non-exempt and pay the employee by the hour.
  - Employee is now entitled to overtime, however.
  - After things settle down, an employer can change the status to exempt again by paying the guaranteed salary.

# Employment Expenses

- Under the Illinois Reimbursement Law (1/1/19), if the employer requires employees to work from home (based on shelter in place or otherwise), the employer must reimburse the employee for all necessary and reasonable business expenses incurred in working from home.
- For example, if the employee is required to make business calls on his/her cell phone, may seek reimbursement for the costs of the calls, or cell phone bill. Likely have to reimburse for internet usage to connect to the employer's platform and perform work.
- If the employee is required to install additional electronic equipment to work from home, then the employee may seek reimbursement for the cost of that equipment.

# Unemployment Benefits

- IDES has created a Q&A for employers/employees answering questions related to unemployment benefits.  
<https://www2.illinois.gov/ides/Pages/COVID-19-and-Unemployment-Benefits.aspx>
- Employment contribution rate increase for each claim: TBD.
- 7-day waiting period is waived. Employees can file as soon as they are laid off.
- When workers are laid off for a period of 7 days or more, or separated from the payroll for any reasons, Illinois employers are required to provide employees with a copy of an IDES publication that provides some basic information regarding unemployment benefits.



# Unemployment Benefits

- Receiving PSL and/or FMLA pay – **not eligible**.
- Receiving paid sick leave under company policy – **not eligible**.
- Temporarily laid off/furlough because of temporary closure – **eligible**, so long as the employee is prepared to return to work as soon as the employer reopens
- Employee refuses to come to work for fear of contracting COVID-19.; **depends**, on whether employee has a good faith basis, reason was attributable to the employer, and tried to get it resolved before quitting.
- Confined to home because (a) doctor imposed self-quarantine; (b) care for a family member who has been diagnosed with COVID-19; or (3) government imposed quarantine – **depends**, on whether employee is able and available to work from home.
- School closure: **depends**, on whether employee is able and available to work from home.
- Reduction in hours: **depends**, if reduced salary is equal or less than weekly benefit amount.

# Federal Pandemic Unemployment Benefits

- Coverage for individuals normally not covered by unemployment, such as those who are self-employed, independent contractors and gig workers.
- 39 weeks of coverage (an extension of 13 weeks), including retroactive coverage back to Jan. 27, 2020.
- **\$600 payment per week on top of the normal unemployment benefit to be paid by the state. This amount is regardless of how much the employee earns.**
- Expires July 31, 2020.

# Federal Pandemic Unemployment Benefits

- An individual must certify that the individual is able and available to work but is unemployed, partially unemployed, or unable or unavailable to because:
  - the individual has been diagnosed with COVID-19 or is experiencing symptoms of COVID-19 and seeking a medical diagnosis;
  - a member of the individual's household has been diagnosed with COVID-19;
  - the individual is providing care for a family member or a member of the individual's household who has been diagnosed with COVID-19;
  - a child or other person in the household for whom the individual has primary caregiving responsibility is unable to attend school or another facility that is closed as a direct result of the COVID-19 public health emergency and such school or facility care is required for the individual to work;
  - the individual is unable to reach the place of employment because of a quarantine imposed as a direct result of the COVID-19 public health emergency;

# Federal Pandemic Unemployment Benefits

- the individual is unable to reach the place of employment because the individual has been advised by a health care provider to self-quarantine due to concerns related to COVID-19;
- the individual was scheduled to commence employment and does not have a job or is unable to reach the job as a direct result of the COVID-19 public health emergency;
- the individual has become the breadwinner or major support for a household because the head of the household has died as a direct result of COVID-19;
- the individual has to quit his or her job as a direct result of COVID-19;
- the individual's place of employment is closed as a direct result of the COVID-19 public health emergency; or
- the individual meets any additional criteria established by the Secretary for unemployment assistance.

# Employee Status Changes and Eligibility for PSL and FMLA Pay

- **Reduction of Hours** - *Not eligible for PSL or FMLA leave because the employee is not prevented from working or teleworking.*
- **Temporary Layoff/Furlough exempt and non-exempt due to a lack of work** *before or after 4/1/20 – Not eligible for PSL or FMLA.*
- **Temporary Layoff/Furlough only non-exempt workers, mandatory work at home policy, and exempt employees still performing work:** *Non-exempt workers not eligible for PSL or FMLA; Exempt employees are eligible.*
- **Termination** *before or after 4/1/20 –Not eligible for PSL or FMLA.*
- **Employer shut downs end of day on e.g. 4/3/20, and furloughs exempt and non-exempt** –*eligible employees are entitled to benefits for 4/1-4/2.*

# IL Mini-WARN Act

- IL WARN Act also requires employers to provide advance notice to affected employees if there is a “plant closing” or a “mass layoff.”
- IL WARN applies to employers with 75 or more employees.
- Under Illinois WARN, a **mass layoff** means a reduction in force that **is longer than 6 months** and:
  - at least 33% of the employees (excluding part-time employees) and at least 25 employees (excluding part-time); or
  - at least 250 employees (excluding part-time)
- **Plant closing** - if the shutdown results in an employment loss at the single site of employment during any 30-day period for **25 or more employees** excluding part-time employees.

# WARN Act and IL Mini-Warn Act

- Under Illinois WARN, an employer is not required to provide 60 days' notice if the mass layoff was necessitated by a physical calamity or an act of terrorism or war.
- The regulations addressing the exceptions provide no guidance on the meaning of “physical calamity” in the case of mass layoffs or the circumstances that could be considered sufficient to not be reasonably foreseeable in the case of plant closures.
- However, employers are still required to provide as much notice as practicable and provide a brief explanation on why you couldn't provide 60 days' notice.

# OSHA

- **Do employers need to record COVID-19 illnesses on our OSHA 300 logs?**
  - In some cases, yes.
  - OSHA requires employers to record work-related illnesses, which, unlike the flu or the common cold, could include COVID-19, if the employee was exposed to the virus while working.
  - Employers are required to assess whether an employee contracted the illness while at work based on the circumstances.



# OSHA

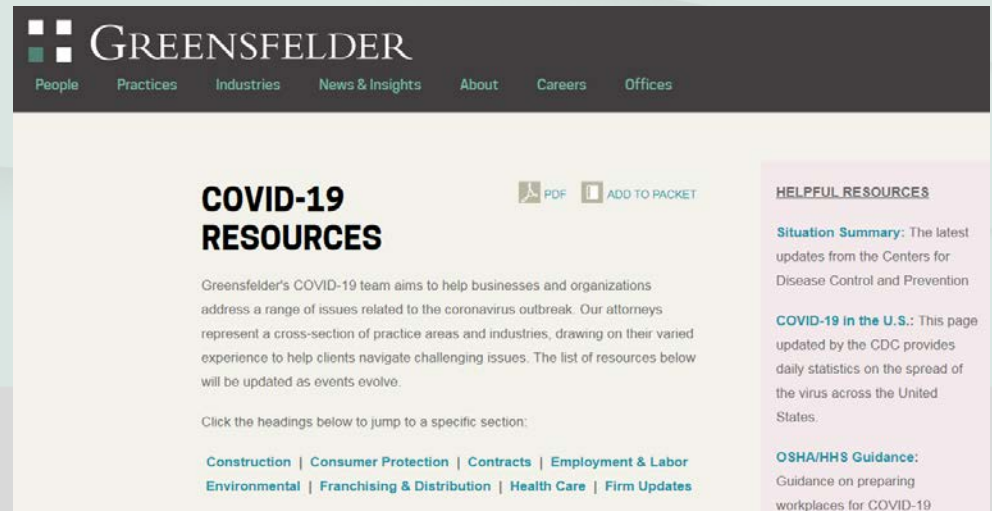
- Employee Rights and COVID-19
  - Section 11(c) – prohibits retaliation against employees for raising concerns about safety and health conditions.
  - Section 13(a) – entitles employees to refuse to work if they reasonably believe they are in “imminent danger.”
    - OSHA defines imminent danger as “any conditions or practices in any place of employment which are such that a danger exists which could reasonably be expected to cause death or serious physical harm immediately or before the imminence of such danger can be eliminated through the enforcement procedures otherwise provided by this Act.”
    - This means that the employee must believe that death or serious physical harm could occur within a short time, for example before OSHA could investigate the problem.

# Social Media

- Social Media –
  - Employee complains on social media that employer is falsifying that it is an “essential business” and putting the lives of its employees at risk.
  - Employer wants to discipline/terminate.
  - Protected concerted activity under Section 7 of the National Labor Relations Act (applies to non-union employers, too) because the employee is discussing terms and conditions of employment.
  - Terminate – unfair labor practice charge.

# COVID-19 Resources

- Greensfelder's COVID-19 resources page is a source for continuing updates:  
<https://www.greensfelder.com/covid-19-resources.html>



The screenshot shows the Greensfelder website's COVID-19 resources page. At the top is the Greensfelder logo and a navigation menu with links for People, Practices, Industries, News & Insights, About, Careers, and Offices. The main heading is "COVID-19 RESOURCES" with icons for PDF and "ADD TO PACKET". Below the heading is a paragraph explaining that the team helps businesses and organizations with coronavirus-related issues. A list of resource categories is provided: Construction, Consumer Protection, Contracts, Employment & Labor, Environmental, Franchising & Distribution, Health Care, and Firm Updates. On the right side, there is a "HELPFUL RESOURCES" section with three items: "Situation Summary" (latest updates from the CDC), "COVID-19 in the U.S." (daily statistics on the virus spread), and "OSHA/HHS Guidance" (guidance on preparing workplaces for COVID-19).

# Questions?



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# THANK YOU

Legal Disclaimer: This document is not intended to give legal advice. It is comprised of general information. Employers facing specific issues should seek the assistance of an attorney.