

# What Obligations Do Companies Have to Pay Their Employees and What Time Off Rights Do Employees Have?

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## (1) Obligations of Companies to Pay Their Employees Working Remotely

**For exempt employees (generally salaried more senior-level employees), employers must pay employees their full salary for any week in which they perform *any* work.** For this reason, most exempt employees will continue to receive their full salaries and benefits, whether they are working remotely or in the employer's facility.

**Caution:** As employees assume different tasks than normal in this fluid situation, be mindful of unintentionally converting exempt employees to non-exempt employees by asking them to take on different lower-level tasks. Some fluctuation in responsibilities will not change their status, but if their job changes significantly, their compensation rights (including a right to overtime pay) may as well.

**For non-exempt (generally hourly) employees, employers need only pay employees for "hours worked."** To the extent non-exempt employees are working reduced schedules, the law does not require that they be paid for more than the hours they actually work. Note, however, that employees' rights to paid time off have increased (see section below).

**Require non-exempt employees to maintain and submit fulsome timesheets.** Non-exempt employees are eligible for overtime (generally time-and-a-half pay for hours worked in excess of 40 in a week, but requirements vary from state to state). With people working unusual and flexible schedules, it is critical for employers to communicate and ensure that all non-exempt employees are keeping fulsome time records, including recording all time they spend checking e-mail and doing other quick tasks from home.

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## (2) What Paid Time Off Rights Do Employees Have?

Both state and federal governments are increasing employees' rights to paid and unpaid time off on nearly a daily basis. The current general principles are as follows:

**Employees should generally be allowed to use any regular paid vacation, sick or personal time they have accrued to cover any time off that would otherwise be unpaid.**

**Employers generally can require employees to use accrued vacation time or personal time in order to be paid for any time off they take, although there are exceptions.** This includes non-exempt employees who may be working a reduced schedule and may need to use vacation or personal time accruals to receive their full-time wages, as well as exempt employees, who will be paid regardless for a part-time schedule but for whom employers can make deductions from their accrued leave banks for time off. However, **note that employers cannot require employees to use regular vacation time or personal time first if they qualify for the new federal sick leave entitlement.**

**Employers generally should not require employees to use their regular accrued sick time,** unless the employee is sick or is using the time for reasons that otherwise qualify him or her to use sick time under the employer's regular policies. In addition, employees must be allowed to use the new federal sick leave entitlement before using their regular accrued sick leave.

**Employees who are on leave, furloughed or working reduced schedules will likely be eligible for unemployment insurance benefits, and should be encouraged to apply for them with the relevant state unemployment agency.** Rights to benefits will vary from state to state and are changing rapidly. In Massachusetts, the Department of Unemployment Assistance will pay unemployment benefits to workers ordered to quarantine themselves or leave work because of risk, exposure, or infection, or for leave to care for a family member. The federal CARES Act dramatically increased employee eligibility for unemployment, length of unemployment benefits (to 39 weeks), and the weekly amounts for which employees are eligible.

The federal government passed the Families First Coronavirus Response Act on March 18, 2020, which provides significantly enhanced paid leave rights for many U.S. employees, as follows:

### 1. Partially Paid FMLA Leave (12 Weeks) for Child Care

- a. Applies to employers with fewer than 500 employees, except that the Department of Labor may exempt employers with fewer than 50 employees if the required leave would jeopardize the viability of their business.
- b. Covers all employees who have been employed for at least 30 days.
- c. Went into effect on April 1, 2020 and expires on December 31, 2020.
- d. Provides 12 weeks of job-protected leave to an employee who is unable to work or telework to care for the employee's child if the child's school or place of care is closed or the childcare provider is unavailable due to a public health emergency.

- e. The first ten days of leave are unpaid, but the employee may use the 14 days of paid sick leave described below or may choose to use other accrued paid time off under the employer's regular policies. Leave thereafter must be paid at two-thirds of the employees' regular rate of pay, provided that an employer need not pay more than \$200 per day or \$10,000 in the aggregate per employee.
- f. Employees must be *permitted* to use additional accrued but unused paid time off under the employer's regular policies (if any) to make themselves whole for any caps on their wages imposed under this new law.
- g. Employers will recoup the cost of this paid leave in the form of tax credits.
- h. Leave may be taken on an intermittent basis, but only if the employer and employee agree to do so.

**Note that this leave does not mean that employers cannot conduct furloughs or lay-offs during an employee's leave.** Under the FMLA, employers are permitted to terminate employees on FMLA leave if the termination would have occurred regardless of the employee's leave. Thus, if the employer would have included the employee in a lay-off or furlough regardless of whether he or she elected to take the leave (even if the lay-off or furlough is for COVID-19 reasons), the employer may include the employee in the lay-off or furlough.

The FMLA typically requires employers to restore employees to the same or an equivalent position upon conclusion of the leave. However, the new amendment provides that an employer's job restoration obligations do not apply if (i) the employer employs fewer than 25 employees, and (ii) the employee's position does not exist at the conclusion of the leave of absence due to an economic downturn or other circumstances caused by a public health emergency during the leave. This exclusion is subject to the employer making reasonable attempts to return the employee to an equivalent position and requires an employer to make efforts to return the employee to work for up to a year following the employee's leave.

There is also an exception (under the original FMLA leave) to the job-restoration right for key employees of an organization (defined as the highest-paid 10% of the company's employees within a 75-mile radius).

## 2. 14 Days of Additional Paid Sick Leave For Virus-Related Reasons:

- a. Applies to all employers with fewer than 500 employees
- b. Applies to all employees regardless of length of employment
- c. Goes into effect on April 1, 2020
- d. Employers must provide employees with two weeks of paid sick leave where the employee is:
  - i. subject to a federal, state or local quarantine or isolation order related to COVID-19;

- ii. advised by a health care provider to self-quarantine due to COVID-19 concerns;
  - iii. experiencing COVID-19 symptoms and seeking medical diagnosis;
  - iv. caring for an individual (loosely defined as a household or family member) subject to a federal, state or local quarantine or isolation order or advised by a health care provider to self-quarantine due to COVID-19 concerns;
  - v. caring for the employee's child if the child's school or place of care is closed or the child's care provider is unavailable due to public health emergency; or
  - vi. 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.
- e. Subject to caps set out below, an employee taking leave for any of the reasons set out in (i-iii) above must be paid his or her regular rate of pay while on paid sick leave. An employee taking leave for reasons (iv-vi) is entitled to at least two-thirds of the employee's regular rate of pay while on leave.
- f. Employers need not provide paid leave at a rate more than \$511 per day, or \$5,110 in aggregate, for those instances described above where the employee is entitled to pay at his/her regular rate. For those instances where leave is paid at two-thirds the employee's regular rate, employers need not pay the employee more than \$200 per day, or \$2,000 in aggregate.
- g. This leave must be provided **in addition to** whatever sick leave the employer already provides. Employers also cannot require employees to use other regular accrued paid time off prior to using this leave.
- h. Employees must be *permitted* to use additional accrued but unused paid time off under the employer's regular policies (if any) to make themselves whole for any caps on their wages imposed under this new law.
- i. Leave must be taken in full-day increments and generally must be used all at once, unless the leave is not all required as a result of the first triggering need and the employee later experiences a second triggering need for the remaining leave.
- j. Any unused leave at the end of the year will not carry over to 2021.

If you have questions regarding these developments, please contact a member of the Labor, Employment & Benefits team.

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