

**MORE ANSWERS TO THE QUESTIONS
EMPLOYERS SHOULD BE ASKING REGARDING
COVID-19 (CORONAVIRUS)**

Marie Burke Kenny

Annie Ellis

Stephenie M. Alexander

Thursday, March 26, 2020

Agenda

Executive Stay Home Order

- California's Statewide Order
- Essential Sectors
- Practical Guidance



Legal Developments

- Families First Benefits under COVID-PSL and EFMLA and Applicable Exemptions
- Tax Credits
- Interplay with EDD Benefits
- Planning Ahead

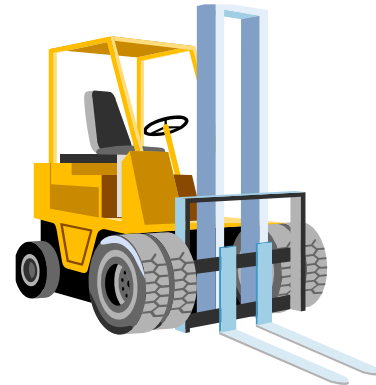
Executive Order N-33-20 Stay Home Directive (March 19, 2020)

- “this order is to go into effect **immediately** and shall stay in effect **until further notice**” (emphasis added)
- I order “all individuals living in the State of California to **stay home or at their place of residence** except as needed to maintain continuity of operations of the federal critical infrastructure sectors”
- “Californians working in these **critical infrastructure sectors may continue their work** . . . [t]he **supply chain** must continue”



What Is an Critical Infrastructure Sector?

- Healthcare/Public Health
- Emergency Services Sector
- Food and Agriculture
- Energy
- Water and Wastewater
- Transportation and Logistics
- Communications and Information Technology
- Other Community-Based Government Operations and Essential Functions
- Critical Manufacturing
- Hazardous Materials
- Financial Services
- Chemical
- Defense Industrial Base



Practical Guidance

- Risks of incorrect determination of essential sector
 - Misdemeanor
 - \$1,000 fine
 - Up to 6 months in jail
 - Sheriff's enforcement (shutting down business)
 - Negative PR
- Seek clarification from the Governor?
- California Labor Code section 1102.5
 - No retaliation for employees who express concern about interpretation of essential sector
- Memo to employees regarding essential sector
 - Provide a copy for those who still report to a worksite or otherwise travel



Families First Coronavirus Response Act

- Emergency Paid Sick Leave (COVID-PSL)
- Extended Family and Medical Leave (EFMLA)





COVID-Paid Sick Leave (PSL)

- Effective date: April 1, 2020.
- Which employers are affected?
 - All private employers with 500 or fewer employees
 - All public employers
- Which employees are eligible?
 - All employees are entitled to COVID-PSL except
 - employers “may elect” to exclude health care providers and emergency responders



COVID-Paid Sick Leave (PSL)

- Are there any exemptions for employers? **Maybe.**
 - The DOL can create regulations **to exempt** businesses with fewer than 50 employees, *“when the imposition of such requirements would jeopardize the viability of the business as a going concern.”*
 - The DOL can also create regulations allowing employers of “health care providers and emergency responders” **to opt out of the FFCRA.**





COVID-Paid Sick Leave (PSL)



- **How much PSL?**
 - Full-time employees are entitled to 80 hours of COVID-PSL.
 - Part-time employees are entitled to the number of hours they work on average over a two-week period. If you have part-time employees with a varying schedule, it is a different calculation.
- **For what purposes?**

If an employee is **“unable to work or telework”** for six qualifying reasons



Coronavirus
COVID-19



COVID-PSL



100% PSL

- (1) The employee is subject to a Federal, State, or local quarantine or isolation order related to COVID-19.
- (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.

- **Note:** Cannot request doctor's note!



2/3 PSL

- (4) The employee is caring for an individual who is subject to an order as described in subparagraph (1) or has been advised as described in paragraph (2).
- (5) The employee is caring for a son or daughter of such employee if the school or place of care of the son or daughter has been closed, or the child care provider of such son or daughter is unavailable, due to COVID-19 precautions.
- (6) 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.

COVID-PSL

- **Rate of Pay For PSL?** Employees must be paid at their “regular rate of pay” subject to these caps:
 - \$511/workday (\$5,110 total) for reasons (1), (2), and (3).
 - \$200/workday (\$2,000) for reasons (4), (5), and (6).
- The DOL created guidelines for calculations of COVID-PSL
- **Exempt employees:** Base salary rate.



COVID-PSL



- **Non-exempt employees:**
 - If they only earn one hourly rate and do not regularly work overtime, this is just their straight hourly rate.
 - Employees with varying rates of pay, bonuses, or commissions, or they regularly work overtime:
 - **For employees who have worked more than 6 months:** Add all compensation that is part of the regular rate of pay over the prior six months and divide that sum by all hours actually worked in the same period.
 - **For employees who have worked less than 6 months:** The average of the employee's regular rate of pay for each week the employee has worked for the employer.

COVID-PSL

- COVID-PSL is “use it or lose it” (as of December 31).
- The employer cannot require the employee to use other paid leave banks before using COVID-PSL.
- The employer cannot require the employee to cover his or her workload or shift before using COVID-PSL.
- No retaliation for application or use of COVID-PSL.
- The employer is required to post information regarding HR 6201 in the workplace.
 - DOL Notice.
- Tax credits.



Emergency Family and Medical Leave Expansion Act (EFMLA)

- **Who is eligible?** All employees who have been employed at least 30 calendar days.
- **Are there employee threshold requirements?** Public agencies and private employers with fewer than 500 employees.
- **For what purpose?** Any eligible employee is entitled to 12 weeks of leave for a Qualifying Need Related to a Public Health Emergency.

If the employee is “unable to work or telework” due to:

A need for leave to care for the son or daughter under 18 years of age of such employee if the school or place of care has been closed, or the child care provider of such son or daughter is unavailable, due to a public health emergency.



EFMLA (CONT'D)



- **Is it paid leave?**
 - The first two weeks are unpaid, although the employee may *choose* to use any available paid leave banks (including COVID-PSL), but the employer *may not require it*.
 - The remaining ten weeks are paid at 2/3 of the “regular rate of pay.”
- **How is pay calculated?** Regular rate of pay.
- **Is it subject to any cap?** \$200/workday (\$10,000 total).
- **If employees have already exhausted 12 weeks of FMLA leave before April 1, do they qualify for an additional 12 weeks of EFMLA leave? NO!**

Interplay Between COVID-PSL and EFMLA for School/Child Care Provider Closures/Unavailability

	WEEK 1*	WEEK 2*	WEEK 3	WEEK 4	WEEK 5	WEEK 6	WEEK 7	WEEK 8	WEEK 9	WEEK 10	WEEK 11	WEEK 12
COVID - PSL	X	X										
EFMLA	X	X	X	X	X	X	X	X	X	X	X	X

COVID - PSL

For COVID-PSL Qualifying Reason No. 5: Up to 80 hours paid at 2/3 of Employee's RRP, with a daily cap of \$200 and aggregate cap of \$2,000

EFMLA

Pay at 2/3 of Employee's RRP Cap at \$200 per day / \$10,000 in the aggregate

*Full-Time: up to 80 hours; Part-Time: Average number of hours over a 2-week period. If PT hours vary, special calculation.

Tax Credits

- **Who qualifies?** Private sector employers and self-employed individuals will be reimbursed 100 percent for paid leave given to employees under the FFCRA
- **How Do The Tax Credits Work?** Employers will be allowed to subtract from payroll taxes the amounts they paid for leave.
 - For example, if the employer owes a total of \$8,000 in payroll taxes but paid \$5,000 to provide paid leave for employees, it will have to remit to the IRS only \$3,000.



Tax Credits

- What if the amount of COVID-PSL or EFMLA benefits paid to employees exceeds the amount of payroll tax owed by the employer? The employer will not have to remit any payroll tax, and it can *file for an expedited refund of the difference*.
 - Note: The expedited refund is to be issued in two weeks.
- Are Health Insurance Costs Included? Yes.
- **Goal:** Businesses can retain and access funds that they would otherwise pay to the IRS in payroll taxes to take immediate advantage of the paid leave credits.

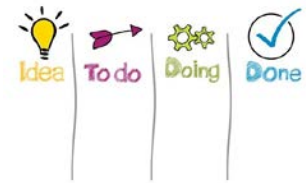


Interplay with EDD Benefits

- Employees must report all sources of income to EDD (including vacation, PSL, COVID-PSL, paid EFMLA)
- Provide eligible employees with notice of potential EDD benefits



Planning Ahead



- **The DOL Poster**
https://www.dol.gov/sites/dolgov/files/WHD/posters/FFCRA_Poster_WH1422_Non-Federal.pdf
- **FAQs regarding DOL Poster** <https://www.dol.gov/agencies/whd/pandemic/ffcra-poster-questions>
- **Employee Request Form For Paid COVID-PSL and EFMLA Leave**
- **Assess productivity** of employees' remote work
- **Communicate FFCRA benefits** to employees
- **Take advantage of tax credits**
 - Require employees to accurately record time that they cannot work to COVID-PSL and EFMLA time
 - Develop a pay code

Furloughs and Layoffs Revisited

- Furloughs
- Temporary work stoppage
- How long?
 - 10 days is a layoff (DLSE opinion)
 - 4 weeks is a layoff under Cal-WARN (NASSCO case)
- No termination of employment
- Anticipated return to work date
- Employees can use
 - Paid Sick Leave, Vacation or PTO
- Insurance benefits and premiums
- EDD benefits



- Layoffs
- Termination of employment
- Employees received final pay
 - including vacation/PTO
 - no payment of PSL
- Employees receive COBRA notice
- EDD benefits
- If more than 50 employees laid off, must provide Cal-WARN notice
 - Notice to employees
 - Notice to government agencies

When a “furlough” becomes a “layoff”

Potential Employer Liability



Cal-WARN: Failure to provide notice as soon “as is practicable” under Cal-WARN as modified by Governor’s Order

- *Back pay and the value of the cost of any benefits each employee may have been entitled to up to a maximum of 60 days or ½ number of days that the employee was employed by the employer (smaller)*

Waiting Time Penalties: Failure to pay all wages (including vacation) due upon termination

- *30 times each employee’s daily wage rate*

When a “furlough” becomes a “layoff”



More Potential Employer Liability

COBRA: Failure to provide COBRA election notices within 14 days of “qualifying event”

- Liable for cost of employee’s medical costs (minus COBRA payment), \$100 excise tax for each day the notice is late (or \$200 per day if dependent affected) and a \$110 per day penalty under ERISA.
- Reasonable cause defense if not wilful neglect and corrected within 30 days

FFCRA: Clearly does not apply to “terminated” employees. BUT, can furloughed employees apply for COVID-PSL and EFMLA paid leave?

Practical Tips/Takeaways

- ✓ Use reliable information
- ✓ Regular and transparent communication
- ✓ Continue to assess operational needs
- ✓ Monitor remote work
- ✓ Monitor industry trends
- ✓ Be proactive and agile
- ✓ Focus on the positive: Good News Network



Resources (FFCRA)

- US Department of Labor (FFRCA FAQs)

<https://www.dol.gov/agencies/whd/pandemic/ffcra-questions>

- US Department of Labor (FFRCA Poster)

<https://www.dol.gov/agencies/whd/posters>

Resources (Health Guidance and Executive Orders)

- Centers for Disease Control – Interim Guidance for Businesses and Employers

<https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html>

- California Governor's Executive Orders

<https://www.gov.ca.gov/category/executive-orders>

<https://covid19.ca.gov/stay-home-except-for-essential-needs/>

- Department of Public Health Guidance Documents

<https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/Guidance.aspx>

- Check local county's department of public health for current versions of individualized orders

Resources (Wage & Hour Issues)

- US Department of Labor (Wage and Hour FAQs)

<https://www.dol.gov/agencies/whd/flsa/pandemic>

- EDD (Unemployment Benefits)

https://edd.ca.gov/about_edd/coronavirus-2019.htm

- California Labor Commissioner (Wage and Hour FAQs)

<https://www.dir.ca.gov/dlse/2019-Novel-Coronavirus.htm>

- California Labor and Workforce Development Agency

<https://www.labor.ca.gov/coronavirus2019/>

Resources (Workplace Safety & Medical)

- **OSHA Guidance on Preparing Workplaces for COVID-19**

<https://www.osha.gov/Publications/OSHA3990.pdf>

- **Cal/OSHA Guidance on Requirements to Protect Workers from Coronavirus**

<https://www.dir.ca.gov/dosh/coronavirus/Health-Care-General-Industry.html>

- **EEOC Bulletin - What You Should Know About the ADA, the Rehabilitation Act, and COVID-19**

https://www.eeoc.gov/eeoc/newsroom/wysk/wysk_ada_rehabilitaion_act_coronavirus.cfm

- **DFEH Employment Information on COVID-19 (FAQ)**

<https://www.dfeh.ca.gov/>

Thank you!

Questions? Please feel free to contact us any time for guidance.



Marie Burke Kenny
Partner

Marie.Kenny@procopio.com

619.515.3876



Stephenie M. Alexander
Senior Associate

Stephenie.Alexander@procopio.com

619.515.3204



Annie Ellis
Senior Associate

Annie.Ellis@procopio.com

619.906.5741