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COVID-19: AG EMPLOYER CRISIS MANAGEMENT BRIEFING

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CRITICAL INFRASTRUCTURE

AG UNDER SHELTER-IN-PLACE ORDERS



California: “Shelter-in-Place” Executive Order

Q: What does Governor Newsom’s Executive Order require? And who does it apply to?

A: Governor Newsom’s Executive Order requires “shelter-in-place” for all individuals living in California to stay at home or their residence except for critical infrastructure.

- Executive Order applies to everyone in California, whether they are permanently living here or temporary resident (students, foreign workers, etc.)
- Executive Order does not apply to individuals working in critical infrastructure.
- Executive Order is in place indefinitely, i.e. no set end date at this time.

Critical Infrastructure Exception (Taken from Feds.)

Food and Agriculture is “critical infrastructure” (also called “essential business”)

Q: Who are we talking about in food and agriculture?

A: These folks (list not exhaustive) –

- Grocery, pharmacy and other retail that sells food and beverages
- Food manufacturing and processing (packing, slaughter facilities, animal feed processing and their suppliers (i.e. food packaging)
- Field and fishery workers
- Animal agricultural workers and veterinary health (i.e. feed, bedding, transportation, distribution of veterinary drugs, slaughter/disposal)
- Truck delivery and transport
- Support services including commodity inspection; sanitation; fuel ethanol facilities; storage facilities
- Production of chemicals, medicines, and vaccines for ag
- Manufacture and maintenance of ag equipment and other infrastructure

NOTE: make sure you check your local County orders as well.

Critical Infrastructure Exception

Q: Who works in “critical infrastructure” (also called “essential business”)?

A: 16 sectors are identified as “critical infrastructure” – including manufacturing (metals, equipment, appliances, transportation vehicles); energy (electricity, oil and natural gas); food and agriculture (processing, storage, transportation; and chemical (fertilizers and pesticides uses)

- Farming/Ag exception will apply to all of your workers including administrative or “office” staff because these folks support food production and distribution.
- Trucking will fall under both the Farming/Ag exception and the Transportation exception so your drivers are covered as well.

Critical Infrastructure Exception

Q: What do we do if our employees are stopped or questioned in-route to work?

A: Work in farming and agriculture is a critical infrastructure section without exception and employees should be permitted to travel and work within California.

- We recommend that employees carry proof of employment (i.e. letter, paystub, employee identification card, etc.)
- Employers may also consider staffing a hotline to address these emergent situations during the Executive Order.
- Employers should consider ID Badges for Essential Personnel with the Company logo and a watermark stamp that says “ESSENTIAL” across the front.

IMMIGRATION UPDATES FOR H-2A EMPLOYERS



DISCLAIMER: This represents the best current information but is subject to change quickly and with little notice. Please use this a starting point, but be sure to seek specific, up-to-the-minute professional guidance tailored to your farm or business.

Update on H-2A Processing

Department of State: U.S. Consulates in Mexico

On March 16, 2020, the Department of State announced that U.S. consulates around the world would cease routine nonimmigrant and immigrant routine visa processing but would continue processing visas in emergent circumstances. Immediately after the announcement, the State Department and Mission Mexico announced that U.S. consulates would continue to process nonimmigrant H-2A visas, recognizing that agricultural workers are “essential and critical” to the health and safety of our food source. Thereafter, the consulates continued to process H-2A visas for workers eligible for a waiver of the visa interview. Those eligible included only those whose H-2A visas *expired* in the previous 12 months. The consulates were instructed to discontinue H-2A visa processing for H-2A applicants who had never been issued an H-2A visa.

Significant efforts were made by various agricultural interest groups, including the National Council of Agricultural Employers, to request the State Department to expand the scope of the exception to “routine” visa processing. On March 30, 2020, those efforts came to fruition.

Update on H-2A Processing

The State Department and U.S. consulates in Mexico dispersed the following announcement and FAQ:

New procedures will enable us to process more visas in the coming days through two major changes that you should be aware of:

1. We have received authorization to grant interview waivers to applicants whose visas expired within the last 48 months (instead of the normal 12). These cases should be scheduled as IW/returning worker appointments now. Any applicant with derogatory information during the screening process must be interviewed in person. If such applications are submitted, their case will be held for administrative processing (refused under INA 221(g)) until such time as we are able to resume interviews. Applications that meet this new rule may be scheduled immediately as returning workers (H2-IW).

2. We have received authorization to grant interview waivers to applicants who have not previously received an H-2 visa, or whose last visa expired more than 48 months ago. These applications should be scheduled as H-2/first time appointments. Any applicant with derogatory information during the screening process must be interviewed in person. If such applicants apply, their case will be held for administrative processing (refused under INA 221(g)) until such time as we are able to resume interviews.

FAQ'S FOR H-2A EMPLOYERS

If an H-2A employer loses customers or otherwise decides not to use the H-2A program any longer this season, what are their options?

- **Contract impossibility.** Under 20 CFR § 655.122(o), if “the services of the worker are no longer required for reasons beyond the control of the employer due to fire, weather, or other Act of God that makes the fulfillment of the contract impossible, the employer may terminate the work contract.” The employer can submit the request to the DOL Certifying Officer by email at TLC.Chicago@dol.gov, describing the loss of customers or other reason why fulfilling the contract has become impossible for reasons beyond the employer’s control. The request can occur at any point before the end of the season, including before any filing has taken place at USCIS, before the visa application at the consulate, or after the workers arrive in the U.S.
- Once the Certifying Officer approves the request, that ends the contract as of that date – the employer is responsible for paying the H-2A workers’ travel to their home or to their next employer, as well as 3/4 of the hours from their start date to the date of the Certifying Officer’s termination notice. If the workers have not left their home country yet (no DOL labor cert, no USCIS visa approval, or no consulate appointment completed), then an impossibility declaration by the Certifying Officer would avoid the travel costs, as well, and give the workers more of a chance to find other employers.
- A Certifying Officer-approved declaration of “contract impossibility” is different than having the Certifying Officer agree that the employer can “withdraw” the application for labor cert. In a withdrawal, the terms-and-conditions of the job order remain in force for any U.S. worker hired as part of the H-2A recruitment. 20 CFR § 655.172.

FAQ'S FOR H-2A EMPLOYERS

If an H-2A employer loses customers or otherwise decides not to use the H-2A program any longer this season, what are their options? (Continued)

- **Transfer to another grower.** If you do not need the workers, but are contacted by or can identify another employer who does need workers (because of border or embassy delays in getting other workers into the US), the new employer can change their I-129 from “new hires” to “transfer” workers, naming your workers, if your workers consent to the transfer. That would be reported to DOL and DHS as a voluntary termination by the workers, which would void the 3/4 guarantee or return-travel obligations.
- **Continue the contract.** If the employer’s customer contracts remain in place, they can continue to perform under the H-2A contract. As the contract goes along, if work slows down, the employer can decide whether the contract has become impossible and pursue Option 1 above; the only exposure is the 3/4 guarantee, which is measured over the life of the entire contract and not week-by-week. If, at the end of the contract (either the stated end-date, or the date the Certifying Officer agrees to terminate it), the employer will need to compare the hours-offered vs. 3/4 of the hours stated on the contract and pay workers for the shortfall (if any).
- **Add more workers.** The OFLC guidance from last week expanded employers’ ability to use the “emergency filing” provisions in 20 CFR § 655.134 and get certified more quickly than the usual 60-to-75-day and 45-day timeline. Once certified to hire more H-2A workers, the employer can either take steps to transfer them from another employer (see #2 above) or complete the consulate/border-crossing process for new hires.

FAQ'S FOR H-2A EMPLOYERS

What happens if the H-2A Employee's home country is closed to incoming travel?

- Several H-2A sending-countries (Peru and Guatemala, for example) have closed their borders and airports to incoming travel, including their own citizens returning from working in the United States. We are working with USCIS on issuing guidance (and hope to have it soon) on what that means for these employees. Most importantly, we want to ensure that they are not deemed to have fallen “out of status” by overstaying their visa or staying beyond the three-year accumulated stay limitation in 8 CFR § 214.2. Beyond that, while they must remain in the United States, we would like to see them able to continue working – either for their previous H-2A employer or a new one.

FAQ'S FOR H-2A EMPLOYERS

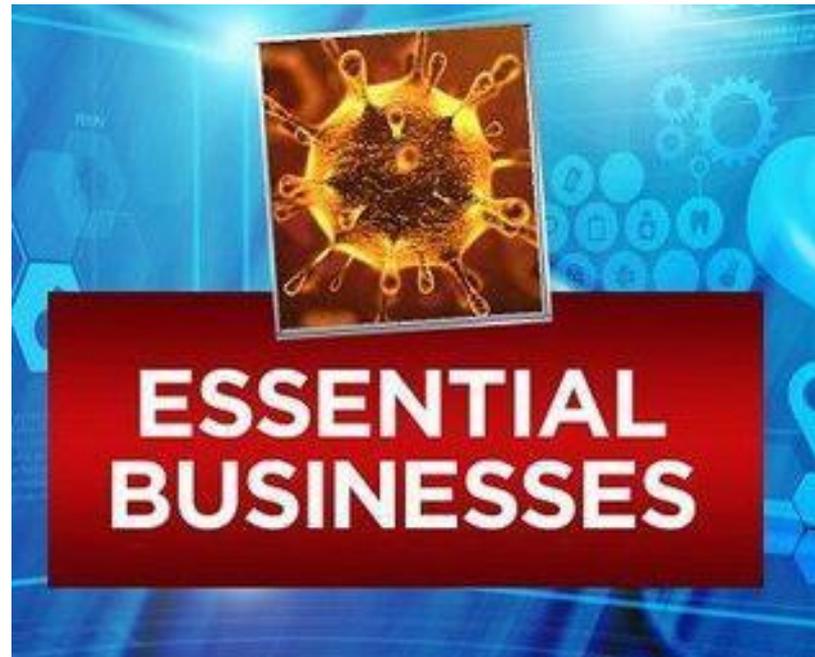
What about H-2A housing and quarantine?

- Employers of H-2A workers must provide free housing under the DOL regulations. If one or more employees develops COVID-19 symptoms, it is essential to remove them from that housing and undergo cleaning protocols immediately. Employers should follow local public health guidelines, and CDC guidance for employers.



LABOR UPDATES

UNIONS WANT IN AS “ESSENTIAL BUSINESSES” TOO!



LABOR UPDATES: UFW OPEN LETTER TO AG

- On March 17th, the UFW issued an “Open Letter” to ag employers listing demands for the industry. The UFW makes it clear its real goal - to collectively bargain for the entire industry it has never been able to organize.
- In terms of what to expect, we have no playbook for this one, not for pandemics and not for the supply chain demands that will be placed upon the Industry, and not from the demands the Industry may face from employees.
- UFCW is already touting victories in grocery with immediate wage increases and additional paid leave so let’s get prepared.
- Remember:
 - California has regulations on access in the fields – don’t give outsiders the run of your place.
 - Supervisors should be trained and provided materials on what to do when unwanted guests show up.
 - Plan for and expect work stoppages.

LABOR UPDATES: UFW OPEN LETTER TO AG



UNITED FARM WORKERS

National Headquarters: La Paz • PO Box 62 • Keene, California 93531
Telephone: (661) 823-6105 • email: execoffice@ufw.org • www.ufw.org

March 17, 2020

Dear agricultural employer:

We continue monitoring breaking developments over coronavirus COVID-19 on local, state, national and international levels. We are following directives issued by the Centers for Disease Control and Prevention (www.cdc.gov), the World Health Organization (www.who.int) as well as all guidelines put in place by state and local agencies. We realize the situation is fluid and we are in constant contact with these organizations.

By joining together can we better combat and mitigate this crisis that the experts predict will only worsen. By working together can we ensure our industry is adopting best health and safety practices as part of a proactive approach to preventing the spread of germs, containing the virus when identified and ensuring all farm workers as well as the food supply chain itself are safer. Some of those best practices are outlined below.

But all of us must do more during this period of genuine crisis. So it is imperative that we all take further proactive steps to ensure the safety of farm workers, protect buyers and safeguard consumers. Agricultural employers have a duty to help all farm workers feel confident as they address their own health needs as well as those of immediate family members. So we are also calling upon you to consider taking the following steps:

- Extend state-required sick pay to 40 hours or more and remove the caps on accruing sick pay
- Eliminate the 90-day waiting period for new farm workers to be eligible for sick pay
- Eliminate the practice of asking for doctors' notes when workers take sick time
- If workers or immediate family members (spouses or children) are identified as infected with COVID-19, those employees should be placed on paid administrative leave for the duration of their illnesses
- Offer daycare assistance and flexibility since schools have closed in many communities

We have started with our own house. The United Farm Workers is individually contacting each unionized employer with urgent appeals to take these steps. We ask you to do the same.

To ensure *all* workers are provided training and written information on best practices to keep them healthy during this time the following are some practices we ask you to implement:

- Frequent and thorough hand washing with soap and water (front and back for 20 seconds or more)
- Encourage workers to stay home if they are sick
- Encourage avoiding touching eyes, nose or mouth with unwashed hands.
- Encourage respiratory etiquette—covering mouth when coughing or sneezing into elbows
- Cleaning and disinfecting frequently touched surfaces multiple times daily.
- Have an emergency plan in place

We encourage you to take advantage of available resources where you can find flyers, pamphlets, tips and guidelines for keeping the food supply chain safe for all workers, retailers and consumers. We thank you for your cooperation and commitment to keeping farm workers safe.

CHEAT SHEET

ACCESS CHEAT SHEET UNDER THE ALRA

ANY PAPER GIVEN TO YOU BY A UNION OR AN ALRB AGENT MUST BE IMMEDIATELY DELIVERED TO THE OFFICE!

🔑 TIME WHEN ACCESS MAY OCCUR:

- ➔ One hour before work
- ➔ One hour after work
- ➔ During Lunch

DURING ACCESS TIMES, SUPERVISORS MUST MOVE TO A NEUTRAL AREA AWAY FROM WHERE ORGANIZERS ARE ADDRESSING WORKERS!

🔑 NUMBER OF UNION ORGANIZERS PERMITTED:

- ➔ If the crew is 30 workers or fewer: 2 organizers
- ➔ If the crew is more than 30: 1 additional organizer for each increment of 15 workers.

🔑 Example: A crew of 46 workers: 4 organizers

- ➔ Organizers must wear identification badges showing their name and their union.
- ➔ Organizers must identify themselves if a supervisor requests it.
- ➔ Organizers may not disrupt operations. SPEECH ALONE IS NOT A DISRUPTION.

🔑 DOCUMENT ALL VIOLATIONS:

- DATE AND TIME
- ORGANIZER'S NAME
- NATURE OF VIOLATION

🔑 REMEMBER... YOU CANNOT... (TIPSS)

Threaten • Interrogate • Promise • Spy • Solicit grievances

CHEAT SHEET

What to do if Unwanted Guests Show Up | Non-Governmental Access

CONSPICUOUS POSTING OF PREMISES:

1. NO TRESPASSING
2. Authorized personnel only! All visitors check in at office for escort into high-hazard ag operation.
3. Food safety regulations in effect. Authorized personnel only.

INTERCEPT THEM AS SOON AS POSSIBLE:

1. Instruct security to stop them at the gate (or point of ingress) before they get into the worksite.
2. If they are already in the field, stop them immediately before they can go any further.
 - a. Train all supervisors/foremen/management employees to identify and stop all non-employees that are seen wandering at worksites uninvited.
 - b. If foremen/supervisors provide any consent for them to continue, the Company may be waiving any claims for trespassing it may have!

CONFIRM THEIR IDENTITIES & DOCUMENT YOUR INTERACTION:

1. Ask for business cards to confirm identities, and call management immediately to ensure their presence is not permitted.
2. Get as much information as you can: names of the trespassers, organizations they represent, purpose of their visit, who invited them onto the property, etc.
3. Take pictures.
4. Record the make, model, and license plate numbers of their cars with pictures or in writing.

STOP THEM FROM ACCESSING THE WORKSITE IMMEDIATELY:

1. If they are stopped at the gate, inform them that they have no right to access the Company property, and do not let them in.
2. If they are found already on the worksite, escort them to the parking lot (or point of egress) to ensure they actually leave.

NOTE: If the Company provides housing, the CRLA or other labor organizations can be allowed access if given permission from the employees, even during work hours!

The Company should have a non-discriminatory housing policy limiting when non-employees can be present. Stop and question any non-employee who is wandering unaccompanied on the Company's premises.

CHEAT SHEET

WORK STOPPAGES

1. Employees Have Right to Strike Over Working Conditions:

- a. DO NOT threaten discipline or discharge.
- b. Employees do not have the right to threaten others or to destroy property.

2. Response to Work Stoppage: Primary Objective - Back to Work:

- a. DO NOT fire or threaten to fire anyone.
- b. DO NOT overreact: Don't get emotional!
- c. DO Notify management - Emergency Call List.
- d. DO Get as much information as you can - open the line of communication between strikers and management: What are the grievances?
- e. DO Attempt to persuade employees to go back to work.
- f. If you cannot get them all to work, get the strikers to leave the work site.
 - Do not engage further ... "No Confrontations"
 - Note the time they stopped working.
- g. DOCUMENT ... DOCUMENT... DOCUMENT actions of employees: e.g. misconduct, refusal to leave, damage to materials or equipment.
- h. Thank the remaining crew and continue production.

SILENCE IS NOT GOLDEN



SILENCE IS NOT GOLDEN

- In this time of uncertainty employers need to be the “rock”...the “champion” of employee rights and protections in the workplace, the champion of their families and the champion of their futures.
- PUT YOUR PEOPLE FIRST! Talk openly and often about protecting our people:
 - ✓ Washing hands,
 - ✓ Wearing PPEs,
 - ✓ Staying at home if you are sick,
 - ✓ Self-reporting if you are sick,
 - ✓ Avoid touching your face and eyes,
 - ✓ Covering your mouth when coughing and sneezing, and
 - ✓ Social distancing.

SHOW IT!!

- ✓ We will...step up sanitation
- ✓ We will...step up education
- ✓ We will...step up communication; and
- ✓ We will step up with enhanced implementation...DAILY!!!



SILENCE IS NOT GOLDEN

TOGETHER WE WILL:



- Keep our families working and safe
- Keep our customers throughout the world fed
- Keep our communities alive and well

RIPPED FROM THE HEADLINES...



After talks with the UFCW, Cargill has agreed to give employees at their meatpacking facilities a \$2/hour emergency pay increase during the COVID-19 pandemic.

SAVE MART SUPERMARKETS

- All grocery workers will start receiving an extra \$2.50 per hour, retroactive to March 8, for all hours worked up to 40 hours per week.
- Anyone working beyond 40 hours per week will earn an extra \$3.50 per hour for all hours worked over 40 hours per week.



- Maple Leaf Foods: Employees will receive additional \$80 per week in premium pay.
- Campbell's Soup: Employees will receive a \$2 per hour pay increase during the outbreak.
- National Beef: Employees are receiving a \$2 per hour pay increase between March 16 through May 10, 2 weeks paid leave if they are required to quarantine, waiver of co-pays for coronavirus medical care, and the ability to take time off for any coronavirus-related absences.

FAMILIES FIRST CORONAVIRUS RESPONSE ACT



Families First Coronavirus Response Act (“FFCRA”)

- President Donald Trump signed the FFCRA into law on March 18, 2020.
- It is designed to help employees and employers by providing paid sick and family leave that is reimbursed, dollar for dollar, through a refundable tax credit.
- **When is This Law in Effect?**
 - The paid leave provisions are effective April 1, 2020 and apply to leave taken between **April 1, 2020 and December 31, 2020.**
- **Who is covered?**
 - includes employers with **fewer** than 500 employees (*the Secretary of Labor has authority to issue exemptions for employers with less than 50 employees.*)

Families First Coronavirus Response Act (“FFCRA”) (Cont’d)

Are certain employers exempt from the provisions of this new law?

Answer: Yes. The Act only applies to workers of those employers with “fewer than 500 employees”. This means that if your operation employs 500 or more employees, you will not be required to provide the new benefits under this law. If you have fewer than 50 employees, you may petition for an exemption from both new laws.

If I have related entities under common ownership and control, can I add those employees together in order to exceed the statutory threshold?

Answer: Yes. According to the administrative regulations under the **Federal Family Medical Leave Act**, the legal entity that employs an employee is normally treated as the employer. Consequently, a corporation is viewed as a single employer under the law. Furthermore, one corporation will be considered a separate employer from another corporation (even if it has an ownership interest in the other corporation, unless it meets the “integrated employer” or “joint employment” test.

Families First Coronavirus Response Act (“FFCRA”) (Cont’d)

What is the “integrated employer test”?

Answer: For the “integrated employer test” to be satisfied, separate entities are determined to constitute parts of a single employer. Thus, the employees of all entities making up the integrated employer will be counted in determining employer coverage. The test applies based on an evaluation of the entire relationship, in its totality, and is not determined based upon any single factor. The factors that are considered in determining whether two or more entities will be treated as an “integrated employer” include:

- Common management;
- Inter-relationship between operations;
- Centralized control of labor relations; and
- Degree of common ownership/financial control

[See, 29 CFR, Section 825.104(c)(2). See Wage-Hour FMLA Advisory Opinion No. 22, CCH ¶ 3200 398 (1993) (a holding company consisting of five different divisions was a single employer)]

NOTE: IF YOU ARE AN INTEGRATED EMPLOYER (NOT A JOINT EMPLOYER), YOU ARE EXEMPT ONLY FROM THE FMLA EXPANSION—NOT THE PSL EXPANSION.

Families First Coronavirus Response Act (“FFCRA”) (Cont’d)

If our company hires a third-party staffing company or FLC, are those employees considered employees of our operation for determining whether we are under or over the 500-worker threshold?

Answer: Special obligations surface under the FMLA where the “joint employment test” is satisfied. For example, employees jointly employed by two employers must be counted by both employers in determining employer coverage and employee eligibility. [29 CFR, Section 825.111(a)(3)] This can be illustrated by use of employees from a third-party staffing company or FLC. If an employer jointly employs 100 employees from one of these firms and has 200 regular employees, it will have 300 employees and therefore be subject to the new **Emergency Family Medical Leave Act**. Application of these issues involve a review of the totality of the circumstances in the application of certain requirements.

TREAD CAREFULLY—AN ADMISSION OF JOINT EMPLOYER CAN COME BACK TO HAUNT YOU IN OTHER CONTEXTS LATER!

Families First Coronavirus Response Act (“FFCRA”) (Cont’d)

- How Does the FFCRA Interact With Other Leave?
 - The FFCRA adds ADDITIONAL leave. Preexisting leave (for example, in California, Paid Sick Leave) REMAINS in effect.
 - Covered Employers have to comply with this law IN ADDITION TO other types of leave.
- As a reminder, under the California Family Rights Act (CFRA), Coronavirus will qualify as a serious health condition for employees to receive up to 12 weeks of job-protected leave for themselves, or to care for a spouse, parent or child.



Families First Coronavirus Response Act (“FFCRA”) (Cont’d)

Refresher on Existing Leave Laws: **California Paid Sick Leave**

- The Healthy Workplaces/Healthy Families Act of 2014 enacting Paid Sick Leave in California **REMAINS IN PLACE**. This provides no less than 24 hours or three days of paid leave or paid time off. This Leave may be used for COVID-19 illness.

Can an employer require a worker who is quarantined to exhaust CALIFORNIA paid sick leave?

No. The employer cannot require that the worker use paid sick leave; that is the worker’s choice. If the worker decides to use paid sick leave, the employer can require they take a minimum of two hours of paid sick leave. The determination of how much paid sick leave will be used is up to the employee.



Families First Coronavirus Response Act (“FFCRA”) (Cont’d)

Refresher on Existing Leave Laws: California Family Rights Act (CFRA) and the Family Medical Leave Act (FMLA)

- Allows eligible employees up to 12 weeks of leave in a 12-month period for the birth of a child, the adoption of a child or the placement of a child in foster care. It also allows leave to care for a seriously ill family member or for the employee's own health condition.
- CFRA and FMLA were enacted as UNPAID JOB PROTECTED LEAVE.
- The FFCRA provides an **expansion** portion of the FMLA for **CERTAIN LIMITED CIRCUMSTANCES ONLY**, as we will explain.
- TO CLARIFY: **Not** all FMLA leave is now paid!!

Families First Coronavirus Response Act (“FFCRA”) (Cont’d)

FMLA Expansion Component

- **Who is Eligible For the FMLA Expansion Leave?**
 - Any employee is eligible so long as the employee has worked for the employer for at least 30 days prior to the leave, and employees qualify if the employee is unable to work **or telework** due to a need for leave to care for their child under the age of 18 if the school or place of care has been closed due to COVID-19.
- **How Are Employees Paid Under the FMLA Expansion?**
 - The first 10 days of leave under this provision may be unpaid, however an employee can substitute vacation leave, personal leave, or medical or sick leave instead. The pay will be not less than two-thirds of an employee’s regular rate of pay. In no event will the pay exceed \$200/day and \$10,000 in aggregate for the 12-week FMLA leave period.

Families First Coronavirus Response Act (“FFCRA”) (Cont’d)

Emergency Paid Sick Leave Component [THIS IS A DIFFERENT “BUCKET” OF LEAVE.]

- When is Paid Sick Leave Available?

- An employer must provide paid sick leave to employees unable to telework or work because (1) the employee is subject to a 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, (4) the employee is caring for an individual who is subject to an order for quarantine or isolation, (5) the employee is caring for a son or daughter if the school or place of care has been closed; (6) the employee is experiencing a substantially similar condition to be specified by the Secretary of Health and Human Services.

Families First Coronavirus Response Act (“FFCRA”) (Cont’d)

Emergency Paid Sick Leave Component (Continued)

How long is the Paid Sick Leave?

- For full-time employees, 80 hours of Paid Sick Time is available, for part-time employees, the employer should provide a number of hours equal to the number of hours that employee works on average over a 2-week period.

Who is Eligible to Use Paid Sick Leave?

- The Paid Sick Leave is available for immediate use regardless of how long the employee has been employed by the employer.

Is there a Cap on Paid Sick Leave Pay?

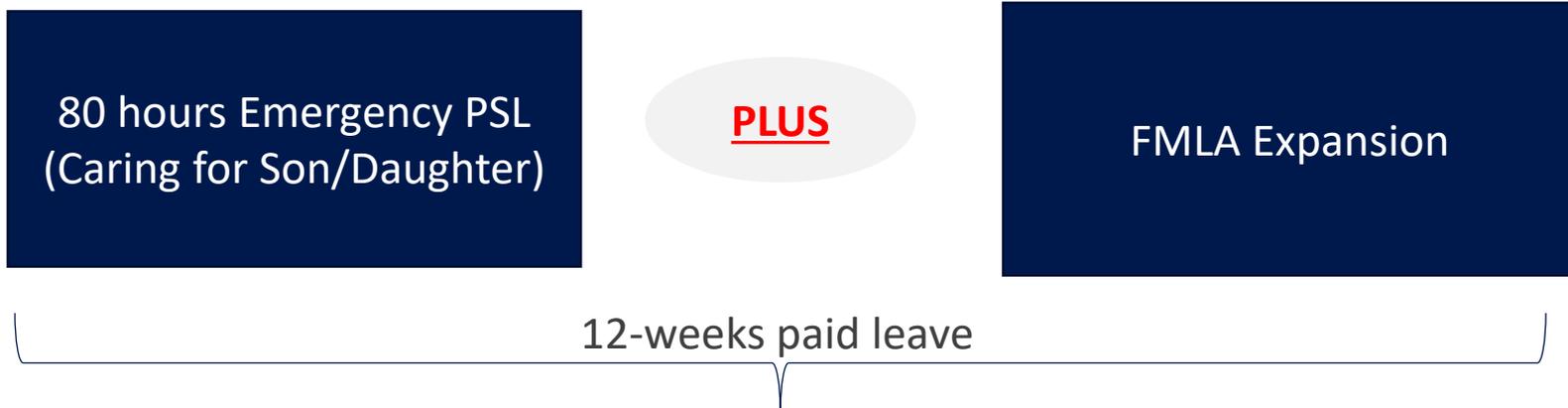
- The Paid Sick Leave is not to exceed \$511/day and \$5,110 in aggregate if the employee is out for reasons (1),(2), or (3) listed on the prior slide. The cap is \$200/day and \$2,000 in aggregate if the employee is out for reasons (4),(5), or (6) listed above. If below the cap, the Paid Sick Leave should be compensated at the Regular Rate of Pay.

Families First Coronavirus Response Act (“FFCRA”) (Cont’d)

Can an Employee “Double Dip” and Use Emergency PSL AND FMLA?

- Yes, but only for a total of twelve weeks of paid leave. An employee can take both paid sick leave and expanded family and medical leave to care for their child whose school or place of care is closed, or child care provider is unavailable, due to COVID-19 related reasons. The Emergency Paid Sick Leave Act provides for an initial two weeks of paid leave. This period thus covers the first ten workdays of expanded family and medical leave, which are otherwise unpaid under the Emergency and Family Medical Leave Expansion Act unless you elect to use existing vacation, personal, or medical or sick leave under your employer’s policy.

Example:



Families First Coronavirus Response Act (“FFCRA”) (Cont’d)

Notice to Employees:

- Available from DOL’s Website in English and Spanish.
- Rule on posting: *Each covered employer must post a notice of the Families First Coronavirus Response Act (FFCRA) requirements in a conspicuous place on its premises. An employer may satisfy this requirement by emailing or direct mailing this notice to employees, or posting this notice on an employee information internal or external website.*

EMPLOYEE RIGHTS

PAID SICK LEAVE AND EXPANDED FAMILY AND MEDICAL LEAVE UNDER THE FAMILIES FIRST CORONAVIRUS RESPONSE ACT

The Families First Coronavirus Response Act (FFCRA or Act) requires certain employers to provide their employees with paid sick leave and expanded family and medical leave for specified reasons related to COVID-19. These provisions will apply from April 1, 2020 through December 31, 2020.

▶ PAID LEAVE ENTITLEMENTS

Generally, employers covered under the Act must provide employees:

Up to two weeks (80 hours, or a part-time employee’s two-week equivalent) of paid sick leave based on the higher of their regular rate of pay, or the applicable state or Federal minimum wage, paid at:

- 100% for qualifying reasons #1-3 below, up to \$511 daily and \$5,110 total;
- ⅔ for qualifying reasons #4 and 6 below, up to \$200 daily and \$2,000 total; and
- Up to 10 weeks more of paid sick leave and expanded family and medical leave paid at ⅓ for qualifying reason #5 below for up to \$200 daily and \$12,000 total.

A part-time employee is eligible for leave for the number of hours that the employee is normally scheduled to work over that period.

▶ ELIGIBLE EMPLOYEES

In general, employees of private sector employers with fewer than 500 employees, and certain public sector employers, are eligible for up to two weeks of fully or partially paid sick leave for COVID-19 related reasons (see below). Employees who have been employed for at least 30 days prior to their leave request may be eligible for up to an additional 10 weeks of partially paid expanded family and medical leave for reason #6 below.

▶ QUALIFYING REASONS FOR LEAVE RELATED TO COVID-19

An employee is entitled to take leave related to COVID-19 if the employee is unable to work, including unable to telework, because the employee:

- | | |
|---|---|
| <ol style="list-style-type: none">1. is subject to a Federal, State, or local quarantine or isolation order related to COVID-19;2. has been advised by a health care provider to self-quarantine related to COVID-19;3. is experiencing COVID-19 symptoms and is seeking a medical diagnosis;4. is caring for an individual subject to an order described in (1) or self-quarantine as described in (2); | <ol style="list-style-type: none">5. is caring for his or her child whose school or place of care is closed (or child care provider is unavailable) due to COVID-19 related reasons; or6. is experiencing any other substantially-similar condition specified by the U.S. Department of Health and Human Services. |
|---|---|

▶ ENFORCEMENT

The U.S. Department of Labor’s Wage and Hour Division (WHD) has the authority to investigate and enforce compliance with the FFCRA. Employers may not discharge, discipline, or otherwise discriminate against any employee who lawfully takes paid sick leave or expanded family and medical leave under the FFCRA, files a complaint, or institutes a proceeding under or related to this Act. Employers in violation of the provisions of the FFCRA will be subject to penalties and enforcement by WHD.



WAGE AND HOUR DIVISION
UNITED STATES DEPARTMENT OF LABOR

For additional information
or to file a complaint:
1-866-487-9243
TTY: 1-877-889-5627
dol.gov/agencies/whd



WH1422 REV 03/20

Families First Coronavirus Response Act (“FFCRA”) (Cont’d)

But...Who is paying for all this?

- Covered employers qualify for **dollar-for-dollar reimbursement** through tax credits for all qualifying wages paid under the FFCRA. Qualifying wages are those paid to an employee who takes leave under the Act for a qualifying reason, up to the appropriate per diem and aggregate payment caps. Applicable tax credits also extend to amounts paid or incurred to maintain health insurance coverage.



Families First Coronavirus Response Act (“FFCRA”) (Cont’d)

What if My Company closed before April 1?

- If your Company shut down before April 1, then there is no emergency paid sick leave or expanded FMLA.

What if My Company closes after April 1?

- If you have employees on paid sick leave or expanded FMLA when you close, you have to pay them in accordance with the law through the date the employer closed.
- Once the employer closes, employees are no longer eligible for the additional leave.

Families First Coronavirus Response Act (“FFCRA”) (Cont’d)

Non Enforcement Period:

- Per Field Assistance Bulletin No. 2020-1, the Department of Labor will **not** bring enforcement actions against employers for violations within the first 30 days of enactment so long as the employer has made “reasonable good faith efforts to comply with the Act.”



Families First Coronavirus Response Act (“FFCRA”) (Cont’d)

What if I think an employee is lying about a COVID-19 diagnosis?

- You can require an employee to provide documentation to support their request for leave under the FFCRA.
- **HOWEVER**, as a practical issue, the DFEH guidance is telling employers to *wave* this documentation requirement:

What medical documentation should employees provide to support a request for reasonable accommodation to work remotely or take leave because they are disabled by COVID-19?

Generally, when an employee requests a reasonable accommodation in the form of a change in schedule, telework, or leave, employers may request reasonable medical documentation confirming the existence of the disability and the need for reasonable accommodation.

During the current pandemic, it may be impracticable for employees to obtain medical documentation of a COVID-19-related disability from their medical provider. To the extent employers require medical documentation in order to grant reasonable accommodations, DFEH recommends waiving such requirements until such time as the employee can reasonably obtain documentation.

Families First Coronavirus Response Act (“FFCRA”) (Cont’d)

What if I think an employee is lying about a COVID-19 diagnosis (Continued)?

Practical Perspective:

- Ask for documentation;
- If the employee says they can’t provide it—make clear you will accept not just a doctors note but emails confirming the diagnosis/test—screenshots—whatever the employee can provide. If the employee was tested, they should have gotten a communication of that result somewhere.
- Follow up for documentation/employee status.
- Use common sense and HR best practices to interview and assess this situation as it occurs—CONSULT YOUR LEGAL COUNSEL FOR GUIDANCE!

FAQ'S ON FFCRA FOR EMPLOYERS

How do I count hours worked by a part-time employee for purposes of FFCRA?

- A part-time employee is entitled to leave for the average number of work hours in a two-week period.
- You will count hours based on the number of hours the employee is normally scheduled to work. If the employee's hours vary, you may use a six-month average to calculate the work hours.
- A part-time employee may take paid sick leave under FFCRA for this number of work hours per day for up to a two-week period, and take expanded FMLA for the same number of work hours per day for up to ten weeks after that.

FAQ'S ON FFCRA FOR EMPLOYERS

When calculating pay due to employees, do I include overtime hours?

- Yes. Expanded FMLA requires you to pay for work hours the employees would have been normally scheduled to work, even if its overtime hours.
- But, Emergency PSL is capped at 80 hours.
- Note that pay does not need to include a premium for overtime hours under with Emergency FMLA or Emergency PSL.

What is the regular rate of pay for purposes of FFCRA?

- Regular rate of pay is the average of your regular rate over a period of up to six months prior to the date on which the employee took leave.
- You can also compute by adding all compensation that is part of the regular rate over the above period and divide that sum by all hours actually worked in the same period.
- Regular rate of pay includes all remuneration, including commissions, tips or piece-rate.

FAQ'S ON FFCRA FOR EMPLOYERS

Can an employee use Emergency Paid Sick Leave or Expanded FMLA if the employee is home with a child because the child's school or daycare is closed or unavailable?

- Yes, an employee may be eligible for both Emergency Paid Sick Leave and Expanded FMLA, but only for a total of 12 weeks of paid leave.
- Emergency Paid Sick Leave provides for an initial two weeks (10 workdays) of paid leave. Expanded FMLA is only available if the school or child care is closed or unavailable due to COVID-19 related reasons.

FAQ'S ON FFCRA FOR EMPLOYERS

What documents do employees need to provide for Emergency Paid Sick Leave or Expanded FMLA?

- The law does not prohibit an employer from requiring medical documentation however we would generally advise to be flexible with such a requirement. To require employees to enter possible contaminated doctor's offices and clinics for a diagnosis or other documentation risks potential liability later on.
- The DOL regulations explain that for paid Sick leave or expanded family and medical procedures leave, as an soon as practical. That can be after the first workday or portion of a workday for which an employee receives paid sick leave in order to continue to receive such leave.
- The Employee must provide a signed statement containing:
 - The employee's name;
 - The date(s) for which leave is requested;
 - The coronavirus qualifying reason for leave;
 - A statement that the employee can't work or telework because of this reason.

FAQ'S ON FFCRA FOR EMPLOYERS

Do I have to continue health coverage for employees on Emergency Paid Sick Leave or Emergency FMLA under FFCRA?

- If the employee has elected into group health coverage or is covered by family health coverage, you must continue coverage during leave on the same terms as if the employee continued working.
- The employee must generally continue to make any contributions to health coverage as if the employee continued working.

What if the employee remains on leave beyond the maximum period of Expanded FMLA?

- You should check with your health insurance carrier to confirm whether the employee's leave beyond the Expanded FMLA is a terminating event.
- If the employee is no longer eligible for health coverage under your plan, the employee may be eligible to continue coverage under COBRA.
- It is a violation of HIPAA to set any employee's premium or contribution rate based on whether the employee is actively at work or on leave.

FAQ'S ON FFCRA FOR EMPLOYERS

Do I qualify for leave for a COVID-19 related reason even if I have already used some or all of my leave under the Family and Medical Leave Act (FMLA)?

- If you are an eligible employee, you are entitled to paid sick leave under the Emergency Paid Sick Leave Act regardless of how much leave you have taken under the FMLA.
- However, if your employer was covered by the FMLA prior to April 1, 2020, your eligibility for expanded family and medical leave depends on how much leave you have already taken during the 12-month period that your employer uses for FMLA leave. You may take a total of 12 workweeks for FMLA or expanded family and medical leave reasons during a 12-month period. If you have taken some, but not all, 12 workweeks of your leave under FMLA during the current 12-month period determined by your employer, you may take the remaining portion of leave available. If you have already taken 12 workweeks of FMLA leave during this 12-month period, you may not take additional expanded family and medical leave.

FAQ'S ON FFCRA FOR EMPLOYERS

Do I qualify for leave for a COVID-19 related reason even if I have already used some or all of my leave under the Family and Medical Leave Act (FMLA)?

(CONTINUED.)

- Any expanded family and medical leave you have already taken counts against your entitlement to preexisting FMLA leave.
- If your employer only becomes covered under the FMLA on April 1, 2020, this analysis does not apply.

WORKPLACE FAQs ON CORONAVIRUS



What to Do With Sick Employees?

Can I send Employees Home?

- The CDC states that employees who exhibit symptoms of influenza-like illness at work during a pandemic should leave the workplace. The Equal Employment Opportunity Commission (EEOC) confirmed that advising workers to go home is permissible and not considered disability-related if the symptoms present are akin to the COVID-19 coronavirus or the flu. Remember if you send an employee home, in California you have to compensate for Reporting Time Pay.

Can I take my employee's temperature?

- The answer to this question has changed, as the EEOC has stated that given “community spread” of COVID-19, employers may take an employee's temperature. HOWEVER—this exposes the employer to liability. A temperature does NOT automatically mean the employee has COVID-19 AND in California, employers must issue a notice compliant with the California Consumer Privacy Act (CCPA) BEFORE testing. A best practice would be to send the employee home.

If An Employee Tests Positive, What Do I Do?

- Send the employee home for the 14-day quarantine period, along with employees who worked closely with that employee.
- Maintain all information about employee illness as a confidential medical record in compliance with the ADA.
- Per the CDC:
 - Clean surfaces with a detergent and soap and water. For disinfection, diluted household bleach solutions, alcohol solutions with at least 70% alcohol, and most common EPA-registered household disinfectants should be effective.
 - Cleaning staff should wear disposable gloves and gowns for all tasks in the cleaning process, including handling trash.
 - Gloves and gowns should be compatible with the disinfectant products being used.

Is A COVID-19 Infection a Recordable Illness on the OSHA 300 Log?

- **Per OSHA Guidance on COVID-19:**
 - Employers are required to record instances where:
 - The case is a confirmed case of COVID-19;
 - The case is work-related; and
 - The case involves one or more of the general recording criteria (e.g. medical treatment beyond first-aid, days away from work).



Cal/OSHA Safety Health And Guidance

- Cal/OSHA released COVID-19 Guidance regarding Infection Prevention for Agricultural Employers and Employees.
 - The guidance is prominently featured on the Cal/OSHA website.
- The Guidance directs that employers must provide training on:
 - What COVID-19 is and how it is spread;
 - Preventing the spread of COVID-19 if you are sick;
 - Symptoms of COVID-19 and when to seek medical attention
 - Information from California's COVID-19 Response Webpage for additional resources. (<https://covid19.ca.gov/>)
 - The importance of handwashing with soap and water per CDC guidelines.

California Department of Industrial Relations
Division of Occupational Safety & Health
Publications Unit



SAFETY AND HEALTH GUIDANCE

COVID-19 Infection Prevention for Agricultural Employers and Employees

Cal/OSHA Safety Health And Guidance (Continued...)

- The Guidance also provides that IIPP administrators should develop procedures to prevent the spread of COVID-19 including:
 - Immediately sending employees with acute respiratory symptoms home or to seek medical treatment;
 - Establish procedures to notify local health officials upon learning that someone has a COVID-19 infection.
 - Encourage sick workers to stay home by not punishing them for missing work.
 - Make hand-washing stations more readily available and encourage their use.
 - Establish procedures to routinely clean and disinfect commonly touched surfaces and objects (e.g., water containers, steering wheels, shared tools, shared work stations, door handles, seat belts, insides of toilet facilities) throughout the workday



Unanswered Question: Is COVID-19 a Workers' Comp. Injury?

- We have seen guidance from other associations stating that if an employee contracts COVID-19, it is not a covered claim under Workers' Compensation.
- **HOWEVER**, the California Labor Workforce Development Agency is taking the opposite position, and is telling employees who think they contracted COVID-19 at work to file for workers' compensation benefits. See guidance from the LWDA below:



Workers' Compensation	<p>If you are unable to do your usual job because you were exposed to and contracted COVID-19 during the regular course of your work, you may be eligible for workers' compensation benefits.</p>	<p>Benefits include temporary disability (TD) payments, which begin when your doctor says you can't do your usual work for more than three days or you are hospitalized overnight. You may be entitled to TD for up to 104 weeks. TD stops when either you return to work, your doctor releases you for work, or your doctor says your illness has improved as much as it's going to.</p>	<p>TD generally pays two-thirds of the gross wages you lose while you are recovering from a work-related illness or injury, up to maximum weekly amount set by law. In addition, eligible employees are entitled to medical treatment and additional payments if a doctor determines you suffered a permanent disability because of the illness.</p>	<p>Learn more about your eligibility for Workers' Compensation benefits</p>	<p>File a Workers' Compensation claim</p>
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Wage and Hour Traps & Choices

- These heightened sanitation standards, require extra time, especially with the workers having to “social distance” or be 6 feet apart when they wash or wait in line to wash their hands?
 - Make it clear this time is compensable or “on the clock”.
 - Add 2 minutes to each duty free rest break. (paid)
 - Add 5 minutes to each duty free meal break. (unpaid)
 - Add hand washing stations to keep from diminishing from productivity.
- What about workers compensated on a piece-rate basis?
 - All time not engaged in the piece-rate activity must be separately captured and accounted for as non-productive time.
 - Other non-productive time is paid at least at minimum wage.
 - Rest break time is paid at the average hourly rate.

Wage and Hour Traps & Choices (Continued)

How to Inform Employees?

California Required Notice:

NOTICE TO EMPLOYEE <i>Labor Code section 2810.5</i>	
EMPLOYEE	
Employee Name:	<input type="text"/>
Start Date:	<input type="text"/>
EMPLOYER	
<input type="text"/>	

Federal Required Notice:

**Migrant and Seasonal Agricultural
Worker Protection Act**

U.S. Department of Labor
Wage and Hour Division



OMB NO: 1235-0002
Expires: 08/31/2020

Worker Information—Terms and Conditions of Employment	
1. Place of employment:	<input type="text"/>

Wage and Hour Traps & Choices (Continued)

How to Inform Employees? Part of the California Notice:

PAID SICK LEAVE

Unless exempt, the employee identified on this notice is entitled to minimum requirements for paid sick leave under state law which provides that an employee:

- a. May accrue paid sick leave and may request and use up to 3 days or 24 hours of accrued paid sick leave per year;
- b. May not be terminated or retaliated against for using or requesting the use of accrued paid sick leave; and
- c. Has the right to file a complaint against an employer who retaliates or discriminates against an employee for
 1. requesting or using accrued sick days;
 2. attempting to exercise the right to use accrued paid sick days;
 3. filing a complaint or alleging a violation of Article 1.5 section 245 et seq. of the California Labor Code;
 4. cooperating in an investigation or prosecution of an alleged violation of this Article or opposing any policy or practice or act that is prohibited by Article 1.5 section 245 et seq. of the California Labor Code.

The following applies to the employee identified on this notice: *(Check one box)*

- 1. Accrues paid sick leave only pursuant to the minimum requirements stated in Labor Code §245 et seq. with no other employer policy providing additional or different terms for accrual and use of paid sick leave.
- 2. Accrues paid sick leave pursuant to the employer's policy which satisfies or exceeds the accrual, carryover, and use requirements of Labor Code §246.
- 3. Employer provides no less than 24 hours (or 3 days) of paid sick leave at the beginning of each 12-month period.
- 4. The employee is exempt from paid sick leave protection by Labor Code §245.5. (State exemption and specific subsection for exemption): _____

WARN ACT NOTICE



WARN Act in COVID-19 Crisis: Governor Provides Relief From 60-Day Notice Requirement

- As a result of the recent executive orders and proclamations to either “shelter-in place” or to shutdown businesses in their entirety, employers are advised of their legal responsibilities under the **Cal-Warn Act**. This law is the State corollary law to the **Federal Warn Act** with regard to business closures and mass layoffs requiring 60 days written notification to workers and government organizations.
- If your organization employed 75 or more persons within the preceding 12 months, you will be covered by this **Act**. The term “layoff” means a separation from a position for lack of funds or lack of work. The term “mass layoff” means a layoff during any 30-day period of 50 or more employees at a covered establishment. Lastly, the term “termination” is a cessation or substantial cessation of industrial commercial operations in a covered establishment.

WARN Act in COVID-19 Crisis: Governor Provides Relief From 60-Day Notice Requirement

- For those of you who have utilized the an Employee Handbook, where the acknowledgement page that there is language indicating that your agricultural employees are engaged in seasonal employment and were hired with the understanding that their employment was seasonal and temporary. You are exempt from the provisions of the **Warn Act**.
- If your business operation does not qualify for this exemption, you are generally required to give 60 days written notification before any of the above acts take effect.
- However, as a result of the recent COVID-19 pandemic, the Governor's office provided guidance and issued an executive order clarifying how mass layoffs due to COVID-19 orders may be handled. According to the proclamation, **Cal-Warn** still applies, but the notice requirement has been relaxed to be given "as soon as practicable" not the usual 60 days of written notification. Notices still must include a basis for reducing the notification period, including reference to being due to "business circumstances that were not reasonably foreseeable as of the time of the notice would have been required". Notices must also direct employees that they may be eligible for unemployment insurance and provide a link to <http://www.labor.ca.gov/coronavirus2019>.
- It is expected that the Labor Workforce Development Agency will be issuing a guidance on **Cal-Warn** by the end of March 2020.



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Questions?

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