

## **What the Families First Coronavirus Response Act Means to Franchisees Q&A**

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### **Q: How will this impact my experience rating or UI Tax Rate?**

A: States have flexibility. I don't think there will be any impact. The DOL has created a helpful guidance on how UI will work, and states have flexibility to implement their programs during this situation. The federal government will pick up 100% of the cost of the extended program.

### **Q: Should our employees file for UI coverage now even though I closed but offered them one week of wages?**

A: There is some guidance from DOL. The link will be shared. The link may help. The DOL has said to the states that you should give everyone as much flexibility to be eligible for UI as you can. For example, if a restaurant furloughs all of their employees because the government ordered it to close or there's just no one coming in, those furloughed employees would still be considered as actively looking for work because the expectation is when the restaurant opens, they would return to work. The only way they would be ineligible for UI is if the restaurant reopens, asks the employee to return to work and the employee says "no." As an employer, I would make sure my employees understand the great flexibility they will have. It is the employee's decision on whether to file or not, but make sure employees understand the flexibility offered to them.

### **Q: How do you calculate the 500-employee count max? Does it apply to common ownership even if they have separate EIN?**

A: In the sick leave section of the bill, it talks about the definition of an employee as being that found under the Fair Labor Standards Act (FLSA). If you are counting those individuals as employees under your existing FLSA obligations, then they would be counted as employees under this bill. For the paid family leave provision, the bill talks about the definition of employee under the Family and Medical Leave Act (FMLA). If you are counting employees for FMLA purposes, you should do so under this current bill. It is subject to some change perhaps because the chamber and many others have been going to the DOL and asking how are you going to count employees under the bill? They know this is a big question. They are going to be responsive to that with regulations or guidance they plan to put out within the next week.

The way you are counting employees under FMLA and FLSA is how you would count them under this new bill.

**Q: Are there any obligations for employers with more than 500 employees? How should they handle this situation?**

A: No. If you have more than 500 employees, you are not covered by the paid sick and paid FMLA. They do not apply to employers with more than 500 employees. The reason Congress did it that way is because they assume employers with more than 500 employees already offer paid leave programs. They didn't feel the need to tell them to do it again because most of them are already doing it.

**Q: Can you ask for proof or medical paperwork before granting paid leave or sick leave or medical leave?**

A: Under FMLA, you can request a doctor's note, but under this bill, the FLMA provisions only applies to someone who's home because of a childcare issue or school closure issue, so it doesn't come into play as much there. On the sick leave side, it's a little unclear as to what documentation you can ask for. That is something the DOL must reference in their upcoming guidance. Please note, these provisions don't come into effect until April 2. We are hopeful we will have that guidance before April 2. I did have a conversation with the EEOC to see if coronavirus is considered a disability. They are saying yes, it is, but because someone who has it would pose an imminent threat to the workplace or other employees, you can ask about it. You can test for it. Because it's considered an imminent threat to the workplace and/or other employees, you should be able to ask about it. It's not written in stone yet. The DOL is aware this is an issue. They are hoping to address it soon.

**Q: Are we to use an average pay or just 40 hours for hourly employees? Most of our hourly employees work 46 hours per week.**

A: There is language in the bill about averaging out hours, but that applies to employees who work infrequently. The operative phrase here is the regular rate of pay. So, you have someone who works 46 hours, so there is some overtime here. You're only obligated to pay 40 hours per week.

You wouldn't factor in overtime. I suggest you look at the 80 hours. Because the regular rate of pay is defined in the FLSA as the rate of pay before overtime, I don't know if you must take that overtime pay into account.

**Q: If the bill is effective April 2, what about employees who are laid off or out sick prior to April 2? Does the paid leave have to be paid for that time before April 2?**

A: I think not because the effective date is the effective date. Someone who's laid off before then is not subject to the leave. Someone who is currently on leave is already receiving another benefit from the employer. So, if they are still on payroll as of April 2, then yes, they would be eligible for this leave because this leave is in addition to whatever other leave you provide.

**Q: Does the sick leave pay apply to those collecting unemployment benefits?**

A: No, because, if you are unemployed, you are not receiving wage income from your employer. So, if you are not working, then you would not be eligible for the leave payment.

**Q: Is it still two-thirds pay if their full rate is minimum wage for someone who maybe a tipped employee?**

A: Defer to the regular rate of pay, which would include tipped income. The bottom line is, yes, it's two-thirds. The way the bill is written, it's the max of the minimum wage, the regular rate or state and local minimum wage. It's two-thirds of that rate.

**Q: How do you define the 50-employee exemption? Is it employee per corporation, full-time equivalent? Does it include part-time and fulltime employees?**

A: Unfortunately, the statute is not clear on that point. We are going to have to wait to see that regulation from the DOL to see how they will count those employees. Again, the default is what the statute currently says, which is refer to the definition under the FLMA and refer to FLSA. The same way you are counting those employees for the purpose of those two statutes currently, that's how you would count them now. Employers who have less than 50, you are not subject to FMLA, so you haven't been counting them at all, so we must wait and see the DOL guidance says about it.

**Q: How will we be reimbursed, as an employer, for 80 hours of paid sick leave to employees who are now furloughed due to government shutdown at, for example, a fitness club?**

A: Employees who are furloughed are not going to be receiving pay from their employer. They will be considered unemployed, so therefore will receive UI. Those people will not be eligible for the paid family leave under this bill.

**Q: How are we supposed to track what absences are for what to know which leaves are tax credit eligible?**

A: The bill is not clear on which. They would expect you to pay the higher rate.

**Q: What applies if you are being forced to close due to a government closure mandate?**

A: First, in Phase 3 of the bill, one of the things they are trying to do is encourage employers to keep employees connected to the employer. Try to keep the employees on payroll as long as you can, even if you've been told to close. The idea is, when those closures are lifted, this will allow you to ramp up quicker and not have to recruit new employees. If you are forced to close in theory, you are going to probably furlough employees or let them go. They qualify for UI. The medical leave and family leave would not apply, since they are no longer employees.

**Q: For those employers with less than 25 employees, can you describe what hardship exemption could be?**

A: If you're under 50, everybody is subject to the same hardship exemptions.

**Q: What if an essential person who currently has a spouse at home watching their kids now say they want to use FMLA to take care of those kids? They want 12 weeks off paid even though they have a spouse at home.**

A: The statute doesn't address this instance. It says if someone is staying at home because of a school closure and needs to take care of their children, they can take the FMLA leave and get two-thirds of their regular pay. Doesn't address "do you really need to stay at home or not?" Hopefully some clarity will be in the guidance that's coming out within the next week or so.

**Q: If an employer is over 500 or under 50, the laws doesn't apply to them. Who covers the cost of paid sick leave and extended FMLA leave?**

A: If you're under 50 employees, it doesn't mean the statute automatically would not apply to you. You would have to meet the hardship regulations as defined by the DOL and their pending regulations. If you are over 500 employees, you would have to cover the cost based off the leave program you already have in place. There're no reimbursements for those costs.

**Q: Any other information you can share about documentation?**

A: No. We will be asking the DOL to clarify. If you, as an employer, send someone home because they have symptoms, you don't need documentation, but if someone calls in sick, it's unclear under the statute.

**Q: Will food stamps be available to employees?**

A: Yes, Phase 2 of the bill does include a lot of additional money for those programs. UI doesn't really cover most of a person's wage, maybe 38% of what they were earning in the workplace. The compensation amounts vary by states. It really is a question of what state someone lives in as to what amount of benefit they will get. There is a table on the DOL website that tells you what the average weekly benefits are by states.

**Q: For an employee to be eligible for FMLA, they must work 30 days prior. Is that 30 actual working days or 30 calendar days?**

A: The statute just says 30 calendar days.

**Q: Are there two paid sick leave programs – sick leave and FMLA leave? Are they separate, and when would you use one over the other?**

A: Yes, these are two separate streams of funding relief. Sick leave is 80 hours. In theory, they are supposed to work together. If someone is out sick, they would take the 14 days of sick leave, and then, beyond that, they could then take the FLMA leave. The

distinction is the FMLA is paid leave only for someone to stay home to take care of their child.

**Q: The UPS stores are being deemed an essential business, and we are being required to remain open by our corporate office. I have a couple of employees who are refusing to come to work out of fear even though they are not sick or compromised. Can I legally let them go and replace them if they are refusing to come to work?**

A: I'm going to refer to what the statute says. It states if you have been told to stay home by a healthcare professional, if you have to self-quarantine, the reasons in the statute are very specific. The statute does not cover being scared to go to work.

**Q: What if two-thirds of your employees are part-time? What if someone works less than 20 hours? How does that apply? What do you have to offer them?**

A: You still do have to offer those individuals the paid sick leave at the number of hours they would normally work. Same for family leave based on the number of hours they would normally work in a given week.

**Q: If we hire someone today and they come in tomorrow and claim illness, can they collect paid sick leave? Do we have to pay them full benefits?**

A: If you hire them prior to April 2, and they claim illness prior to April 2, they will not be eligible for the leave. Once the bill goes effective, that paid sick leave is available to employees no matter how long they've worked for the employer. They must have worked 30 days prior to April 2 to be eligible for the paid family medical leave.

**Q: How are tips included? Is that minimum wage or bottom threshold included or are tips added in when you're talking about pay?**

A: The statute doesn't specifically say anything regarding tips. It talks about the regular rate or the minimum wage. When you're doing your calculations of what they earned, you would look at regular rate to include the tips, but that's not clear in the statutes yet. That's one of the things we will be asking DOL to provide guidance on.

**Q: Am I required to allow employees who are furloughed to use their accrued paid time off?**

A: My understanding is, if someone is furloughed, they are not receiving wage or salary income from their employer, they are considered unemployed. If they are not employed, then they are not subject to the paid sick leave or paid family leave under the statute.

**Q: What resources are available to parents without childcare and children home from school?**

A: There's nothing in the statute that covers employees who work for an employer with 500 or more employees. As the employer, you are not required to provide the employee anything other than what you already have in place under your existing leave program.

**Q: If employees are terminated upon store closure and then hired when the store reopens, does that 30-day clock start all over to be eligible for sick pay or family leave?**

A: Yes, if they are on payroll after the effective date of this legislation. If things get back to normal and you bring people back on payroll and then a second wave hits and then there's another closure order, because they are on payroll during the effective period of this bill, then they would be eligible for the paid sick leave and the paid family leave provisions under the legislation.