



## Webinar Q&A

4/2/2020

Please note that these answers reflect our best information to date and may change over time due to other State and Federal guidance. Information that is different/and or updated from the material we covered or discussed as part of the session's Q&A are in blue below. Please note that the US DOL issued clarified regulations on 4/1/2020, which were not available at the time of the webinar.

### Resources:

Department of Labor Mandated COVID-19 Benefit Poster. Please print and post: [http://wsd.dli.mt.gov/Portals/56/Documents/Posters/FFCRA\\_Poster\\_WH1422\\_Non-Federal.pdf?ver=2020-03-31-140345-337](http://wsd.dli.mt.gov/Portals/56/Documents/Posters/FFCRA_Poster_WH1422_Non-Federal.pdf?ver=2020-03-31-140345-337)

Helpful Unemployment Flyer. COVID-19 Scenarios & Benefits Available: <http://www.dli.mt.gov/Portals/57/Documents/covid-19/COVID-19-ScenariosAndBenefits.pdf?ver=2020-03-18-113453-153>

Federal Family First Coronavirus Response Act: Questions and Answers: <https://www.dol.gov/agencies/whd/pandemic/ffcra-questions>

Federal Family First Coronavirus Response Act: Federal Employer Paid Leave Requirements: <https://www.dol.gov/agencies/whd/pandemic/ffcra-employer-paid-leave>

Coronavirus Emergency Loans Guide and Checklists: [https://www.uschamberfoundation.org/sites/default/files/C3\\_COVID\\_EmergencyLoanGuide.pdf](https://www.uschamberfoundation.org/sites/default/files/C3_COVID_EmergencyLoanGuide.pdf)

IRS: Employee Retention Credit FAQ: <https://www.irs.gov/newsroom/irs-employee-retention-credit-available-for-many-businesses-financially-impacted-by-covid-19>

### Significant updates from the new DOL regulations

1. The updated CARES Act was amended to expand family and medical leave to certain employees who were laid off or terminated after 3/1/2020, but who are re-employed by the same employer prior to 12/31/2020.
2. A violation of the Emergency Paid Sick Leave Act can be enforced as a wage claim under the Fair Labor Standards Act.

3. Quarantine or isolation orders mentioned in the paid sick leave provisions include governmental orders that advise citizens to shelter in place, stay at home, quarantine, or otherwise restrict their own mobility. **However, paid sick leave is only available if one of these orders prevents the employee from working or teleworking. If the employee cannot work because the employer does not have work for the employee, even if the lack of work is due to a shelter in place order, the employee is not eligible for paid sick leave.** Based on DOL's interpretation of how this will work, it seems like it would be very difficult for an employee who has to stay at home due to a shelter in place order to be eligible for paid sick leave. If the employee works for a non-essential business, the business may not have work to offer the employee. For an essential business, the employee would be allowed to go to work, which means the shelter in place order itself would not be preventing the employee from working. Under either of these scenarios, the employee would not be eligible for paid sick leave.
4. An employee who is quarantined, subject to an isolation order, or self-quarantining but **able to telework** would not be eligible for paid sick leave.
5. An employee cannot take paid sick leave to self-quarantine without seeking a medical diagnosis.
6. If an employee is taking paid sick leave due to a quarantine or isolation order, a self-quarantine, symptoms of COVID-19 and a medical diagnosis, or is caring for a qualifying individual, **the sick leave cannot be taken intermittently and has to be taken in full-day increments.** This is to avoid having people in the workplace spreading the virus.
7. Employers do not have to give employees FMLA notices of eligibility, rights and responsibilities, or written designations of expanded FMLA leave, which is a relief because the DOL has not provided any forms, and the current ones do not lend themselves well to the new qualifying events. Nonetheless, employers are required to document the reason for the leave under the regulations and to keep records that justify the payroll tax credit. We are also recommending that they provide some type of written approval or denial of the leave, especially since the leave rights can be enforced against the employer.
8. An employee who takes leave under the expanded FMLA has to be restored to their position unless certain specific criteria are met. The regulations also make it clear that the expanded FMLA will not protect an employee who has taken leave from

employment actions, such as layoffs, that would have affected the employee regardless of whether the leave was taken.

9. Employers have to retain all documents related to leave for four years, regardless of whether the leave was granted or denied.

### **Paid Sick Time and Paid Family Medical Leave Q&A**

- NFIB said that if a govt-mandated shelter-in-place order is in place then paid sick time is not applicable. The thought process was that travelers coming into Montana who have to self-quarantine would be eligible for sick pay reimbursement BUT anyone who has been shuttered (like our employees) are not eligible and also shelter in place does not qualify.
  - We had originally been advised that the Shelter-In-Place does NOT meet the first qualifying condition for emergency paid sick time; however, see #3 above regarding updated DOL rules.
- Does the FMLA only apply to the employee's child or does it extend to grandchildren?
  - Under the Expanded FMLA Leave “child: means a biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing in loco parentis who is:
    - A. Under 18 years of age; or
    - B. 18 years of age or older incapable of self-care because of a mental or physical disability.

A grandchild would not apply to the expanded FMLA unless the above applies.

- Does the employee have to take all 10 full days of sick leave without working at all in order to be eligible? Example: an employee is being told to self-quarantine by a healthcare provider and is very sick, but has been able to work about 10 hours/week. Can he/she spread the 80 hours of sick leave over three weeks vs. two?
  - Our original understanding was that employees that are teleworking and taking time off under Paid Sick Time or Paid Family Medical leave may take intermittent leave for the applicable covered reasons with employer approval. However, if the employee is working on the employer’s premises, employees are not allowed to take paid leave intermittently unless the employee is taking the leave for

school closure or childcare unavailability (and if the employer is in agreement).  
**However, see #6 in blue above as part of the updated DOL rules.**

- How do we get documentation for telephone calls? We have an employee told to stay home by CCH, called them with symptoms they do not want people going there.
  - We would recommend documenting these situations in as much detail as possible. This could include date of call, name and title with whom the conversation took place, and the details of the conversation. This could consist of an email from the employee who had the actual conversation. Request that the employee provide you detail that matches the language identified in the Emergency Sick Leave and Expanded FMLA.
  
- In calculating the retention amount on the payroll taxes, is the employer portion of SS/Medicare taxes included in that calculation along with health insurance?
  - Based on information from [irs.gov](https://www.irs.gov), the payroll taxes available for retention includes withheld federal income taxes, employee share of Social Security and Medicare taxes, and the employer share of Social Security and Medicare taxes with respect to all employees.
  - Since the amount of wages paid for emergency sick leave and expanded paid family medical leave are not subject to the employer's portion of Social Security taxes (6.2%), the amount of the available credit would be the paid sick leave wages (up to the applicable caps depending on qualifying reasons) plus the employer portion of Medicare taxes (1.45%), plus the allocable portion of healthcare coverage for the employee.
  
- In addition to health insurance costs - would vehicle, phone, or other allowances provided to an employee be allowed as part of the credit?
  - Based on our understanding, no, only emergency paid sick time, emergency paid family leave and health insurance are included for credit purposes.
  
- If an employee who is immunocompromised or has underlying health conditions obtains a doctors order to stay home (and employee can't work from home), does this meet the Emergency PST/FMLA criteria #2?

- In general, it appears to meet the criteria that states “the employee has been advised by a health care provider to **self-quarantine** due to COVID-19 reasons.” However, we would encourage you to retain documentation to support the doctor’s order, and see #3 in blue above regarding updated DOL rules.
  
- If we've already paid employees PST for either Sick or Childcare reasons (prior to 4/1/20), have we met the relief laws, but just can't submit for reimbursement?
  - No, the credits are related to leave paid beginning on 4/1/2020.
  
- Does the employee have to take all 10 days of sick leave at once?
  - See #3 above in regards to the updated DOL rules.
  
- Documentation from doctors will be hard to come by at this time because hospitals are too busy and many times the advice from doctors is via telephone, not in-person visits. If the employee is unable to provide documentation right away or later, what are the employer's options to make sure that they do not lose the credit from the government?
  - We would recommend documenting as much detail as you can. This could include date of call, name and title with whom the conversation took place, and the details of the conversation. This could consist of an email from the employee who had the actual conversation. We recommend attempting to get working, or documentation, that meets as much of language specific criteria identified in Expanded Sick Leave and Emergency FMLA.
  
- We are still struggling with the 500 employee threshold. Do we count College student employees as an employee toward this count - they are exempt from FICA? College Professional Resources are still researching this question so we are seeing conflicting information - # of W-2's and total head count vs. exclusion of students.
  - We would recommend reaching out to other similarly sized colleges to see if they have an industry specific answer. If we come across it in our research we will reach out directly.

- Do the new PST and FMLA rules last forever or do they end at some point?
  - The effective dates of the rules begin on 4/1/2020 and are effective through 12/31/2020.
  
- We applied for SBA Economic Injury Disaster Loan by ourself and not over our bank or credit union, will this cause a problem?
  - No, the Disaster Loans are obtained directly from the SBA; the 7(a) (Paycheck Protection Program) loans are obtained through approved lenders.
  
- Are most 401k plans allowing the participants to remain on the plan even with gaps in payroll?
  - We encourage you to contact your 401(k) administrator; it may be they have relaxed requirements specific to your plan during this time.
  
- How does PST and unemployment work together? How does paid sick leave under emergency sick leave relate to unemployment coverage; are they concurrent or does one supersede the other?
  - If employees are laid off or terminated due to a work slow down, before or after 4/1, they should apply for UI but they are not eligible for the new paid sick leave benefits.
  - If starting 4/1 they cannot work due to a reason listed under the emergency paid sick leave and expanded FMLA laws, they get paid based on the reason for their leave. Depending on the reason for the leave and the duration, they may also qualify for UI. For example, they may be immunocompromised and told to stay home for longer than two weeks. They would get emergency paid leave for the first two weeks and UI thereafter.
  
- Are employees eligible for both PST and FMLA and UI?
  - Yes, depending on the circumstances employees could find coverage under all three benefits.
  - If employees are laid off or terminated due to a work slowdown, before or after 4/1, they should apply for UI but they are not eligible for the new paid sick leave benefits nor eligible for the expanded FMLA.

- If starting 4/1 they cannot work due to a reason listed under the emergency paid sick leave and expanded FMLA laws, they get paid based on the reason for their leave. Depending on the reason for the leave and the duration, they may also qualify for UI. For example, they may be immunocompromised and told to stay home for longer than two weeks. They would get emergency paid leave for the first two weeks and UI thereafter.
  
- The telemed options I work with email you a copy of Dr. notes from your call.
  - Great to know, thank you!
  
- I am sorry if this question was already asked. But, we offer retirement benefits to our employees. Do we treat the PST and PFML as normal wages for these benefits? If yes, is this something that will be eligible for the tax credit?
  - Our understanding is that these would be treated the same as other paid time items; the slides distributed includes a practical tip as to how you might consider setting those items up in your payroll system. As long as the employee is taking time off under one of the 6 criteria listed on the slide handout, the paid time would be eligible for credits. Please note, however, that wages paid under PST and PFML are not subject to the employer portion of Social Security taxes (6.2%), and are only subject to the employer portion of Medicare taxes (1.45%).
  
- For the payroll tax credit, it would be for hours/payroll starting on April 1st? For example, if pay period ends on April 3rd (for previous 2 weeks) we would only count the hours for April 1-April 3 towards the payroll tax credits?
  - Correct. The credits apply in regards to the actual dates of emergency-related leave from 4/1/2020 through 12/31/2020.
  
- I was unsure about how and when we can stop paying the employer portion of social security in regards to payroll.
  - Assuming this is in reference to the PST and PFML pay items for employees with qualifying conditions for the leave, the wages paid under the Act are not subject to the employer portion of Social Security taxes (6.2%), so we are assuming that the payroll item would be set up to calculate this accordingly.

- Do we continue to withhold all usual payroll taxes from employees each pay period?
  - The PST and PFML are not subject to the employer portion of Social Security taxes; otherwise, payroll taxes should be withheld as normal.
  
- Can a small business less than 50 FTE be exempt from both Emergency Paid Sick Leave AND Emergency Paid Family Leave for reason 5 (only the childcare portion)?
  - That is our understanding, yes.
  
- Is there a formal opt-out for the applicable portions of the PST/PFML for employers with less than 50 employees?
  - We understand there is a potential for small employers to opt out of the childcare-related paid sick leave and paid family leave if the requirements would cause undue hardships for the business to operate as a going concern. According to the most recent information from the US DOL, a small business may claim this exemption if an authorized officer of the business has determined that at least one of the following is satisfied:
    - i. The provision of paid sick leave or expanded family medical leave would result in the small business's expenses and financial obligations exceeding available business revenues and cause the small business to cease operating at a minimal capacity;
    - ii. The absence of the employee or employees requesting paid sick leave or expanded family and medical leave 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
    - iii. There are not sufficient workers who are able, willing, and qualified and who will be available at the time and place needed, to perform the labor or services provided by the employee or employees requesting paid sick leave or expanded family and medical leave, and these labor or services are needed for the small business to operate at a minimal capacity.
  - The updated DOL rules state that a denial of paid sick leave or expanded family medical leave is done by an employer, the employer must document the facts and circumstances to justify the denial; no records should be sent to the DOL, but rather should retain such records for the employer files.

**SBA Loans Q&A – Please note at the time of these answers, the SBA final regulations had not been issued; therefore, updated information has been issued and banks have been given the information for the application process.**  
We have a dedicated team of professionals that are available to help you through this process; if you need assistance in any of the steps throughout the loan application process.

- As part of the online SBA loan application process there is a self-certification that we are expected to certify which says “Applicant does not derive more than one-third of gross annual revenue from legal gambling activities.” I have been told that the SBA has waived this requirement so that our Montana casinos/bar-casinos are eligible to apply for these loans but I worry that with the online loan application process we have to “lie” on the answer to get to the next page. Thoughts on this?
  - We don’t have any specific information on this; we encourage you to contact the SBA for resolution, and keep detailed documentation related to their final recommendation.
- NFIB said 3.75% interest rate yesterday for EIDLs
  - That is our understanding as well; this applies to the Emergency Injury Disaster Loans specifically.
- With regards to the Payroll Protection Program. For employees that make over \$100k, are we able to apply for a portion of their salary up to \$100k as forgivable?
  - That is our understanding, yes.
- Under the 7A CARES act loan will the rent portion that qualifies from a business be allowed if you rent from a closely held company / albeit a separate holding company for the building but owned by the same people running the business. (as a forgiven debt from the 7A cares act loan)
  - As of the time of this answer, we don’t believe there is a distinction based on ownership that would preclude the loan forgiveness.

- On SBA loans for nonprofits - does it discuss qualifications if currently leveraging a LOC? Also, I read there would be personal guarantees for anything over \$200k. Is it the same for nonprofits?
  - We haven't seen anything specifically related to the LOC; that would have to be discussed during the application process (either with the SBA if applying for an Emergency Injury Disaster loan (EIDL), or with your financial institution if applying for a 7(a) (Paycheck Protection Program) loan). There is no distinction to my knowledge between entity types (nonprofits versus commercial). Our understanding is that there is no personal or collateral guarantee required on the 7(a) loans; collateral may be required for the EIDL loans depending on the size of the loan.
- It was mentioned that it would be retroactive to 2/15/2020, is that only for eligibility purposes, or does that mean expenses starting then are eligible for the forgiveness?
  - The date of 2/15/2020 refers to whether you were operating as of that date and had employees as of that date. Expenses are measured for the 8-week period after the origination of the loan.
- Can a company receive a SBA 7(a) loan and also participate in refundable tax credits?
  - To our knowledge, yes. The credits are based on employees taking the emergency paid sick leave or the emergency family medical leave for qualifying conditions.
- How do you handle voluntary terminations unrelated to Covid-19 with the 7a loan? can you rehire those positions?
  - The 7(a) loan is intended to sustain a business in relation to the economic downturn amid the pandemic. There is no distinction as to voluntary or involuntary terminations; the loan amount is based on payroll and other eligible costs in the 1-year period prior to the loan origination date, and the loan forgiveness is based on amounts spent on certain eligible costs for the 8-week period after the loan origination date.

- Should there be any concern that availability of the 7(a) would be limited or run out?
  - Our understanding is that the federal government has set aside a total of \$349 billion for the CARES Act loans. There is likely to be a high demand for these funds, so the sooner the process is started, the greater the chance is of obtaining funding.
  
- What are the conditions to qualify for the SBA loan? What constitutes 'impacted by COVID-19?'
  - Eligibility is based on size of the company (any business with 500 or fewer employees), was in business on 2/15/2020, and had employees as of that date to whom it paid salaries and payroll taxes. If the business has experienced any interruptions to normal operations due to COVID-19, the company may be eligible for funds.
  
- For employees that make over \$100k, are we able to apply for a portion of their salary up to \$100k as forgivable?
  - That is our understanding, yes.
  
- With the loan forgiveness, do you include up to \$100,000 of those whose salary is over that? Or do you exclude those salaries completely?
  - Our understanding is that wages up to \$100,000 can be included as part of the loan forgiveness.
  
- To qualify for the 7(a) loan, is there a 500 employee limit for the business?
  - Yes, the business has to have 500 or fewer employees.
  
- Rent expense to closely held company, would that debt be forgiven? 8 weeks from time of loan origination is the only time for eligible debt to be forgiven? (7A Loan)
  - We have seen no distinction as to eligibility for forgiveness related to rents paid based on ownership. Yes, the 8-week period after the loan origination date is what is being measured for loan forgiveness.

- Operating as a seasonal operation, how do we calculate our FTE employees for the sake of the 7(a) forgiveness? Thank you.
  - Based on our understanding, this would be based on the average number of FTEs per month for the 8 weeks beginning on the loan origination date compared to the average number of FTEs per month from the period of 2/15/2019 – 6/30/2019. Please note this may change upon finalization of rules from SBA.
  
- Can a group of individual businesses (with unique EIN), filing on consolidated basis, can each business apply for \$10K each? e.g. 5 businesses applying for \$50 versus parent company applying for \$10K?
  - As of the time of this answer, we haven't seen anything that would preclude this from being an option.
  
- Can we apply for SBA 7(a) and also be eligible for COVID-19 ECONOMIC INJURY DISASTER LOAN \$10,000 grant?
  - Our understanding is that you can't receive funds from multiple SBA loan programs for the same purpose. If you have applied for a disaster loan, there is the possibility of "rolling" the existing loan into the 7(a) loan, but at the time of this answer, SBA hadn't yet finalized their regulations.
  
- How does this apply to a mandated shut down for Restaurant and Bars, when we cannot bring employees back until reopening of business?
  - Assuming this is reference to the loan programs, the intent of the loan programs is for continuance of operations (including payroll, if operation is still going) during the COVID-19 crisis. Loans can be used for operational expenses such as rent, utilities, and interest payments on mortgages, if applicable, so it may still be a viable option.
  
- We filed for the SBA Economic Injury Disaster Loan, but may have made a mistake. Can we submit another application?
  - We encourage you to reach out to the SBA in regards to the existing application to determine action points to be taken.

- To clarify - Does the business apply for EIDL and the bank apply for the 7(a) loans?
  - That is our understanding, yes. The EIDL is done directly through SBA and the 7(a) loans are done through approved lenders.

## **Unemployment Q&A**

- The govt forced us to shutter...we have all hourly working employees, there is no work. What is the govt saying...pay the employees for not working? What's the point of that, doesn't the UI benefits cover those wages?
  - The intent of the loan program is to prevent having to layoff employees or reduce wages. This assumes the business is still open, and there is work for employees to do. In the event that is not feasible, UI benefits would be an alternative option for employees if they are not working. The SBA loans, however, also can be used for operational expenses such as rent, utilities, and interest on mortgage payments, so the loans may still be a viable option for those items.
- If my employee is on unemployment and we are continuing his health insurance, does this qualify for the payroll tax credit involving health insurance paid by us?
  - We would first recommend that you contact your health insurance provider to ensure your employee will continue to be eligible for your plan in their laid-off status. We are assuming that this individual is still working and has only had their hours reduced.
- I work for an after school program which had to close during this time, I can still do 1/2 my hours as admin time, but was denied UI for the other half- any suggestions?
  - We would recommend documenting as much detail as you can how your layoff was related to COVID-19 and discussing that with an UI Claims Examiner.
- As an owner (partner) and officer, but also receiving W2 wages from an S-Corp, would I be eligible for unemployment?
  - You may be eligible for unemployment; we encourage you to contact UI to determine the specific eligibility for your situation.

- So an employee will receive unemployment benefits plus \$600.00 per week??
  - That is our understanding, yes. Under the CARES Act, unemployment insurance expansion would give jobless workers an extra \$600 per week for four months on top of state benefits. State agencies will make payments of regular compensation to individuals in amounts and to the extent determined by state law plus an additional \$600 in "Federal Pandemic Unemployment Compensation."
- If an employee is paying their portion of insurance while on unemployment, how do we ensure this is done pretax?
  - We would first recommend that you contact your health insurance provider to ensure your employee will continue to be eligible for your plan in their laid-off status. We are assuming that this individual is still working and has only had their hours reduced. Otherwise, if they were terminated they may not be eligible for health insurance and may need to move to COBRA. It will depend on what type of layoff they are under.
- Can you apply for unemployment as an Independent Contractor with this new legislation?
  - We encourage you to contact UI; they will be able to determine your eligibility based on your specific situation.
- Is an increase for pay as "hazard pay" okay under the Cares act for those that work with contact to the public?
  - As far as we are aware, there are no provisions for "hazard" pay as it relates to payroll tax credits for employees covered by the Emergency Paid Sick Leave or Expanded FMLA.
- Are we able to include S-corp insurance costs in the average payroll costs used to calculate past 12 months of payroll costs?
  - Based our understanding of the costs that are included, "payroll costs" are defined very broadly and include "group health insurance".

- What is the cap situation on the 7A loans. The bank would be making the loan so why would there be a cap?
  - The intent of the loans is that the operating costs (payroll, rent, utilities, etc.) are able to be maintained during the COVID-19 crisis, and would therefore inherently be based on a calculation of such operating costs over a specific period of time. Also, there is an overall cap from the federal government for the available funds of \$349 billion (at the time of this answer).