

How Employer's Manage Their Covid-19 Response...

Tips from a Senior HR Consultant:

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GUS BATES

— insurance & investments —

Due to the COVID-19,
Offices are closed until further notice...

How do we get back on track?

QUESTIONS!!! Will business return to “norm”?

QUESTIONS!!! Employees are not being productive at home?

QUESTIONS!!! What about the employee out on FMLA?

Furloughed & remote employees

Interviews

How would you recommend we handle in-person interviews?

Full PPE? Masks? Gloves?

Questions to applicant regarding COVID interaction?

Employees who put themselves in harms way

We know you will get stopped going between Louisiana & Texas- and quarantined for 14 days is possible- and has happened.

What business continuity concerns should I consider regarding an outbreak of COVID-19 in my community?

If your business did not have an employee who is effected by COVID-19, you are very fortunate!

BUT, should you have an employee who did test positive, your business continuity plan is critical!

- Is your business legally equipped to provide service & products with remote employees?
- Are you able to have essential workers only on site?
- IT prepared with adequate security/risk assessments?

If my business needs to lay off employees, will they be able to get unemployment payments?

Unemployment will follow the same rules & regulations with a few “upgrades”.

- Any PTO, or other type of payout will be considered receiving pay, and unemployment would not begin until completed.
- Also, if an employer keeps the business open, but reduces working hours, affected employees may be eligible for partial unemployment.
- CARES Act provides federal funding for payment of unemployment for the first week of unemployment benefits and further provides an additional \$600 per week payment to each recipient of unemployment insurance for up to four months.

Is an employee entitled to paid sick leave under the Emergency Paid Sick Leave Act (EPSLA) if the employee is sent home with symptoms, but determined they are **not positive** for COVID-19 and they choose to not return to work for several days?

Employees are only entitled to leave under the EPSLA if they are unable to work due to a qualifying event, which includes leave for an employee experiencing symptoms of COVID-19 and seeking a medical diagnosis.

****If an employee is not entitled to leave under the Act, he or she may be entitled to leave under other federal, state, or local laws.**

(we will discuss how OSHA needs to be considered later)

If our company offers PTO of a minimum of 3 weeks per employee, does that cover the 2 weeks of sick time required by the Emergency Paid Sick Leave Act?

- The 80 hours of paid sick leave must be offered to employees in addition to, and prior to, any other paid time off already offered by the employer.
- The DOL has recently clarified that if the employee and employer agree, the employee can use accrued paid time off or vacation time to supplement the amount the employee receives from paid sick leave up to the amount of the employee's normal earnings.

What do you do if you have an employee over 65 who is healthy right now but does have a chronic condition and they cannot work from home?

- Employees are only eligible to take leave under the Emergency Paid Sick Leave Act if they are unable to work or remote work because of a qualifying event.
- If the employee is unable to work remotely because of advice from a health care provider to self-quarantine due to concerns related to COVID-19, he or she may be entitled to paid sick leave under the Act.

If your organization has recently passed the 50 employee mark, is there an average, or look back period as to how many employees on April 1st need to be followed?

Emergency Paid Sick Leave Act does **not** take into account a look back period or any type of averaging.

Small employers with fewer than 50 employees qualify for an exemption from the requirement to provide paid leave due to school, place of care, or child care provider closings or unavailability, if the leave payments would jeopardize the viability of their business as a going concern.

If a full-time employee averages 64 hours per pay period, will their paid sick leave be only 64 hours or will they be entitled to 80 hours?

- Under the Emergency Paid Sick Leave Act, full-time employees are entitled to 80 hours of paid sick leave over a two-week period.

DOL has taken the position that a full-time employee is an employee who works at least 40 hours each workweek. Therefore, any employee who works less than 80 hours over two workweeks is considered part-time for purposes of the EPSLA.

- A part-time employee is entitled to the number of hours that the employee works, on average, over a 2-week period.

If the part-time employee's schedule varies from week to week or is unknown, then employers may use a 6-month average to calculate the average daily hours.

What notice may an employer require where the employee is unable to work (or remote work) due to caring for son or daughter whose school/daycare has closed?

Notification must follow the employer's procedures and cannot require the employee to provide more than the information noted below.

- It may be reasonable for the notice to be given by a spokesperson for the employee (e.g., spouse, adult family member or other responsible party) if the employee is unable to do so personally.
- Notice may be oral and must provide sufficient information for an employer to determine whether the requested leave is covered.
- However, the employer may not require notice to include documentation beyond the following for childcare leave under EPSLA and EFMLEA:
 - Employee's name;
 - Date(s) for which leave is requested;
 - Qualifying reason for the leave;
 - Oral or written statement that the employee is unable to work because of the qualified reason for the leave.
 - The name of the son or daughter being cared for;
 - The name of the school, place of care, or childcare provider that has closed or become unavailable; and
 - A representation that no other suitable person will be caring for the son or daughter during the period for which the employee takes Paid Sick Leave or Expanded Family and Medical Leave.

ALSO:

If the FMLA expansion leave is requested for a child who is over 14 years during daylight hours because the employee is unable to work onsite or remotely, the statement must state that special circumstances exist requiring the employee to provide the care for the child over 14 years.

Does an employee's "regular rate" include an employee's shift differential?

Short answer, YES.

The DOL's guidelines refer to the definitions of the Fair Labor Standards Act in determining the employee's regular pay.

Shift differentials should be included as part of the regular rate when calculating overtime, and, therefore, would be included in the computation of the regular rate for purposes of the FFCRA.

Is an employee eligible for paid sick leave if remote work is available? 1/2

If an employee qualifies for leave due to one of the following:

Subject to a quarantine or isolation order, advised by a healthcare provider to self-quarantine, or caring for an individual who is subject to a quarantine or isolation order or who has been directed by a healthcare provider to self-quarantine.

The employee **may not take paid sick leave if:**

employer has work for the employee to perform;

the employer permits the employee to perform remotely work;

and no extenuating circumstances that prevent the employee from performing the work

If an employee seeks paid sick leave because he or she is experiencing symptoms of COVID-19 and is seeking a medical diagnosis, the paid sick leave is limited to the time the employee is **unable to work** because he or she is taking affirmative steps to obtain a medical diagnosis, or waiting for and attending an appointment for a COVID-19 test.

How should employers compensate employees who must work remotely work due to COVID-19 related reasons?

- The Department of Labor regulations clarify that remote work, is no less work than if it were performed at an employer's worksite.
- As such, employees who remote work for COVID-19 related reasons must record, and be compensated for, all hours actually worked.
- An employer does not have to compensate employees for unreported hours while they are remote working due to COVID-19 reasons, so long as the employer did not know, and should not have known, about such remote work.

May an employee take leave under the EPSLA or the EFMLEA on an intermittent basis?

- In line with prior guidance issued by the DOL, new regulations state that employers may, but are not required to, permit employees to take leave under the EPSLA and the EFMLEA intermittently, if both the employer and the employee agree.
- Intermittent leave may be taken in any agreed increment of time.
- Employees working at an employer's worksite may only take leave intermittently to care for the employee's son or daughter whose school or place of care is closed, or whose child care provider is unavailable because of reasons related to COVID-19.

What notice must an employee give to the employer for Paid Sick Leave (other than for childcare leave)?

An employee will need to follow reasonable notice procedures.

Reasonable, and the norm for your workplace, please be aware of the following:

Notice may not be required in advance...

It may be reasonable for the notice to be given by a spouse/family member if the employee is unable to do.

- Notice may be oral and must provide sufficient information for an employer to determine whether the requested leave is covered, but the employer may not require notice to include documentation beyond the following:
 - For all types of EPSLA paid sick leave, the notice must include
 - Employee's name;
 - Date(s) for which leave is requested;
 - Qualifying reason for the leave;
 - Oral or written statement that the employee is unable to work because of the qualified reason for the leave.
 - Depending on the type of leave, the employee must also provide the following:
 - For EPSLA paid sick leave due to a quarantine or isolation order, the name of the government entity that issued the order;
 - For EPSLA paid sick leave due to an employee being advised to self-quarantine, the name of the health care provider;
 - For EPSLA paid sick leave due to caring for an individual, then the name of the governmental organization or health care provider providing the basis for the quarantine or isolation order.

KEEP IN MIND:

The regulations do not provide specifically what notice or information must be given by an employee who has COVID-19 symptoms and seeks leave.

Presumably, if the employer questions the need for leave, the employer may inquire to the health care provider with authorization from the employee, to verify time off constraints/accommodations.

If an employee has already taken some traditional FMLA leave during the twelve-month period, is that employee entitled to an additional 12 weeks of expanded family and medical leave?

No. If an eligible employee has already taken some traditional FMLA leave during the twelve-month period (e.g., for the birth or adoption of a child, or the employee's own or a family member's serious health condition), the employee may take only the remaining portion of that twelve workweek leave period as EFMLEA leave.

PLEASE NOTE: the employee would be entitled to take up to 80 hours of Paid Sick Leave under EPSLA, regardless of whether the employee has exhausted his or her FMLA entitlement.

If an eligible employee takes 3 weeks of expanded family and medical leave to care for the employee's son or daughter whose school is closed because of COVID-19, how many weeks of unpaid FMLA could the employee take due to the employee's own serious health condition?

Expanded family and medical leave would fall under FMLA leave.

The employee could take up to 9 work weeks of unpaid FMLA leave for the applicable twelve-month period.

If the employer or employee elects to have FMLA expansion leave run concurrently with employer-provided PTO, what does the employer owe?

The employer must pay the employee the full amount to which he or she is entitled under the existing paid leave policy for the period of leave that runs concurrently.

May the employee be required to pay for the continuation of their health coverage (medical, dental, vision, etc.) during an EPSLA or EFMLEA leave?

Yes, the employee is required to pay for maintenance of their group health coverage on the same terms and in the same amount as they were required to pay before the commencement of such leave.

The standard FMLA rules regarding payment of premiums during an FMLA leave apply to such payment requirements.

What records should an employer maintain and for how long?

Employers should maintain the following records for four years from the date the tax return claiming the credit is filed:

Employee request for leave and documentation supplied to the employer.

Any information given orally should be documented by the employer.

What records must an employer maintain in order to claim the tax credit for the EPSLA or EFMLEA leaves?

[IRS FAQs on their website \(and updates to such FAQs\)](https://www.irs.gov/newsroom/covid-19-related-tax-credits-for-required-paid-leave-provided-by-small-and-midsize-businesses-faqs)

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What are the penalties for not providing EPSLA or EFMLEA leave or retaliating against employees who take such leave?

- The EPSLA prohibits employers from discharging, disciplining, or discriminating against any employee because the employee took paid sick leave, initiated a proceeding under or related to paid sick leave, or testified or is about to testify in such a proceeding.
- Employers that do so may be liable for lost pay and even compensatory and punitive damages.

The COVID-19 outbreak has made it difficult or impossible to perform some of my contractual obligations. Can I be excused from performance?

The term is force majeure (förs-mä-'zhər) is French, as superior force.

A force majeure clause is a contractual provision which excuses one or both parties' performance obligations when circumstances arise which are beyond the parties' control and make performance of the contract impractical or impossible.

WE NEED EMPLOYEES BACK ONSITE, ASAP!!

Before employees start returning to work, employers need to define the new normal by creating or revising policies to address a range of critical workplace issues, including employee relations and benefits.


Can you provide any tips on how to communicate new policies adopted in response to COVID-19?

- A communication task force to plan an internal communications strategy, is key.
- Prompt, accurate, and clear communications about new company policies: remote work, travel, leave policies, are just a few examples.

What information can I disclose about employees who are ill with COVID-19?

May I legally require employees who believe they are ill with COVID-19 or who may have come in contact with COVID-19 to remain away from the workplace for a period of time?

Can you say, HIPAA?



Employers can disclose that an employee has been diagnosed but should avoid identifying the ill employee by name and should be careful before providing any other specific information, particularly in small offices.

Employers may legally require an employee who is sick at work to leave the worksite and may also implement other attendance policies intended to protect the health of their workforce.

No fever for 24 hours.

What limitations does the ADA place on the Org's ability to attempt to contain the spread of COVID-19 in our workplace?

The co-workers should be advised to self-monitor for symptoms.

If they exhibit symptoms, the CDC currently recommends that they should notify their employer and stay home.

CDC added guidance on the timing of disinfection after a suspected or confirmed COVID-19 case.

If it has been less than 7 days since the employee with confirmed COVID-19 was at the place of business. CDC recommends the following:

- Close off areas visited by the ill persons.
- Wait 24 hours or as long as practical before beginning cleaning and disinfection.
- Clean and disinfect all areas such as offices, bathrooms, common areas, shared electronic equipment like tablets, touch screens, keyboards, remote controls, used by the ill persons, focusing especially on frequently touched surfaces.

**More time if you have overnight staff/guests. Please see the CDC.

May an employee file for workers' compensation benefits if he or she has been exposed to COVID-19 at work?

An employee may be entitled to workers' compensation benefits if the employee was exposed to the virus while traveling on business or exposed to the virus by another employee.

If reported COVID-19 was due to another employee at work, employers should follow standard workers comp reporting procedures.

Does an employer have to provide sick leave to a worker who contracted Covid-19?

If subject to FFCRA, Families First Coronavirus Response Act, an employer must provide emergency paid sick leave to an employee who has been advised by a health care provider to self-quarantine due to concerns related to COVID-19 or who is subject to a federal, state, or local quarantine or isolation order related to COVID-19.

Employees who test positive for COVID-19.

Employers may also be required to provide leave under the ADA to workers whose disabilities may put them at high risk for complications from COVID-19.

In such cases, employees may request leave or make a request to work from home as a reasonable accommodation.



Our business is still open to the public.

What should I do to protect my employees from customers and other members of the public that my employees must interact with?



The CDC has many recommendations, here are the top suggestions:

- Increasing physical space between employees and customers
- Providing customers and employees with tissues and make no-touch disposal receptacles available.
- Installing physical barriers, such as clear plastic sneeze guards between employees and customers.
- Installing a drive-through window for customer
- Providing soap and water in the workplace. Alcohol-based hand sanitizer
- Place posters that encourage hand hygiene to help stop the spread at the entrance to your workplace and in other workplace areas where they are likely to be seen.
- Discourage handshaking – encourage the use of other noncontact methods of greeting.
- Training workers who need to use protecting clothing and equipment how to put it on, use/wear it, and take it off correctly, including in the context of their current and potential duties.
- Training material should be easy to understand and available in the appropriate language and literacy level for all workers.

What is the new “NORM”?

Employers need to define the new normal by creating or revising policies to address a range of critical workplace issues, including employee relations and benefits.

- Social distancing may now be a company mandate
- checking of employees' temperatures when they arrive

Employers who communicate with their workforce and act with genuine concern for employee health and safety, usually see workers who respond with productive work styles, and in turn see a reduced risk of illness or further outbreak.

Some workers may opt not to come back.


Employers have permitted remote work during the pandemic, many employees with children at home have not yet used the emergency family and medical leave provided by the Families First Coronavirus Response Act...

So, please do not be surprised once you ask them to return- they request the 2 additional weeks time off.

What do you do when an employee refuses to return to work for fear of exposure to COVID-19?

SELF QUARANTINED...has ended, now what?

Who knows the definition of “tricky”?



According to OSHA, an employee's right to refuse to work if the employee reasonably believes that he or she is exposed to an imminent danger, which is defined as a reasonable expectation of death or serious physical harm immediately or before the imminence of such danger can be eliminated through OSHA's enforcement procedures.

Employers should promptly address employee concerns regarding exposure to the COVID-19.

Employee Relations: Keep Up Communications

HR should build communication strategies that are welcoming to returning employees.

Keeping communication lines open with management, and partner with them as to bringing the workforce back on site.

HR professionals suggest adding policies that address:

If and how the organization will conduct temperature checks, whether it's done directly, through a third party or by self-reporting.



Cross-training the workforce to accommodate more employee absences.



Social distancing in the workplace.



CHECKLIST FOR ALL EMPLOYERS

- *In accordance with Governor Abbott's executive order GA-18, the following are the minimum recommended health protocols for all businesses choosing to operate in Texas*
- *Please note, public health guidance cannot anticipate every unique situation. **Employers should stay informed and take actions based on common sense and wise judgment** that will protect health and support economic revitalization.*

Health protocols for your employees:

Train all employees on appropriate cleaning and disinfection, hand hygiene, and respiratory etiquette.

Send home any employee who has any of the following new or worsening signs or symptoms of possible COVID-19:

- - Cough
- - Shortness of breath or difficulty breathing
- - Headache
- - Loss of taste or smell
- - Feeling feverish or a measured temperature greater than or equal to 100.0 degrees Fahrenheit
- - Known close contact with a person who is lab confirmed to have COVID-19
- Chills
- Muscle pain
- Sore throat
- Diarrhea

Do not allow employees with the new or worsening signs or symptoms listed above to return to work until:

In the case of an employee who was diagnosed with COVID-19, the individual may return to work when the following criteria are met: at least 3 days (72 hours) have passed & showing no signs of the above mentioned.

How do you pick & choose who will return onsite, and who will continue working remotely?

If the position is strictly working on the computer, staying at home is an easy options.

For other positions, who is essential?

Important steps & stages to get your business back on site!

Plan a staggered reintroduction to the office.

Establish a process such that a rotating group of employees work from the office every few days.

Create these groups across functional lines, both to ensure coverage across roles and to support employee distancing.

Resist the temptation to open the doors to everyone on the same day!

If your business can continue some form of remote working for several months, this would be for financial, and taking safety precautions.

Many organizations will elect to keep staff working from home for economic reasons.

Others may have a return to remote working forced upon them if a staff member suddenly contracts the virus.

This reinforces the importance of an effective communications platform to connect with employees working from home.

DID I MENTION CROSS TRAINING?

Reopening of workplaces won't entirely remove all restrictions imposed during COVID-19.

Businesses will still need to observe regulations governing social distancing, employee gatherings and hygiene practices.

Businesses will need to be proactive in reconfiguring their office spaces. The requirement for 6 feet between employees impacts on individual seating arrangements and shared spaces like cafeterias.

What is a Furloughed employee?

A furlough is an unpaid leave of absence.

Some employers have made the decision to furlough their employees because there is not enough work for the employees to do during this time.

In accordance with DOL guidance, because employees who have been furloughed are placed on leave for a reason outside of the six (6) reasons listed in the EPSLA, they are not eligible to receive paid sick time under the Families First Coronavirus Response Act during the unpaid leave of absence.

**Please check your state guidelines, as many states have varied laws as to those laid off, versus those furloughed who may be called back.

Furloughed employees

I want to make sure we follow all the right procedures.

Do we treat them like a rehire or is there a furlough “rehire” process?

Furloughed employees should receive communications, as furloughs may be extended or shortened, depending on what occurs with COVID-19.

STEPS to return furloughed employees

Returning employees are likely to have a lot of questions.

As well as stating all the necessary facts, take this opportunity to reassure them about any changes when it comes to their place in the organization, their salary and benefits packages.

An Employment Offer

Here's the most important thing for employers to know — an offer letter, stating the usual- position, salary, benefits.

Employees may have found alternative employment while furloughed or simply not wish to return to work at this time.

Employees should be given a choice whether to accept the offer to return, or reject it and have their employment terminated.

Legal concerns: please make sure management is not calling with the offer, and making any “agreements” as to pay, or increases/promotions

Return To Work Date

The exact date they are expected...this is not a, “Hey, come in when you can...”

Please report to your supervisor, May 1, 2020, at 8am in the operations break room.

Terms of Employment

This letter will now supersede any previous terms of employment, so it's important to get all the important details right:

- Position
- Supervisor
- Responsibilities / Job Description
- Salary
- Hours
- Exempt/Non-Exempt Status

What's Changed—And What Hasn't

For full transparency, lay out whether any of an employee's terms of employment have changed.

A small change not disclosed will clearly lead to resentment.

If salaries or hours have been reduced across the board, be clear about this.

**ER concern: This is not the way we have done it before!

When did this change take place?

Is this something you taught the people who were **not** furloughed?!?

Benefits Status

Employees will naturally want to know how the recall from furlough affects their company seniority, benefits, and any accrued PTO and sick leave.

Any changes, please have the employee sign and acknowledge.

New Safety Procedures

The furlough is over, but the crisis isn't.

Employees should still work from home if they can.

If it isn't possible in your industry, it's an employer's responsibility to create a safe work environment and work to promote social distancing.

Possible measures include:

Scheduled handwashing

Enforced social distancing

Staggered Shifts

Regular disinfection of surfaces

Reduced customer capacity

Any industry-specific requirements

Reassurance

This is a time of high anxiety and you can't be expected to predict every question a returning employee may have.

Offer employees to chance to reach out privately with any questions and concerns.

Do you remember how the first day back from summer break was at school? It took about a month for everyone to get back into the groove of things. Your business is the same...expect it, embrace it, and please plan for it!

Transparency-
as we do not have all the answers

Open and honest communication with employees will likely lead to a smooth transition and avoid the employee concerns and complaints.

Where can I find information about COVID-19 to guide my organization's decision-making process about any new employment policies outbreak?

CDC and also HR website, SHRM.org

Are you able to restore business on site in waves- or phases?

Flex schedules, staggering those in the same department

Positions that may continue to be remote

May my business require employees to travel?

May my business require employees to travel?

Within the US, please remember the airports listed below, are also airports that US citizens returning to the US will be redirected to for health screening.

American citizens, lawful permanent residents, and member of their families may enter the United States but will be redirected to one of the following 13 airports for health screening:

- Boston Logan International Airport (BOS), Massachusetts
- Chicago O'Hare International Airport (ORD), Illinois;
- Dallas/Fort Worth International Airport (DFW), Texas;
- Daniel K. Inouye International Airport (HNL), Hawaii;
- Detroit Metropolitan Airport (DTW), Michigan;
- Hartsfield-Jackson Atlanta International Airport (ATL), Georgia;
- John F. Kennedy International Airport (JFK), New York;
- Los Angeles International Airport, (LAX), California;
- Miami International Airport (MIA)
- Newark Liberty International Airport (EWR), New Jersey;
- San Francisco International Airport (SFO), California;
- Seattle-Tacoma International Airport (SEA), Washington; and
- Washington-Dulles International Airport (IAD), Virginia.

Payroll Protection Program (PPP)

- What happens if an employee quits and we do not have as many employees as stated at the time of the loan application?
- What happens if we terminate an employee because of misconduct, etc.?
- Do we need to keep the same number of employees for it to be forgivable?
- Can we replace the terminated employee?

The unknown, unclear questions, and waiting for clarification...

Can a business rehire in any position or does it have to be similar positions?

Does it have to rehire specific employees which were furloughed or laid off or can the replacements be anyone?

Is there an exception for poor performers or retirees?

Can it increase its headcount to achieve maximum forgiveness?

- I have seen many things about the Families First Coronavirus Response Act, but where can I find the bill itself?

<https://www.congress.gov/bill/116th-congress/house-bill/6201/text>

- In addition, the DOL's FAQs may be found at "Families First Coronavirus Response Act: Questions and Answers" at <https://www.dol.gov/agencies/whd/pandemic/ffcra-questions>

- In addition, the IRS's FAQ's on the related tax credits can be found at <https://www.irs.gov/newsroom/covid-19-related-tax-credits-for-required-paid-leave-provided-by-small-and-midsize-businesses-faqs>

Additional information resources for businesses:

CDC Guidelines: <https://www.cdc.gov/coronavirus/2019-nCoV/index.html>

ADA: https://www.ada.gov/emerg_prep.html

OSHA: <https://www.osha.gov/SLTC/covid-19/>

For a deep dive explanation, or to answer your one-off scenario, please feel free to reach out

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Continuing Education Certification

- HRCI Activity ID: 522180 (pending 1.5 credit hours)
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