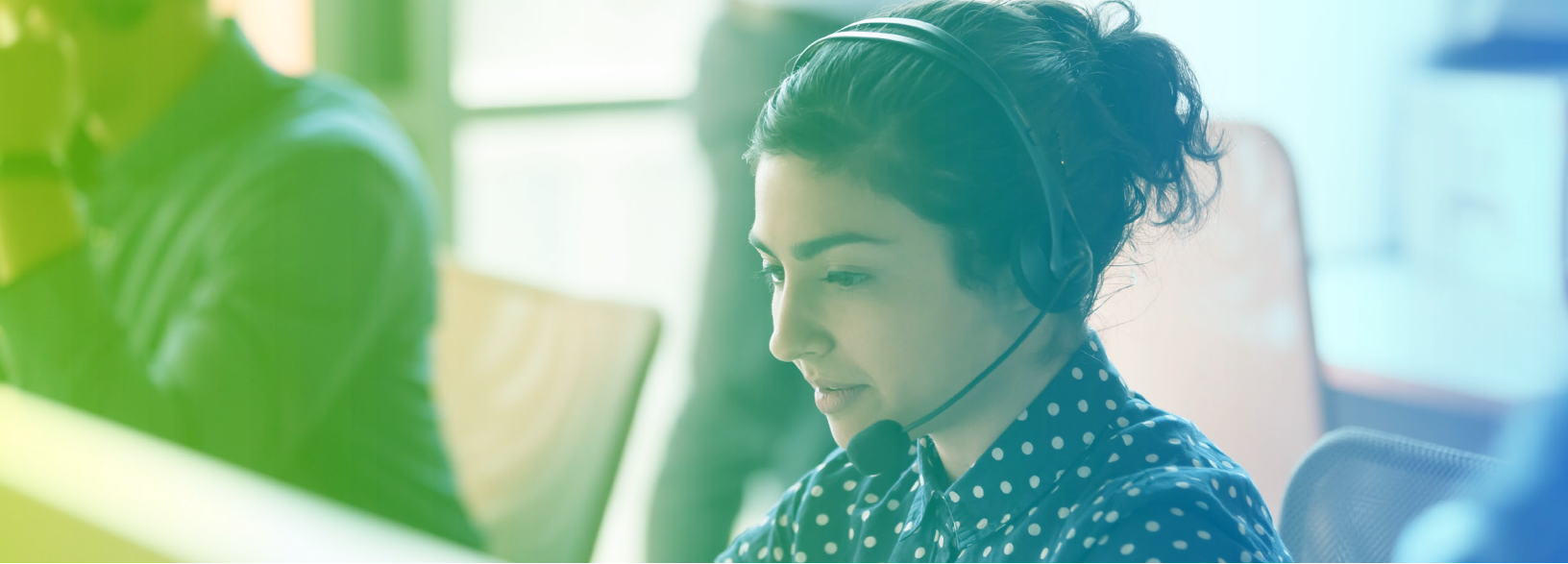




COVID-19 EMPLOYER FAQ

Curated from over 2,000 questions submitted to ThinkHR and Mammoth.



Introduction

Since early this year, we have been on the ground, supporting employers as COVID-19 continues to cause understandable confusion, anxiety, and multiple challenges. Tens of thousands of employers have turned to us for answers about new legal obligations, workplace health, employee management, and business operations.

Because we understand the biggest challenges facing employers, we created this list of Frequently Asked Questions (FAQs) to help employers get trusted answers. As we continue to field new questions, we will promptly update this resource.

The FFCRA and Other Applicable Leaves

What is the new federal COVID-19 law, and what does it do?

Effective April 1, 2020, the Families First Coronavirus Response Act (FFCRA) is a federal law that will require employers to facilitate two major benefits. Under the new law, most employees must be given:

1. Up to two weeks of emergency paid sick leave (EPSL) for illness, quarantine, or school closures related to COVID-19.
2. Up to 12 weeks of emergency Family and Medical Leave Act (EFMLA) leave for care of their children during school closures related to COVID-19, most of which must be paid. A few exceptions apply.

Payment under these leaves is 100 percent reimbursable by the federal government through a payroll tax credit up to certain caps.

Do we need to provide the required sick leave under the FFCRA in addition to the sick leave we already offer?

Yes. The Department of Labor makes it clear in an **FAQ** regarding the FFCRA that leaves under the FFCRA are intended to be in addition to any pre-existing sick leave entitlements that an employee may have.

What are our EPSL and EFMLA obligations to different employee situations, such as remote employees?

All employees are entitled to emergency paid sick leave (EPSL) and emergency expansion of the FMLA (EFMLA) benefits unless a specific exemption applies to your business or the individual.

Is the FFCRA retroactive or applicable before its effective date?

No. The leaves available under the FFCRA went into effect April 1. Leave taken before April 1 is not covered and employers can't get a tax credit for anything paid out prior to that date.

Does the FFCRA apply to me if I have more than 500 employees? How do I count them?

The FFCRA does not apply to your organization if you employ more than 500 employees. You have fewer than 500 employees if, at the time your employee's leave is to be taken, you employ fewer than 500 full-time and part-time employees within the United States. In making this determination, you should include employees on leave, temporary employees who are jointly employed by you and another employer (regardless of whether the **jointly-employed employees** are maintained on only your or another employer's payroll), and day laborers supplied by a temporary agency (regardless of whether you are the temporary agency or the client firm if there is a continuing employment relationship). Workers who are independent contractors under the Fair Labor Standards Act (FLSA), rather than **employees**, are not considered employees for purposes of the 500-employee threshold.

How do EFMLA and EPSL relate to each other, especially in regard to caring for children?

The emergency FMLA (EFMLA) and emergency paid sick leave (EPSL) both cover caring for children whose school or place of care is closed due to COVID-19 precautions. The leaves can run concurrently with the first 10 days of EFMLA being unpaid, which will, in many cases, coincide with the 80 hours of pay (at 2/3 the regular rate) under EPSL for full-time employees. If an employee uses EPSL for a non-childcare reason first, they'd still have 12 weeks of EFMLA available for use.

How does the FFCRA define emergency workers or healthcare providers?

The FFCRA defines healthcare workers as anyone employed at any doctor's office, hospital, health care center, clinic, post-secondary educational institution offering health care instruction, medical school, local health department or agency, nursing facility, retirement facility, nursing home, home health care provider, any facility that performs laboratory or medical testing, pharmacy, or any similar institution, employer, or entity.

This includes any individual employed by an entity that contracts with any of the above to provide services or to maintain the operation of the facility. This also includes anyone employed by any entity that provides medical services, produces medical products, or is otherwise involved in the making of COVID-19 related medical equipment, tests, drugs, vaccines, diagnostic vehicles, or treatments. This also includes any individual that the highest official of a state (or the District of Columbia) determines is an emergency responder necessary for the response to COVID-19.

An emergency responder is an employee who is necessary for the provision of transport, care, health care, comfort, and nutrition of such patients, or whose services are otherwise needed to limit the spread of COVID-19. This includes but is not limited to military or national guard, law enforcement officers, correctional institution personnel, fire fighters, emergency medical services personnel, physicians, nurses, public health personnel, emergency medical technicians, paramedics, emergency management personnel, 911 operators, child welfare workers and service providers, public works personnel, and persons with skills or training in operating specialized equipment or other skills needed to provide aid in a declared emergency as well as individuals who work for such facilities employing these individuals and whose work is necessary to maintain the operation of the facility. This also includes any individual that the highest official of a state (or the District of Columbia) determines is an emergency responder necessary for the response to COVID-19.

To minimize the spread of the virus associated with COVID-19, the Department of Labor encourages employers to be judicious when using these definitions to exempt employees from the provisions of the FFCRA.

[Do we still have to provide EPSL or EFMLA if we lay off or furlough employees?](#)

No. Employers who are closed – either due to lack of business or a state or local order – do not have to provide these leaves because they don't have work available. Employees who are furloughed (temporarily not working but still on the payroll) are also not entitled to these benefits. In either of these cases, employees may be eligible for unemployment insurance instead. However, employers should ensure that they are not making furlough or layoff decisions based on an employee's request or potential need for leave, as this would likely be considered interference or retaliation (and grounds for a lawsuit).

[How are we supposed to pay for the sick leave and FMLA leave mandated by the Families First Coronavirus Response Act?](#)

To take immediate advantage of the paid leave credits, businesses can retain and access funds that they would otherwise pay to the IRS in payroll taxes. If those amounts are not sufficient to cover the cost of paid leave, employers can seek an expedited advance from the IRS by submitting **Form 7200**.

We know that for many of our clients, business slowdowns related to the spread of COVID-19 have made it hard to imagine how they could bear any additional expenses. We encourage anyone with these concerns to read the **Treasury, IRS, and Labor Announcement on FFCRA Implementation** announcement carefully.

[If I am a nonprofit or a public employer, do tax credits and reimbursement apply to me?](#)

Most public employers (e.g., cities, municipalities, public school districts) will not be eligible for the tax credits or reimbursements provided in the act. Private nonprofit entities, however, are eligible.

Health & Safety

Can we tell employees who travel to stay home and quarantine, even if they don't have symptoms?

Yes. However, given the widespread community transmission in the United States, an individual who has traveled may pose no more risk than someone who has not. If you feel where they traveled to was higher risk than where your workplace is located and that concerns you, consider options to keep them working during the quarantine period.

We are an essential business where there's a shelter-in place-rule and an employee is refusing to work as they say it's not safe. Can we discipline them?

This is certainly a difficult situation to be in. We recommend extreme caution in disciplining or terminating an employee who refuses to work in a location that has shelter-in-place rules in effect, as it poses several types of legal risk. Generally, employees do not have a right to refuse to work based only on a generalized fear of becoming ill if their fear is not based on objective evidence of possible exposure. In that case, you would be able to enforce your usual attendance policies. However, under the current circumstances, where COVID-19 cases are increasing and many cities and states are implementing drastic public health measures to control spread of the virus, we think it would be difficult to show that employees have no reason to fear coming in to work, particularly in a location with a shelter-in-place rule.

Provide Reasonable Accommodation

Employees who are in a high risk category — either because they are immunocompromised or have an underlying condition that makes them more susceptible to the disease — should be granted a reasonable accommodation under the Americans with Disabilities Act (ADA) and/or state law. Employees who live with someone who is at high risk should be granted a similar accommodation. It would be a reasonable accommodation under the circumstances to allow the employee to work from home or take a non-working leave, if working from home is not possible.

Under OSHA rules, an employee's refusal to perform a task will be protected if all of the following conditions are met:

- Where possible, the employee asked the employer to eliminate the danger, and the employer failed to do so;
- The employee refused to work in "good faith." This means that the employee must genuinely believe that an imminent danger exists;
- A reasonable person would agree that there is a real danger of death or serious injury; and
- There is not enough time, due to the urgency of the hazard, to get it corrected through regular enforcement channels, such as requesting an OSHA inspection.

No Punishment or Retaliation for Raising Safety Concerns

An employer cannot retaliate against an employee for raising a safety concern. Additionally, employees who won't work because of safety concerns may be considered to be engaging in protected concerted activity under the National Labor Relations Act (NLRA) if they have a "good faith" belief that their health and safety are at risk.

Incentivize Employees Instead

Instead of disciplining employees who express fear at this time, we recommend you consider methods to encourage employees to come to work and to help put their minds at ease. Consider emphasizing all of the safety methods you have put in place (e.g., scheduled hand-washing, frequent disinfection of surfaces, social distancing rules, reduced customer capacity, staggered shifts, or more extreme measures if warranted by your industry). We recommend relying heavily on the Centers for Disease Control and Prevention (CDC) guidelines and local health department information in establishing safe working conditions at this time. You might also consider offering premium pay or additional paid time off (PTO) for use in the future to employees who must come to work.

Is it safe for our employees to keep working? How do we decide whether to keep employees working or not?

Ultimately each company will need to determine how it will fulfill its duty to provide a safe workplace to its employees. It's very important to pay attention to federal, state, and local authorities to see if they are rolling out specific guidance or prohibitions that you need to be aware of. For example, some locations have issued an order for individuals to "shelter in place," which drastically limits what workplaces can remain open and provides some guidance for those who can remain working.

Guidance has been changing from day to day and region to region. We recommend keeping up with the latest information on the Centers for Disease Control (CDC) Coronavirus [home page](#), related pages on that site, and your local health department for the most up to date guidance for your region and operations.

Can we send employees home if they are symptomatic?

Yes. The Centers for Disease Control and Prevention (CDC) has **advised employers** that employees who appear to have symptoms of COVID-19 (e.g., cough, shortness of breath) should be separated from other employees and sent home immediately. If the employee feels well enough to work, consider whether they can effectively telecommute.

Note: Nonexempt employees may be entitled to a few extra hours of pay if you're in a state with reporting time pay, but this cost will be well worth it to maintain the safety of the workplace.

Can I send an employee home if they are sick or pregnant, regardless of whether it's COVID-19-related, just to be safe?

You have the right to send people home for sickness if it appears that they have something contagious; in this case, you are protecting other employees in the workplace. This includes sending employees home who have the common cold.

You should not send employees home because you believe they are higher risk — this includes pregnant employees. We would encourage you to make working from home or unpaid leaves available for employees who want that option, but not to force that on anyone who doesn't pose a risk to others.

What if my employee discloses that their family member or roommate has COVID-19?

Individuals who share a household with someone who is infected should self-quarantine for 14 days per the Centers for Disease Control and Prevention (CDC). The CDC does not currently recommend special scrutiny or quarantine for those who have been exposed to an asymptomatic person who has been exposed to someone with COVID-19 (meaning you don't need to send everyone home to quarantine as a result). Remember that the confidentiality of medical information must be maintained per the Americans with Disabilities Act.

Given COVID-19, if an employee is out of the office due to sickness, can we ask them about their symptoms?

Yes, but there's a right way to do it and a wrong way to do it. In most circumstances, employers shouldn't ask about an employee's symptoms, as that could be construed as a disability-related inquiry. Under the circumstances, however – and in line with an employer's responsibility to provide a safe workplace – we recommend asking specifically about the symptoms of COVID-19 and making it clear that this is the extent of the information you're looking for.

Here's a suggested communication: "Thank you for staying home while sick. In the interest of keeping all employees as safe as possible, we'd like to know if you are having any of the symptoms of COVID-19. Are you experiencing a fever, cough, and/or shortness of breath?"

Remember that medical information must be kept confidential as required by the Americans with Disabilities Act (ADA). If the employee does reveal that they have symptoms of COVID-19, or has a confirmed case, the CDC recommends informing the employee's co-workers of their possible exposure to COVID-19 in the workplace (but not naming the employee who has or might have it) and directing them to self-monitor for symptoms (fever, cough, or shortness of breath).

What should we do if an employee says their symptoms are not related to COVID-19?

This is a tough situation. The Centers for Disease Control and Prevention (CDC) advises employers to send employees home when they have COVID-19 symptoms (fever, cough, shortness of breath).

If an employee claims that their symptoms that are similar to those of COVID-19 are from another cause (e.g., allergies, asthma), the most risk-adverse response would be to send them home with pay. We understand that providing paid leave is not feasible for every business, but under the circumstances this is the best way to keep your workplace safe.

“The CDC recommends informing the employee’s co-workers of their possible exposure to COVID-19 in the workplace (but not naming the employee who has or might have it) and directing them to self-monitor for symptoms (fever, cough, or shortness of breath).”



How do we handle taking employee's temperatures?

The Equal Employment Opportunity Commission (EEOC) has issued guidance that employers may take employees' temperatures during the COVID-19 pandemic because COVID-19 is spreading nationwide. Note that many people may have COVID-19 without a fever, so other safety precautions should not be scaled back just because employees "checked out" upon arrival to work. The CDC summarizes symptoms [here](#). Employees' body temperatures are considered medical information and must be kept confidential under the Americans with Disabilities Act (ADA).

The main [CDC COVID-19 page](#) has general community mitigation strategies as well as certain regional specific strategies. We cannot provide guidance on how to implement temperature checking procedures, but significant precautions should be taken so that you do not actually increase risk by reusing a tool that comes into contact with hands, faces, and/or mouths of multiple employees.

Are employees required to provide documentation in support of leave taken under the FFCRA?

If you intend to claim a tax credit under the FFCRA for your payment of the sick leave or expanded family and medical leave wages, you should retain appropriate documentation in your records.

A written request for leave from the employee should include the following (and you can't require that it include more):

- The employee's name;
- The date or dates for which leave is requested;
- A statement of the COVID-19 related reason the employee is requesting leave and written support for such reason; and
- A statement that the employee is unable to work, including by means of telework, for such reason.

In the case of a leave request based on a quarantine order or self-quarantine advice, the statement from the employee should include the name of the governmental entity ordering quarantine or the name of the health care professional advising self-quarantine, and, if the person subject to quarantine or advised to self-quarantine is not the employee, that person's name and relation to the employee.



For a leave request based on a school closing or child care provider unavailability, the statement from the employee should include the name and age of the child (or children) to be cared for, the name of the school that has closed or place of care that is unavailable, and a representation that no other person will be providing care for the child during the period for which the employee is receiving family medical leave and, with respect to the employee's inability to work or telework because of a need to provide care for a child older than 14 during daylight hours, a statement that special circumstances exist requiring the employee to provide care.

It's worth noting that the FFCRA makes emergency FMLA available to an employee who is "unable to work (or telework) due to a need for leave to care for the son or daughter if the school or place of care has been closed, or the child care provider of such son or daughter is unavailable, due to a public health emergency." In the case of a child over the age of 14, to claim the tax credit, the IRS is asking that employers collect a statement from the employee noting that a special circumstance exists requiring them to provide care. For questions about tax credit documentation, we recommend consulting with a qualified tax professional.

"...the IRS is asking that employers collect a statement from the employee noting that a special circumstance exists requiring them to provide care."



Making Working from Home Work

Can we require or allow certain groups of employees, but not others, to work from home?

Yes. Employers may offer different benefits or terms of employment to different groups of employees as long as the distinction is based on nondiscriminatory criteria. For instance, a telecommuting option or requirement can be based on the type of work performed, employee classification (exempt v. nonexempt), or location of the office or the employee. Employers should be able to support the business justification for allowing or requiring certain groups to telecommute.

How do I make a telecommuting policy?

Although some employers will be comfortable sending everyone home with their laptop and saying “go forth and be productive,” most will want to be a little more specific. A good telecommuting policy will generally address productivity standards, hours of work, how and when employees should be in contact with their manager or subordinates, and office expenses.

For instance, your policy might require that employees are available by phone and messaging app during their regular in-office hours, that they meet all deadlines and maintain client contacts per usual, and that they check in with their manager at the close of each workday to report what they have accomplished. Be sure to let employees know whom to contact if they run into technical difficulties at home.

You'll also want to specify how expenses related to working from home will be dealt with. If you don't expect there to be any additional expenses involved, communicate this. You don't want employees thinking this is their chance to purchase a standing desk and fancy ergonomic chair on your dime. That said, you should consider whether employees will incur reasonable and necessary expenses while working from home. Some states mandate reimbursement for these kinds of expenses, but it's a good practice to cover such costs even if it's not required by law.

How do we make sure we pay employees appropriately when they work from home?

You'll want to pay an employee that is working from home just like you would pay someone who is working in the office. Have them log their time and, if needed, report it to someone who can enter it into your payroll system (if this is something they can't do themselves online). Nonexempt employees should take all the same breaks at home that they are required to take in the workplace. With respect to ensuring that people are actually doing work at home, you may want to set up regular check-ins to see that things are getting done. You can also require that employees remain available online via a messaging app and are available by telephone or for video conferences during working hours.

Furloughs & Layoffs

What's the difference between a furlough and a layoff?

First, you should note that the language used when sending employees home for a period of time is less important than communicating your actual intent. Since temporary layoffs and furloughs are only used regularly in certain industries (usually seasonal), you should not assume that employees will know what they mean. Be sure to communicate your plans for the future, even if they feel quite uncertain or are only short-term.

Furlough

A furlough continues employment but reduces scheduled hours or requires a period of unpaid leave. The thought process is that having all employees incur a bit of hardship is better than some losing their jobs completely. For example, a company may reduce hours to 20 per week for a period of time as a cost-saving measure, or they may place everyone on a two-week unpaid leave. This is typically not considered termination; however, you may still need to provide certain notices to employees about the change in the relationship, and they would likely still be eligible for unemployment.

If the entire company won't be furloughed, but only certain employees, it is important to be able to show that staff selection is not being done for a discriminatory reason. You'll want to document the nondiscriminatory business reasons that support the decision to furlough certain employees and not others, such as those that perform essential services.

Layoff

A layoff involves terminating employment during a period when no work is available. This may be temporary or permanent. If you close down completely, but you intend to reopen in the relatively near future or have an expected reopening date — at which time you will rehire an employee, or all employees — this would be considered a temporary layoff. Temporary layoffs are appropriate for relatively short-term slowdowns or closures. A layoff is generally considered permanent if there are no plans to rehire the employee or employees because the slowdown or closure is expected to be lengthy or permanent.

“Be sure to communicate your plans for the future, even if they feel quite uncertain or are only short-term.”

Pay for exempt employees (those not entitled to overtime)

Exempt employees do not have to be paid if they do no work at all for an entire workweek. However, if work is not available for a partial week for an exempt employee, they must be paid their full salary for that week, regardless of the fact that they have done less work. If the point is to save money (and it usually is), it's best to ensure that the layoff covers the company's established seven-day workweek for exempt employees. Make it very clear to exempt employees that they should do absolutely no work during any week you're shut down. If exempt employees do any work during that time, they will need to be paid their normal weekly salary.

Pay for nonexempt employees (those entitled to overtime)

Nonexempt employees only need to be paid for actual hours worked, so single day or partial-week furloughs can be applied to them without worrying about pay implications.

We recommend that you engage in open communication with the affected employees before and during the furlough or temporary layoff period.

Our business is suffering due to COVID-19. We can't afford to pay people and might have to close. What do we do?

This is understandably a very difficult situation for employers and their employees.

There are three basic options when it comes to keeping employees or letting them go: furlough (temporary reduction in hours of work or weeks of work); temporary layoffs (layoff with the intention of rehire, generally within six months); or permanent layoffs (layoff with no anticipated rehire date). In all situations, it's best to be very clear in written communications about your decision and work with an attorney.

Employees who are furloughed can generally still receive unemployment insurance benefits, so employers shouldn't feel like they have to terminate everyone just so they can receive unemployment insurance.

Can we reduce pay because of an economic slowdown due to COVID-19?

You can reduce an employee's rate of pay based on business or economic slowdown, provided that this is not done retroactively. For instance, if you give employees notice that their pay will change on the 10th, and your payroll period runs from the 1st through the 15th, make sure that their next check still reflects the higher rate of pay for the first 9 days of the payroll period.

Nonexempt employees (those entitled to overtime)

A nonexempt employee's new rate of pay must still meet the applicable federal, state, or local minimum wage. Employees must be given notice of the change to their rate of pay, and some states require advance notice.

Exempt employees (those not entitled to overtime)

An exempt employee's new salary must still be at or above the federal or state minimum for exempt employees. The federal minimum salary is \$684 per week. Several states have weekly minimums that are higher than that (California and New York, for instance, are in the \$1,000 per week range). The minimum may not be prorated based on hours worked.

Exempt employee reclassification

If an exempt employee has so little work to do that it does not make sense to pay them the federal or state minimum (or you simply cannot afford to), they can be reclassified as nonexempt and be paid by the hour instead. This must not be done on a very short-term basis. Although there are no hard and fast rules about how long you can reclassify someone, we would recommend not changing their classification unless you expect the slowdown to last for more than three weeks. Changing them back and forth frequently could cause you to lose their exemption retroactively and potentially owe years of overtime.

Employees with contracts or CBAs

If employees have employment contracts or are subject to collective-bargaining agreements (CBAs), you should consult with an attorney before making any changes to pay.

If we choose to close temporarily, do we need to pay employees?

It depends on the employee's classification.

Nonexempt employees only need to be paid only for actual hours worked. For these employees, you may:

1. Pay the employee for the time, even though they did not work;
2. Require they take the time off unpaid;
3. Require they use any available vacation time or paid time off (PTO)*; or
4. Allow employees to choose between taking an unpaid day or using vacation or PTO.

All four options are compliant with federal law. We generally recommend option 4 – allowing but not requiring employees to use vacation time or PTO. If your office is required to close by health authorities, mayor, or governor and your state has a sick leave law, employees may be able to use accrued paid sick leave during the closure depending on the terms of the applicable sick leave law.

Exempt employees must be paid their regular salary unless the office is closed for an entire workweek and they do **no work at all from home**. You can, however, require them to use accrued vacation or PTO during a closure if you have a policy that indicates you will do so, or if this has been your past practice.* When it comes to accrued vacation or PTO, it is safest to give employees advance notice if there are situations where you will use their accrued hours whether they like it or not.

*California limits mandatory PTO use without significant notice. Check state law.

Do we still offer the same benefits during a furlough due to COVID-19 as we did before? What about a layoff or closure?

Check with your benefits provider before you take action. Eligibility for benefits during a furlough or layoff will depend on the specifics of your plan. For health insurance, if an employee would lose their eligibility during a furlough (or layoff), then federal COBRA or state mini-COBRA would apply.



If we close temporarily, will employees be able to file for unemployment insurance?

Yes. Employees should be encouraged to apply as soon as possible.

I'm concerned about the cost of unemployment as well as how to advise employees about it. Any help?

Remember that you don't pay unemployment insurance (UI) claims directly. They are paid by the state, and the state gets funds for that from unemployment insurance taxes that employers pay into regularly. Some employers are concerned that their UI tax rate will increase due to current layoffs, but it appears that many states (perhaps all) will essentially be forgiving COVID-19-related terminations with respect to future increases in UI tax rates.

Most employees who experience reduced hours, furloughs, or layoffs will be eligible for at least some unemployment insurance. Exactly how much will depend on a number of factors. Employees should be encouraged to file as soon as possible and to research rules, benefits, and options themselves to ensure they get the best benefit possible. We recommend that both employers and employees visit their state's unemployment insurance department website and track local and state news, as departments across the country are updating their rules to facilitate displaced workers during this time.

Conclusion

Many small businesses are overwhelmed due to COVID-19. In this time of unprecedented need, we're offering the best information from our customer-only resources to the public, including this FAQ. We appreciate you sharing it with any employer who could benefit.

About

The combined entity of ThinkHR and Mammoth is a trusted provider of HR knowledge and technology-powered employer solutions. Together, the two companies deliver HR on-demand to hundreds of thousands of small- and medium-sized businesses nationwide.



www.thinkhr.com/COVID19