



Coronavirus Webinar Q&A's

March 18, 2020

The following are responses to questions asked by participants on our March 18, 2020 Coronavirus Webinar. The situation is evolving rapidly. Answers are valid as of March 19, 2020. DOL regulations expected to be issued in the coming weeks as well as other legislative changes could render the answers here inaccurate without notice. This Q&A is not, and should not be treated as, legal advice or a summary of legal obligations. This Q&A concerns the Families First Coronavirus Response Act as signed into law on March 18, 2020, and does not address state or local laws that might apply to your jurisdiction. Confer with counsel about specific employment situations that may arise. Please contact your insurance broker or carrier to discuss submitting any possible claim. Only the insurer can make a coverage determination.

Human Resource Questions

Q. What are employers doing if an employee comes in sick, we send them home and then they come back a day or two later stating they feel better?

A. It depends on the circumstances of illness (symptoms), the employee's history if already known to you (ex., do they get seasonal allergies every year), the availability of testing (currently there are not enough tests to be provided for the purposes of "clearance"), and the availability of the employer to provide a work environment where appropriate distancing is readily achievable for the duration of the workday. There is no one-size-fits-all answer here unfortunately. Where fever is an issue, the current [CDC Guide for Small Businesses](#) recommends at least that employees be fever and symptom free without the aid of fever or cough suppressants for 24 hours. It is okay to ask employees in this scenario if they every had fever, dry cough, and if they have tested positive or negative for COVID-19. Employers should not ask if employees have a disability that could be causing them to have COVID-19-like symptoms.

Q. I thought employers could require employees to use accrued PTO prior to the mandated paid leave?

A. This language is (confusingly) in the Public Emergency FMLA expansion. Why that portion (the FMLA expansion) doesn't expressly reference the Emergency Paid Sick Leave provision, I do not know. But, if an employee qualifies for Emergency Paid Sick Leave, they cannot be required to use other leave programs, including when they are using Emergency Paid Sick Leave and Emergency FMLA Expansion leave concurrently.

Q. We have some employees that have recently traveled on public transportation from areas with many cases and are wanting them to stay home for a week. We are a small business, so is the government saying they would cover their pay?



A. Under federal law, you can exclude workers that have traveled to “hot spots” as long as you are consistent in application. If they are not symptomatic and have not been advised by health care provider to isolate, they are not eligible for pay under the Emergency Paid Sick Leave or FMLA Expansion.

Q. If we are forced by the government to shutdown operations, are we required to pay our employees for two weeks? Even if they are hourly employees not able to work in the field? Is this still required for businesses under 50 employees?

A. Nothing in the Families First Coronavirus Response Act requires employers to pay employees due to government closure of that business. It is only due to the employee’s inability to work due to being subject to quarantine/isolation order, health care provider advice, seeking a COVID-19 diagnosis due to symptoms, caring for an individual subject to a quarantine/isolation order or health care provider advise, to care for a child due to loss of school/daycare coverage, employee experiencing “substantially similar condition” as specified by Departments of HHS, Treasury, and Labor

Q. New York State just ordered a reduction of workforce of 50%. Does this apply to all organizations?

A. The order is to reduce onsite workforces by 50%. It applies to businesses relying on in-office personnel. You should consult local counsel for analysis of your specific situation related to in-office personnel and reduction.

Q. Does the sick leave apply to workers who have been employed less than 30 days?

A. The 2 week Emergency Paid Sick Leave Act applies to all employees. The FMLA Expansion has a 30 day requirement.

Q. If the employee requests to stay home for fear of contracting, is the employer required to pay and not take from PTO?

A. No, that is not a qualifying reason under the Paid Sick Leave Act unless their health care provider has advised them to stay home (for instance due to an underlying disability). It is not a qualifying reason at all under the FMLA Expansion Act.

Q. Can you just put the employee on unemployment and not pay the FMLA paid sick leave?

A. No.

Q. What if the full-time employee does not usually work 40 hours a week?

A. The statutory language does not address this gray area with respect to Emergency Paid Sick Leave. The DOL has always advised that the definition of “full time” is to be set by employer. Very risk-averse employers will want to go ahead and pay 40 hours/week for anyone they classify as full time. Other businesses will prorate anyone working fewer than 40 hours/week.

Under Emergency FMLA, the pay is prorated.

Q. One of my employees lives at home with his family. His mother works at a health care facility where a co-worker has been diagnosed with COVID-19. Some of my other employees are demanding that his person no longer comes to work. What should we do?

A. You can ask the employee questions related to assessing the risk of transmission to others. Questions like: Did the mother work in close contact* with the diagnosed co-worker (or any other known diagnosed case)? Did mom and co-worker have any common surfaces? What preventive measures did she take? Do the mother and employee meet the standard of living in close contact? Has mom or employee had fever or dry cough?

You should also consider the employee's ability to transmit to co-workers...does he/she work in close contact with others?

If the employee's responses leave you uneasy, then work from home or paid administrative leave can be a relatively painless way to reduce stress, but I understand that may not be financially feasible. There would be no federal prohibition to placing the employee on unpaid leave or in a termination status.

*CDC defines close contact as—

a) being within approximately 6 feet (2 meters) of a COVID-19 case for a prolonged period of time; close contact can occur while caring for, living with, visiting, or sharing a healthcare waiting area or room with a COVID-19 case

— or —

b) having direct contact with infectious secretions of a COVID-19 case (e.g., being coughed on)

Q. What if some of your employees are currently on seasonal layoff and on unemployment? Would the paid leave rules apply?

A. If they are on your payroll, they would generally be covered based on FMLA definition of employee. However, they are only eligible for pay for what they would have been scheduled for (Emergency FMLA) or their average for a two-week period. Remember, both these provisions are based on the employee's inability to work, not reductions in business. So, in the case of people on seasonal lay off, you'd start scheduling them and then they would claim a protected reason to become eligible for paid leave.

Q. Does Emergency FMLA cover companies with fewer than 50 employees?

A. Yes for now. There are some big exceptions: (1) statute invites Secretary of Labor to exempt employers with fewer than 50 employees if complying would jeopardize the viability of the business; (2) exception for employers of fewer than 25 employees on job restoration if position no longer exists due to change in business conditions or operating conditions caused by COVID-19 and employer takes



certain steps to try to restore employee; (3) exception to being sued for civil damages if under 50 employees; employer can still be sued for injunctive relief and attorneys' fees.

Q. For the 12 weeks under FMLA, do we have to pay Hourly Non-Exempt Staff?

A. The first two weeks aren't paid under Expanded FMLA Emergency rules; remaining needed leave for this provision only is paid at 2/3 pay subject to the daily and aggregate cutoffs. But leave under the FMLA Expansion Act does apply to non-exempt and exempt employees.

Q. Do the temporary FMLA sick leave rules only apply to exempt employees?

A. No. non-exempt employees are included as well.

Q. Under HR6201, does paid leave (FMLA) apply to employees who have COVID-19, are quarantined or are caring for a family member with COVID-19 or quarantined?

A. No with respect to expanded FMLA. This was removed from the Act by the House with the "technical amendments" on Monday night. These are still qualifying reasons for the Paid Emergency Sick Leave

Q. What should we recommend to employees who are scared to take public transit to sites? (Question from Canada)

A. I'm sorry, I cannot speak to Canadian law.

Q. Your slide said 500 employees but you said 50 employees. Can you clarify which number is correct?

A. It's fewer than 500. It's odd, I know, and divorced from the 50 employees/75 miles standard we always think of when we think FMLA. We think the reasons that very large employers are excluded is that: (1) many mega-employers had already announced similar expansions; (2) and also that these very large employers should not benefit from the tax credit which is part and parcel of the Families First Coronavirus Response Act. The statute exempts employers with fewer than 50 employees from civil suit by an employee for back pay and liquidated damages; small employers could still be sued by the DOL or DOJ or by an employee for injunctive relief and attorneys' fees. Additionally, the Secretary of Labor has the option to publish regulation to exclude small businesses of fewer than 50 employees from Expanded FMLA or Paid Sick Leave.

Q. Does the new bill that was signed for paid sick leave cover hourly employees that don't have any PTO already? In other words, our hourly employees don't get paid vacation or sick days now. Will the new bill require us to pay them?

A. Yes.

Q. What do you recommend for time tracking? We use a timeclock. what would be best?

A. You might want to look into online time tacking systems. You can ask other members on our Facebook Group. <https://www.facebook.com/groups/203117040783019/?ref=bookmarks>

Safety Questions

Q. Clarify limit occupancy in crew cabs. How many is ok in regular cab and how many is ok in crew cab?

A. In order to follow the six (6) foot spacing rule, company vehicles like crew cab trucks don't provide the spacing needed. If more than one employee is in the vehicle, it is important to provide a lot of ventilation in the cab to encourage good air circulation. No matter the decreased number of workers being transported, the recommendation is to wipe down hard surfaces in the cab (metal, glass, plastic) and door and tailgate handles with wipes that contain at least 60% alcohol. Hopefully you will be able to purchase enough wipes to make a dent in the decontamination process.

Employees should be instructed to use wipes while working at job sites; wash their hands thoroughly before and after eating and the same after using a restroom; and to go immediately to the company's restroom area when returning from worksites to scrub down with warm water and soap back at the shop and office complex. I would suggest the 2X x 2X rule - Wash hands with warm water and soap twice as often as normal, and for twice as long as normal (at least 20 seconds is recommended).

Also, disinfect heavily-used door handles and surfaces thoroughly and often with products that meet alcohol and bleach content recommendations from the EPA. Please see the EPA's updated disinfectant guidelines at www.EPA.gov.

Q. Due to the lack of availability of sanitizing products available, what are some options for homemade sanitizing solutions?

A. The internet has multiple suggestions for alternative homemade treatments. The important thing is to ensure that either alcohol or bleach is added to the homemade solution to ensure its sanitizing and disinfecting capabilities. I would also double check my information sources on the internet. OSHA, EPA and WHO are reliable providers of the latest recommendations, along with health organizations like hospitals.

Q. What is the recommendation for wearing a mask during normal movement, not related to PPE required tasks?

A. Mask wearing during normal activity - If your firm is able to provide the 6-foot space requirement (social distancing), mask wearing may not be necessary unless the individual has allergies that mandate respiratory protection. If the normal activity includes pesticide applications or work locations where respirable silica dust may be present, respirators and masks may be needed. Keep in mind that employees working with concrete, brick, and landscape pavers being cut or shaped should be using "wet saw technology". This includes extreme care when cleaning up the worksite.

Q. Would baby wipes count as a single use towel?

A. Baby wipes are moist and would leave the skin on the palms and back of the hands wet after use. I would consult a dermatologist for clarification on the recommendations for disposable, single-use towels.



Q. Many stores are sold out of PPE? Are there any resources that is out there for contractors only?

A. Please consult the internet for vendors and suppliers who serve the commercial needs of businesses. They may be able to fill the void being found in your local supplier outlets

Q. Are hand dryers being discouraged in light of the disposable hand towel recommendation?

A. I have not heard that hand dryers like those found at rest stops and in convenience store restrooms are being discouraged. The warm water hand wash with soap for at least 20 seconds or more is the recommendation that is most important. Please make sure after washing and drying that you do not touch potentially contaminated surfaces when leaving the rest room like door-knobs and handles, sink and counter tops, walls, etc.

Q. How much at risk are our field employees who work primarily outside?

A. I'm sorry, this is a question for a public health expert.

Q. If someone has nicks, cuts or grazes at work as many employees will, any advice on how to handle these?

A. Prevention of nicks, cuts, lacerations, and abrasions is the first line of defense. That means the wearing and use of durable work gloves that are not damaged in any manner. Crew managers must ensure that their crew members are wearing them at all times when a skin injury potential exists, like during the spring season for many parts of the U.S.

Obviously, the infection routes (mouth, nose, and eyes from sneezing and coughing exposures) for COVID-19 into the human body have been heavily communicated to the public. There have been recent reports that this virus is found in blood more reliably than when swabs are initially used. Rather than risk direct disease contact with blood, I would promote (require) that landscape employees use durable hand protection in the form of work gloves.

Insurance Questions

Please contact your insurance broker or carrier to discuss submitting any possible claim. Only the insurer can make a coverage determination

Q. If employees drive their own vehicles from job site to job site, is that covered under portal to portal, or does the company assume liability as a "company vehicle?"

A. The Portal to Portal Act would be more of an HR question as it relates to compensating employees for activities, they perform for the company regardless of location. However, the company would ultimately assume some if not all of the liability related to an accident involving a "non-owned" vehicle being used for company purposes. A non-owned vehicle is not owned, leased, rented, hired, or borrowed by the company.



In order to insure you have “Non-Owned” auto liability you would want to confirm that you have symbol 9 under the Liability portion of your Commercial Auto Insurance Liability Policy found in the declarations page.

It is best practices that you run motor vehicle reports at minimum annually for all drivers including those with non-owned driving exposure. Established company driver qualification requirements must be maintained and met for each driver.

It is also best practices to have those employees who drive non-owned company vehicles for business use to increase their personal auto policy limits at minimum to \$100,000 per person, \$300,000 per occurrence and \$100,000 property damage. If using a combined single limit, \$300,000 should be required at minimum.

Government Relations Questions

Q. We had a number of questions about what to do if you are in a state or locality that has a shelter in place order, and about whether or not landscape and lawn care are considered Essential Services.

A. The situation is changing by the day, but NALP has been working with state associations and governors to explain that landscape, tree care, and lawn care are essential public services. [View our letter](#) which you can use and share. In some states that have shutdown “non-essential” services, our industry is not specifically listed and it is up for interpretation. In some locations, like Palm Beach, Florida, our industry has been named specifically as essential. It is our interpretation that landscape services are always deemed essential due to the critical nature and support we serve to other industries and the fact that we are protecting public health and safety. Our team will continue to working to achieve clarity and to deem our industry essential.

Q. There were a few questions about the state of the H-2B program.

A. The situation is evolving daily, but currently the U.S. State Department has slowed down its consular operations in Mexico where the majority of H-2B visas are processed - giving preference to returning working visas. It is likely that the Border with Mexico will be shut down completely.