



Sarah K. Bowen
San Francisco, Associate

Direct Dial: 415.352.2715
Fax:
Email Attorney

Small Business Employer and Employee Options in This Uncertain Time

By Sarah K. Bowen, John M. Kreutzer

Many small U.S. businesses are facing uncertainty about continued viability as a result of the COVID-19 pandemic. An important part of this deliberation is how these small businesses can not only continue operations, but care for their valued employees during continued operation. The legal landscape related to these issues is constantly evolving. This article addresses some available legal options in the current legal landscape related to both small employer and employee rights related to the pandemic.

We recently posted an article regarding the Families First Coronavirus Act. For your convenience, that article is copied in substantial part below. The full article can be found [here](#).



John M. Kreutzer
Portland, Shareholder

Direct Dial: 503.499.4420
Fax: 503.295.0915
Email Attorney

EMERGENCY PAID SICK LEAVE ACT AND EMERGENCY FEDERAL FAMILY AND MEDICAL LEAVE ACT

1. Who is covered?

Employers: Covered employers under the Act include private employers with less than 500 employees and certain public employers. Under the emergency FMLA provisions, small businesses with fewer than 50 employees may be exempted if complying with the paid leave requirements would jeopardize the viability of the business.

Employees: For Emergency Paid Sick Leave, covered employees generally include all full-time and part-time employees, regardless of tenure.

To be eligible for paid emergency FMLA leave, employees must have been employed by the employer for at least 30 calendar days. Additionally, employers may exclude certain health care providers and emergency responders from the definition of eligible employees.

2. When are employees eligible for paid leave?

Paid Sick Leave: Covered employees are entitled to paid sick leave if they are unable to work or telework due to any of the following conditions:

- The employee is subject to a federal, state, or local quarantine or isolation order related to COVID-19.
- The employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19.
- The employee is experiencing symptoms of COVID-19 and is seeking a medical diagnosis.
- The employee is caring for an individual who is subject to an order described in bullet point 1 above or has received advice as described in bullet point 2 above.
- The employee is caring for a son or daughter because the son's or daughter's school or place of care has been closed due to COVID-19 precautions.
- The employee is experiencing "any other substantially similar conditions" as specified by the Secretary of Health and Human Services.

Paid FMLA Leave: Eligible employees are entitled to emergency FMLA leave if they are unable to work or telework due to any of the following condition:

- The employee is caring for a son or daughter because the son's or daughter's school or place of care has been closed due to COVID-19 precautions.



3. How much paid leave is required?

Paid Sick Leave: Full-time employees are eligible for up to 80 hours of paid sick leave and part-time employees are eligible for up to their two-week equivalent of work hours of paid sick leave calculated based on their regular rate of pay, or the applicable state or Federal minimum wage, whichever is highest. Paid sick leave is paid at the following rates per employee:

- 100% for leave taken for the following reasons, limited to \$511 daily and \$5,110 total.
 - The employee is subject to a federal, state, or local quarantine or isolation order related to COVID-19.
 - The employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19.
 - The employee is experiencing symptoms of COVID-19 and is seeking a medical diagnosis.
- 2/3 for leave taken for the following reasons, limited to \$200 daily and \$2,000 total.
 - The employee is caring for an individual who is subject to an order described in the first bullet point above or has received advice as described in the second bullet point above.
 - The employee is caring for a son or daughter because the son's or daughter's school or place of care has been closed due to COVID-19 precautions.
 - The employee is experiencing "any other substantially similar conditions" as specified by the Secretary of Health and Human Services.

Paid FMLA Leave: Full-time employees are eligible for up to 10 weeks of paid emergency FMLA leave and part-time employees are eligible for paid FMLA leave for the number of hours that the employee is normally scheduled to work over the leave period. The Emergency FMLA does not pay for the first two weeks (10 days) of leave, but employees may use available paid leave, including paid leave under the Emergency Paid Sick Leave Act for those ten days.

Paid FMLA leave is calculated based on the higher of their regular rate of pay, or the applicable state or Federal minimum wage, whichever is higher, and paid at the following rate per employee:

- 2/3 for leave taken for the following reason, limited to \$200 daily and \$10,000 total.
 - The employee is caring for a son or daughter because the son's or daughter's school or place of care has been closed due to COVID-19 precautions.

Conditions	Paid Sick Leave (full-time employees)	Paid FMLA Leave (full-time employees)
1. The employee is subject to a federal, state, or local quarantine or isolation order related to COVID-19.	YES Up to 80 hours paid at 100%, up to \$511 daily and \$5,110 total YES	NO



2. The employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19	Up to 80 hours paid at 100%, up to \$511 daily and \$5,110 total	NO
	YES	
3. The employee is experiencing symptoms of COVID-19 and is seeking a medical diagnosis.	Up to 80 hours paid at 100%, up to \$511 daily and \$5,110 total	NO
	YES	
4. The employee is caring for an individual who is subject to an order described in item 1 above or has received advice as described in #2 above.	Up to 80 hours paid at 2/3, up to \$200 daily and \$2,000 total	NO
	YES	YES
5. The employee is caring for a son or daughter because the son's or daughter's school or place of care has been closed due to COVID-19 precautions.	Up to 80 hours paid at 2/3, up to \$200 daily and \$2,000 total	Up to 10 weeks paid at 2/3, up to \$200 daily and \$10,000 total
	YES	
6. The employee is experiencing "any other substantially similar conditions" as specified by the Secretary of Health and Human Services.	Up to 80 hours paid at 2/3, up to \$200 daily and \$2,000 total	NO

4. Can employees be required to use other paid leave first?

No, employees are entitled to use paid sick leave or paid FMLA leave provided under the Act before they are required to use any other paid leave benefit provided by the employer including vacation, regular sick leave or other paid time off.

5. Are employers required to notify employees?

Yes, employers are required to post this Department of Labor notice in the workplace. Employers may also want to consider adopting a temporary policy, that ends when the law



sunset on December 31, 2020, to clarify the coordination of these new benefits with their existing leave benefits.

6. Employer Tax Benefits for Providing EPSL and EFMLA Leave.

Eligible private small business employers providing paid leave required under EPSL and EMFLA will receive a 100% tax credit against employer payroll tax liability for the paid leave subject to the caps.

THE CORONAVIRUS AID, RELIEF, AND ECONOMIC SECURITY ACT (CARES ACT)

The two trillion-dollar federal CARES Act was signed into law on March 27, 2020. The reported purpose of the CARES Act is to provide economic relief to employees and businesses facing economic hardship and possible business closure due to the pandemic.

For the benefit of employees, the CARES Act includes an additional \$600 payment to unemployment recipients per week for up to four weeks and extends unemployment benefits to self-employed workers, independent contractors and those with a limited work history. Additionally, the federal government will fund an additional thirteen weeks of unemployment benefits through December 31, 2020 after unemployed workers have exhausted state unemployment benefits.

For the benefit of small employers (and thus their employees), the CARES Act provides grants and forgivable loans. The emergency grant terms provide for up to \$10,000 to provide emergency funds to small businesses to cover immediate operating costs.

Additionally, the Act provides for up to \$10,000,000 per business in forgivable loans. Any portion of that loan used to maintain payroll, keep employees on the books or pay for rent, mortgage or utilities may be forgiven provided employees remain employed through the end of June 2020. The amount of the loan forgiveness shall be reduced generally by the percentage equal to the difference of the number of employees during the covered period as compared to the period March 1 to June 31, 2019.

OREGON UNEMPLOYMENT WORK SHARE PROGRAM

Under the Oregon Unemployment Work Share Program, an employer has the option to reduce the hours of a group of employees rather than implementing layoffs. Partial unemployment benefits are then paid to supplement the worker's reduced wages.

An employer must apply for the program by sending a written plan to the Oregon Employment Department. The employer must select three or more employees with reduced hours to participate in the Work Share Program.

The employer must verify that the hours worked and wages will be reduced by at least 20% but no more than 40% per week and that the normal workweek is 40 hours or less.

Each qualified employee must have worked full-time for six months or part-time for twelve months before the Work Share Plan is submitted by the employer.

An additional resource regarding Oregon's Work Sharing Program can be found here:

Work Share Oregon Home Page

Work Share Oregon - Frequently Asked Questions



CALIFORNIA UNEMPLOYMENT INSURANCE WORK SHARING PROGRAM

Pursuant to the California Unemployment Insurance Work Sharing Program, an employer has the option to reduce the hours and wages of a group of employees in order to minimize or eliminate the need for layoffs. Partial unemployment benefits are then paid to supplement employees' reduced wages, enabling them to keep their current jobs and avoid financial hardships.

An employer must apply for the program by mailing a Work Sharing Unemployment Insurance Plan Application to the California Employment Development Department.

The employer must select at least 10% of the employer's regular workforce or a unit of the workforce, and a minimum of two employees, affected by a reduction in hours and wages to participate in the Work Sharing Program. Each participating employee's hours and wages must be reduced by at least 10% but not more than 60%. The Work Sharing Program cannot be used as a transition to a layoff.

Participating employees must be regularly employed by the employer, either full or part time, and must have completed a normal work week with no hour or wage reductions prior to participating in the Work Sharing Program. Leased, intermittent, seasonal, temporary service employees, and corporate officers or major stockholders with investment in the employer's company cannot participate in the Work Sharing Program.

Additional resources regarding California's Work Sharing Program can be found here:

A Guide For Work Sharing Employers (PDF)

FAQs – Work Sharing Information for Employees

FAQs – Work Sharing Information for Employers

WASHINGTON UNEMPLOYMENT INSURANCE SHARED WORK PROGRAM

Under the Washington Unemployment Shared Work Program, an employer has the option to reduce the hours of a group of employees rather than implementing layoffs. Partial unemployment benefits are then paid to supplement the worker's reduced wages.

An employer must apply for the program by submitting a written signed program application to the Washington Employment Security Department. Applications may be submitted online, by electronic upload or fax.

The employer must select two or more permanent employees with reduced hours to participate in the Shared Work Program. The work hours for each participating employee will be reduced by at least 10% but no more than 50%.

Each qualified employee must be hired on a permanent basis. Corporate officers cannot participate in the Shared Work Program.

Additional resources regarding Washington's Shared Work Program can be found here:

Washington SharedWork Home Page

FAQs – SharedWork for Employees

FAQs – SharedWork for Employers

The laws related to this pandemic are subject to change based upon evolving interpretation.



However, the legal options stated above provide current options for employees and employers alike to weather this storm.