

CORONAVIRUS:

EMPLOYER Q&A

Updated: May 18, 2020

Introduction

We continue to receive questions from clients on how to handle coronavirus from an HR perspective. Because it is likely that most of our clients may have similar questions, we are collecting these into the following Q&A format.

We plan for this to be an ongoing and cumulative guide as more questions are identified. As you have additional questions, we invite you to please submit those to Info@BFGonline.com. We will post all updated versions on our website for your easy reference:

<https://www.businessfinancialgroup.com/coronavirus-employer-qa>

In addition, please see the following webpage for more articles and other resources to assist you as you navigate the COVID-19 crisis: <https://www.businessfinancialgroup.com/covid-19>

Nonexempt versus Exempt Employees

As a preface to these questions, it's important to note the difference between exempt (salaried) and nonexempt (hourly) employees. Because the purpose of this Q&A document is to address general handling of coronavirus situations, we will only address some basic guidelines regarding compensation.

Essentially, according to the Fair Labor Standards Act (FLSA), nonexempt employees are entitled to overtime and exempt employees are not. With few exceptions, an exempt employee must be paid at least \$35,568 per year (\$684 per week), be paid on a salary basis, and also perform exempt job duties as defined in the Act.

Compensation requirements:

- Nonexempt employees: Must be paid only for hours worked. Paid time off, if offered, is administered per company policy. No compensation is required for hours where work is not performed.
- Exempt employees: The FLSA requires exempt employees to be paid a guaranteed weekly salary that cannot be reduced based on the quality or quantity of the employee's work during that week. If improper deductions are taken, the exempt status of that employee may be jeopardized.

In the event of sickness and the employer does not provide a bona fide leave plan (paid sick leave or paid time off), an exempt employee who performs any work during a company-specified work week must be paid their salary for the full week. If the company does provide a PTO plan, and it is exhausted, the employer may deduct in full day increments for full days off.

While there are other nuances in the FLSA, the above should serve as general guidelines.

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Returning to Work

1. What are some recommended best practices for reopening and returning to work?

Several resources may be helpful.

The first is a Checklist for Employers that comes straight from *The Governors Report to Open Texas*:

https://cdn2.hubspot.net/hubfs/5643634/Governor%20Abbott%20Report%20to%20Open%20Texas.pdf?utm_campaign=COVID%20communications&utm_source=hs_email&utm_medium=email&utm_content=87113993&hsenc=p2ANqtz-900KUxkOFTtomk-tPWrb8iDoTibDCIUOVNAUMcobv_gaJhnlsoopvytbRrJY8lUKU_wNaIRxLpRNFbUMOGJiE7XBgJg&hsmi=87113993

This checklist is found on pages 21–22. A couple of notes on the checklist:

- First, on page 22, the last item under “Health protocols for your employees,” it says that you could consider having all employees wear cloth face coverings. We interpret this to mean that you could choose to require them to do this at the office. If you do this, you may want to consider making these available to them so cost is not an objection.
- Second, the first item in the next section (“Health protocols for your facilities”), it says “Regularly and frequently clean and disinfect....” The frequency for doing so is not defined. This could be weekly or some other frequency for the time being until you know more. The key may be to state what your intentions are in writing and then follow those. Record if there are any complaints about the frequency and determine steps from there.

There does appear to still be some unresolved issues that could arise if there are differences between the Governor’s order and local municipalities. So far, San Antonio and Bexar County have indicated that they will operate consistent with the Governor’s order.

The most recent San Antonio/Bexar County report is found at the link below. This report does not provide specific dates, and indications are that their dates will be modified for the time being to be consistent with the Governor’s.

<https://www.sanantonio.gov/Portals/0/Files/health/COVID19/Public%20Info/4.28%20COVID-19%20Health%20Transition%20Team%20Report.pdf?ver=2020-04-28-124709-987>

Phase 1 of the Governor’s order requires a limit of 25% occupancy of the maximum occupancy allowed under the office’s Certificate of Occupancy.

The following samples may help you communicate with your employees. We recommend that you modify the Notice of New Guidance to suit your purposes and include it with the other notices. Doing so illustrates for your employees how you will be protecting the workplace and that you intend to maintain a reasonable standard of care. Employees who refuse to come back to work following your notification could be terminated, or you could allow them to use their accrued PTO or consider granting temporary “unpaid leave” for some period of time.

- [Notice: Reactivation of Employment](#)
- [Notice: Return to Full Employment](#)
- [Notice of New Guidelines for our Workplace \(Sample\)](#)

The Notice of Reactivation of Employment is for use if you have some employees

- who have been laid off or furloughed or had hours reduced

- whom you would like to pay as a result of the SBA PPP Loan even though you are not ready to return them to full-time status

It simply indicates that you will communicate with them when it's time to resume their work schedule, but they will be paid for the time being with a reassessment at the end 8 weeks.

2. What do I do if I have reopened, and my folks were only off for 3 weeks, but now they do not want to come back to work? They would prefer to stay home and draw unemployment.

Per the TWC (COVID-19 FAQ website: <https://www.twc.texas.gov/jobseekers/unemployment-benefits-services>), you should report any job refusal. In Texas, you may send the information to twc.fraud@twc.state.tx.us or call 1-800-252-3642.

3. We have questions about getting our employee back to work. One employee has been out on disability and actually contracted COVID-19 while in the hospital having surgery three or four weeks ago.

Both CDC and EEOC have stated that when an employee has previously tested positive, an employer has a right to request the employee be tested and provide a physician's statement prior to returning to work. The principle reason for this is the obligation the employer has to other employees and customers to maintain a safe workplace. Please find links below to CDC and EEOC.

- <https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html>
- <https://www.cdc.gov/coronavirus/2019-ncov/if-you-are-sick/steps-when-sick.html>
- <https://www.eeoc.gov/laws/guidance/pandemic-preparedness-workplace-and-americans-disabilities-act>

Please note that this employee should have been eligible for Emergency Paid Sick Leave based on FFCRA.

4. We have questions about getting our employee back to work. One employee has basically been under self-quarantine due to a number of pre-existing conditions and is wanting to come back.

If this employee felt he had been exposed to COVID-19, based on EEOC guidance you can actually require him to be tested prior to coming back to work. That is something you can choose to pay for or not. As testing becomes more prevalent, it may be possible for you to provide onsite testing at some point.

If he has been out on quarantine for 14 days and has not shown any symptoms, then the standard indicates he may be safe.

You can also require all employees to take their temperature prior to coming to work each day if you choose. They can take their temperature and send you a picture of it. Some employers are also purchasing no touch temperature devices so they can be used onsite.

5. We are bringing our employees back to work at the office and would like to communicate with them about changes we're making to our workplace policies. Do you have any suggestions for how we do that?

Below is a notice that you might consider communicating to your employees about possible steps you are taking or will take to help maintain a healthy workplace, including guidance to employees. You can modify this as fits your needs.

- [Notice of New Guidelines for our Workplace \(Sample\)](#)

PPP Loans

Loan Application

1. How do I apply for a PPP loan?

The final borrower application that came out April 3 is linked here: [Paycheck-Protection-Program-Application-3-30-2020](https://home.treasury.gov/system/files/136/Paycheck-Protection-Program-Application-3-30-2020-v3.pdf)
<<https://home.treasury.gov/system/files/136/Paycheck-Protection-Program-Application-3-30-2020-v3.pdf>>

2. What additional information might the bank request as part of the application process?

Banks have a lot of leeway about what they can request. However, according to the most recent SBA guidance that came out April 3, lenders will need to collect “know your customer” information from new customers only and are permitted to rely on existing documentation for current customers unless the institution’s risk-based approach to BSA compliance requires.

We will help you where we can. Please know, however, it’s possible that we may not be able to provide some information that banks may request.

3. Can payments to independent contractors be counted toward the loan?

Guidance from the SBA has stipulated payments to independent contractors (1099s) cannot be included in the calculation for your loan nor are they considered eligible expenses that can be forgiven.

4. Which businesses are eligible to apply for a loan?

Eligible entities are generally those with less than 500 employees, including the following:

- Private businesses;
- Nonprofit organizations;
- Veterans organizations;
- Certain tribal business concerns;
- Eligible self-employed individuals;
- Independent contractors;
- Sole proprietorships;
- Businesses in the “Accommodation and Food Services” industry (NAICS 72) that have less than 500 employees per physical location;
- Have been in operation on February 15, 2020;
- Had employees for whom the borrower paid salaries and payroll taxes; or
- Paid independent contractors, as reported on a Form 1099-MISC.

For the purposes of determining the 500-employee threshold, applicants should include full-time, part-time and other basis employees. Generally, SBA affiliations apply except such rules are waived with respect to:

- Businesses in the “Accommodation and Food Services” industry (NAICS 72)
- Franchises assigned a franchise identifier code
- Any business concern that receives financial assistance from a company licensed under section 301 of the Small Business Investment Act of 1958

5. What is the maximum loan amount?

The maximum loan amount will be equal to the average monthly payroll expenses for the previous year preceding the date of the loan times 2½. If any Emergency Disaster loan is in place or in process since January 31, these can potentially be added and refinanced. The maximum total loan size is \$10 million.

For seasonal employers, they may choose to calculate the average monthly payroll costs based on the 12-week period starting February 15, 2019 or the period starting March 1, 2019 through June 30, 2019.

For employers not in business between February 15, 2019 and July 30, 2019, the average monthly payroll cost is calculated based on the period beginning January 1, 2020 through February 29, 2020.

Payroll costs as defined in the Small Business Act include:

- Employee compensation (e.g., salary, wages, commissions, cash or equivalents);
- Cash tips;
- Payment for vacation, parental, family, medical or sick leave;
- Allowance for dismissal or separation (severance);
- Payment for group health benefits, including insurance premiums (presumably including all COBRA benefits);
- Payment for any retirement benefit;
- Any state or local taxes assessed on the compensation of employees; and,
- The sum of any compensation paid to a sole proprietor or independent contractor (i) that is a wage, commission, income net earnings from self-employment or similar compensation and (ii) that does not exceed \$100,000 in one year, prorated for the covered period.

Payroll costs exclude:

- Compensation of an individual person in excess of \$100,000 (as prorated for the period);
- Federal employment taxes imposed or withheld taxes;
- Compensation to an employee whose principal residence is outside of the U.S.; and,
- Qualified sick leave for which a credit is allowed under Section 7001 of the Families First Coronavirus Response Act.

6. What process do you recommend for applying for a PPP loan?

- 1) Contact your local SBA Lender and let them know you are interested. If you don't have a current banking relationship, please let us know and we can make an introduction;

- 2) Pull your affected financial records. You will want a summary of compensation, rent and utilities;
 - 12-month historical compensation summary from probably March 30, 2020, back to April 1, 2019.
 - Current compensation summary of most recent month.
 - These summaries would include a summary of the following:
 - Employee compensation (e.g., salary, wages, commissions, cash or equivalents);
 - Cash tips;
 - Payment for vacation, parental, family, medical or sick leave;
 - Allowance for dismissal or separation (severance);
 - Payment for group health benefits, including insurance premiums (presumably including all COBRA benefits);
 - Payment for any retirement benefit;
 - Any state or local taxes assessed on the compensation of employees; and,
 - The sum of any compensation paid to a sole proprietor or independent contractor (i) that is a wage, commission, income net earnings from self-employment or similar compensation and (ii) that does not exceed \$100,000 in one year, prorated for the covered period.
 - Payroll costs exclude:
 - Compensation of an individual person in excess of \$100,000 (as prorated for the period);
 - Federal employment taxes imposed or withheld taxes;
 - Compensation to an employee whose principal residence is outside of the U.S.
- 3) Create your personal certification to include the following;
 - The uncertainty of current economic conditions makes necessary the loan request to support our ongoing operations;
 - Funds will be used to retain workers and maintain payroll or make mortgage payments, lease payments, and utility payments;
 - We do not have an application pending for a loan under this subsection for the same purpose and duplicative of amounts applied for or received under a covered loan; and,
 - During the period beginning on February 15, 2020 and ending on December 31, 2020, we have not received amounts under this subsection for the same purpose and duplicative of amounts applied for or received under a covered loan.

Our suggestion is to put these on letterhead and have the principals sign the letter.

- 4) Review your staffing plan and identify any changes that have been made to date, such as reduced hours, reduced pay, layoffs, furlough, and so on. Part of the incentive in the law was to promote remaining at full staff. Reductions in staffing or pay versus the previous 12 months, could result in a deduction in the full forgiveness of the loan. Once you have this information, we can help you with a

formula. With that, you will be able to then determine your strategy for staffing moving forward.

- 5) Analyze your loan strategy based on all the information above.
- 6) If you have additional questions or would like help in thinking through this unprecedented process, please let us know, and we will work to help you.

Loan Forgiveness

1. How does loan forgiveness work?

Your loan will be forgiven conditioned on the following taking place over the 8-week covered period, which begins on the day of loan funding:

- 75% or more of the loan proceeds must be spent on compensation to employees.
- No more than 25% can be spent on non-compensation qualified expenses (rent, utilities and mortgage interest).
- Number of Staff: With some exceptions, your loan forgiveness will be reduced if your average total full time equivalent (FTE) employees is less than the average was during one of two look-back periods: either 2/15/19-6/30/19 or 1/1/20-2/29/20.
- Level of Payroll: Your loan forgiveness will also be reduced if compensation decreased by more than 25% for any employee who made less than \$100,000 annualized in 2019 between the 8-week period and 1/1/20-3/31/20.
- Re-Hiring: You have until June 30, 2020 to restore your full-time employment and salary levels for any changes made between February 15, 2020 and April 26, 2020.

Note: Remember that “total salary or wages” would include overtime, tips, allowances, commissions, bonuses, shift premiums, and so on, that were paid.

2. Is there any flexibility with the 8-week covered period?

The instructions included in the Loan Forgiveness Application indicate that you are permitted to choose an “Alternative Payroll Covered Period” (ACP). The Covered Period (CP) had been previously designated as the 8-week period beginning on the date of loan funding. Now, borrowers will have the option to select instead that the first day of the ACP be the date of the first pay period following the loan disbursement date. This would allow for more symmetry to match the payrolls within the 8-week period. (This does not apply to non-payroll related expenses.)

3. What reports can BFG provide to payroll clients to help with tracking loan forgiveness?

For our Payroll Clients, we now have a report to pull compensation data and employee FTE counts out of our Payroll system. We will be able to then calculate your compensation regularly during the 8-week period in relation to the primary forgiveness factors.

The first two will compare the current weekly totals to the appropriate look-back periods for:

1. full time equivalent employees,
2. compensation for each employee

Additionally, we will track your total compensation against the total loan to verify it represents 75% or more.

4. How do I apply for loan forgiveness?

On Friday, 5/15/2020, the Small Business Administration (SBA), in consultation with the Department of the Treasury, released the Paycheck Protection Program (PPP) Loan Forgiveness Application and detailed instructions for the application.

The link to the announcement and the form is here:

<https://www.sba.gov/sites/default/files/2020-05/3245-0407%20SBA%20Form%203508%20PPP%20Forgiveness%20Application.pdf>

The form and instructions inform borrowers how to apply for forgiveness of their PPP loans. The Application is an 11-page document that contains 4 pages of forms (Application, Schedule A, Worksheet for Schedule A and Borrower Certifications) plus 7 pages of instructions

5. The phrase “costs incurred and payments made” is unclear. What does it mean?

Payroll (and non-payroll) related expenses that may have been incurred prior to the 8-week Covered Period (CP) and paid within the CP will be eligible. Payroll (and non-payroll) related expenses incurred within the CP but paid after the CP will be eligible, as long as they are paid no later than the next regular payroll date.

6. How are “full time equivalent employees” (FTEs) computed?

Per the Loan Forgiveness Application, Full Time Equivalent Employee (FTE) has now been defined as follows:

- Employees who average 40 or more hours per week count as 1.0,
- For employees who work on average less than 40 hours per week, you can either:
 - Divide the total hours by 40, or
 - Count each part time employee (less than 40 hours) as .5 FTEs (Simplified Method).

Note: For employers who have been using the ACA definition with 30 hours instead of 40 for both your look back periods and the 8-week Covered Period (CP), we don't expect that your results will look significantly different in terms of a percentage comparison between the CP and the look backs.

Now that FTE has been defined, recalculate your FTE counts for both the 8-week CP (or Alternative Payroll Covered Period or “ACP”) and for the look back periods. We recommend caution on using the Simplified Method of assigning .5 to all employees who average less than 40 hours per week if you have substantial part-time hours. Doing so could skew your actual counts depending on whether your average part-time worker earns over 20 hours per week versus less than 20 hours per week.

7. What is the process for submitting a request for loan forgiveness?

In an Interim Final Rule issued April 14, the SBA provided its process for submitting a request for forgiveness. The rule indicates that the request could be submitted as early as the end of the week seven of the 8-week covered period.

To submit a request, the borrower needs to provide the following to the lender who, in turn, submits this to the SBA Administrator:

- the Paycheck Protection Program Application Form (SBA Form 2483) and any supporting documentation submitted with such application;
- the Paycheck Protection Program Lender's Application for 7(a) Loan Guaranty (SBA Form 2484) and any supporting documentation;
- a detailed narrative explaining the assumptions used in determining the expected forgiveness amount, the basis for those assumptions, alternative assumptions considered, and why alternative assumptions were not used;
- any information obtained from the borrower since the loan was disbursed that the lender used to determine the expected forgiveness amount, which should include the same documentation required to apply for loan forgiveness such as payroll tax filings, cancelled checks, and other payment documentation;
- and any additional information the Administrator may require to determine whether the expected forgiveness amount is reasonable.

Once the lender has submitted the request, the Administrator will “purchase the expected forgiveness amount of the PPP loan(s) within 15 days of the date on which the Administrator receives a complete report that demonstrates that the expected forgiveness amount is indeed reasonable.”

See III.4.e (page 26) at the following link for documentation:

<https://www.sba.gov/sites/default/files/2020-04/PPP--IFRN%20FINAL.pdf>

8. What happens if I ask my employees to come back to work, and they refuse? How does that affect my loan forgiveness?

The SBA's FAQ resource, which they published on May 3, addresses this question as follows:

40. Question: *Will a borrower's PPP loan forgiveness amount (pursuant to section 1106 of the CARES Act and SBA's implementing rules and guidance) be reduced if the borrower laid off an employee, offered to rehire the same employee, but the employee declined the offer?*

Answer: *No. As an exercise of the Administrator's and the Secretary's authority under Section 1106(d)(6) of the CARES Act to prescribe regulations granting de minimis exemptions from the Act's limits on loan forgiveness, SBA and Treasury intend to issue an interim final rule excluding laid-off employees whom the borrower offered to rehire (for the same salary/wages and same number of hours) from the CARES Act's loan forgiveness reduction calculation. The interim final rule will specify that, to qualify for this exception, the borrower must have made a good faith, written offer of rehire, and the employee's rejection of that offer must be documented by the borrower. Employees and employers should be aware that employees who reject offers of re-employment may forfeit eligibility for continued unemployment compensation.*

The Loan Forgiveness Application instructions have also added a new exemption from the loan forgiveness reduction related to FTE. Previously, there was an exception provided that applied to laid off employees to whom the borrower had made a “good faith, written offer to rehire... which was rejected by the employee.” This has been extended to now include employees who “(a) were fired for cause, (b) voluntarily resigned, or (c) voluntarily requested and received a reduction of their hours. In all of these cases, include these FTEs... only if the position was not filled by a new employee. Any FTE reductions in these cases do not reduce the Borrower’s loan forgiveness.”

9. Are we allowed to give raises or bonuses during the 8-week period?

Yes, and doing so may help you spend 75% of the loan on payroll expenses if you would otherwise have trouble doing so. You might consider changing the timing of your annual bonuses (if you normally bonus at yearend) or think about providing bonuses as an incentive for employees to come back work. If you are trying to maximize forgiveness, be aware of the rules regarding employees making over/under \$100,000.

10. I have a payroll date that falls just outside of my 8-week period. What can I do?

With the Loan Forgiveness Application, the SBA has clarified that payroll (and non-payroll) related expenses that may have been incurred prior to the 8-week Covered Period (CP) and paid within the CP will be eligible. Payroll (and non-payroll) related expenses incurred within the CP but paid after the CP will be eligible, as long as they are paid no later than the next regular payroll date.

Even so, we believe that it would be acceptable to adjust the timing of your pay date so that it falls within the 8-week period.

11. Am I able to convert 1099 workers to employees?

This strategy may work based on the situation and is not specifically addressed in the CARES Act or SBA guidance. You should consider why they were a 1099 contractor and if there is a valid reason to convert them to an employee.

That said, if it is possible and plausible for these individuals to become W-2 employees, and you can hire them within the 8-week period, they would certainly count as part of the FTE calculation. And any W-2 compensation paid to them during this period would count toward your overall payroll costs and toward your compensation per employee as compared to the lookback.

12. Do profit sharing contributions qualify for payroll expense?

Yes, when paid during the 8-week period.

13. If not forgiven, is there an early payment penalty?

No, there is not an early payment penalty.

14. How will the SBA determine if my certification that “current economic uncertainty makes this loan request necessary to support the ongoing operations of” my business?

Originally, the Treasury gave borrowers until May 14, 2020 and since extended the deadline to May 18, 2020, to return funds if they believe that the certification was not made in “good faith.”

The SBA and Treasury have updated their FAQs to explain how they would review this certification. Under question 46, the Treasury states, “Any borrower that, together with its affiliates, received PPP loans with an original principal amount of less than \$2 million **will be deemed to have made the required certification concerning the necessity of the loan request in good faith.**”

For those with loans over \$2 million, the Treasury states that these applications may be reviewed to determine if they believe the good faith certification was met. If they determine the loan is not eligible for loan forgiveness, they will inform the lender. If the borrower pays back the loan, the “SBA will not pursue administrative enforcement or referrals to other agencies.” Additionally, for the lenders the determination “will not affect SBA’s loan guarantee.”

15. Allocation of at Least 75% of Loan Proceeds to Payroll Costs: does this mean I won’t be forgiven if I don’t spend 75% of the loan on payroll costs?

According to an Interim Final Rule by the SBA, “...at least 75 percent of the PPP loan proceeds shall be used for payroll costs.” To justify this statement, the Rule goes on to say “the Administrator believes that finite appropriations and the structure of the Act warrant a requirement that borrowers use a substantial portion of the loan proceeds for payroll costs, consistent with Congress’ overarching goal of keeping workers paid and employed.”

There is also the requirement that no more than 25% of the proceeds can be used for non-payroll expenses.

While the requirement that no less than 75% of forgivable funds must be attributed to payroll costs remains in the Loan Forgiveness Application, the Application appears to make clear that total payroll costs that are less than 75% of the actual loan funds will still be forgivable. This means that, if an employer were to spend 50% of the loan funds on allowable payroll costs, there can still be forgiveness so long as no more than 25% of the forgivable amount is for non-payroll costs.

16. Can owners be paid from the loan? Would owner pay be included in forgiveness?

Per the Loan Forgiveness Application, “forgiveness includes any amounts paid to owners (owner-employees, a self-employed individual, or general partners)...capped at \$15,385 (the eight-week equivalent of \$100,000 per year) for each individual or the eight-week equivalent of their applicable compensation in 2019, whichever is lower.” This means that owners cannot increase their compensation during the Covered Period (CP) or Alternative Payroll Covered Period (ACP) to be higher than their average was in 2019.

The statement, “forgiveness includes any amounts paid to owners...” stands alone. There is no other description about the nature or type of owner compensation, whether it be by draw or compensation through the payroll system. Unless and until guidance to the contrary comes out, this would appear to mean, if you take it literally, “any amounts paid.”

17. Explain how rehiring and the June 30 deadline works.

The Loan Forgiveness Application makes no change to the Safe Harbor protection if an employer restores either or both the FTE count or the salary/wage deficit by June 30 as

compared to February 15. In fact, the instructions have expanded the language to include an additional look back period for compensation of employees whose salaries or hourly wages was reduced by more than 25% during the Covered Period (CP) or Alternative Payroll Covered Period (ACP).

What We Still Don't Know

The following are some of the questions that remain. They may or may not get resolved with further guidance, but we felt it might be helpful for you to have a summary in case you want to discuss them with your lender. We believe the lenders will be the final decision makers. Therefore, understanding how they may interpret something like the 75% rule would be very important from a strategic planning standpoint.

1. Is the compensation deduction formula measured on an average frequency or over the whole period?

The actual language in the Act says: "The amount of loan forgiveness...shall be reduced by the amount of any reduction in salary or wages for any employee...that is in excess of 25% of the total salary or wages that occurred in the most recent full quarter (first quarter 2020), during which the employee was employed before the covered period."

Because the reference is to the "full quarter," one could interpret this to mean that what is paid during the full 8 weeks is being compared to what was paid during the whole first quarter: 8 weeks versus 13 weeks. We are interpreting that it is reasonable to use an average monthly or weekly comparison; however, we don't know how banks will interpret this language.

2. For the compensation deduction formula, which employee's compensation are we comparing to?

For the salary/wage reduction, the most significant indication is that the reporting will, in fact, look at each separate employee on an individual basis. There are a number of questions related to this which we will be studying carefully.

The question remains: how do we assess the compensation for employees who may have been employed during the first quarter of 2020 but are no longer employed and whose position has been filled by a new employee? Or for employees who have become employed but were not employed during the first quarter of 2020?

In our tracking report, we compare the compensation for each employee who is still employed to their compensation in the first quarter; however, we are also showing a comparison of the total payroll costs and the average compensation per FTE to the lookback period in anticipation that some turnover took place in most companies. Even though the emphasis in the Act is to provide incentive for employers to be at full staffing relative to recent lookback periods, we believe that if an employer who has had turnover for any reason makes a good faith effort to retain the same relative number of employees at the same relative compensation, they would meet the test.

3. What if a subsidiary that is in operation in Q1 is sold?

Do you back out those affected employees for determining deductions?

- 4. The CARES Act and current guidance do not define rent. Can expenses that are included in my rent (CAM, property taxes and insurance) be include as “rent costs”?**
Are items such as common area maintenance (CAM) charges, insurance and taxes that are often defined as “additional rent” in a lease agreement included? Are rental agreements limited to leases of real property or could they include equipment and vehicles? The answers are not clear.

The CARES Act lists rent as an allowable cost for leases in place prior to February 15, 2020. If these costs are lumped into your rent payment, you may be able to include them. You will want to talk with your lender to see what they will accept.

We are advising clients that they might include any rental/lease agreements for legitimated business-related real estate and equipment or vehicles that had a rental agreement in place on February 15, 2020 or earlier. On the final report to the bank, these should be itemized and documentation for the agreements provided. Without further guidance, it will be the bank’s decision whether or not to allow them.

- 5. The CARES Act requires that the lender make a decision on loan forgiveness not later than 60 days after the date the lender receives the application. Will your lender have their own forms that must be completed?**

We encourage you to reach out to your lender and find out. There is reference to a narrative that might be prepared for the lender to able to report to the SBA providing a summary of what took place any assumptions that were made by the borrower.

- 6. What interest am I allowed to pay with PPP loan funds?**

While mortgage interest is most commonly listed, we believe that interest on any business-related debt incurred prior to February 15, 2020, can be paid with loan funds and is allowable for forgiveness. While the Act is not clear on this subject, until further guidance emerges, this might be a question to your lender if you need to verify the forgiveness.

You should also remember the 75% rule (75% of the loan must go to payroll costs in order to be forgiven).

- 7. Can the loan cover the rental of equipment?**

At this point, we believe the rent expense for rental of equipment would be an allowable expense, but you may want to confirm with your lender to see what they will accept.

- 8. I pay SUTA quarterly. Would it still be counted toward forgiveness if my payment date falls outside of the 8-week period?**

This is an unclear area, and we may hear some additional guidance. With the Loan Forgiveness Application, the SBA has so far clarified that payroll (and non-payroll) related expenses that may have been incurred prior to the 8-week Covered Period (CP) and paid within the CP will be eligible. Payroll (and non-payroll) related expenses incurred within the CP but paid after the CP will be eligible, as long as they are paid no later than the next regular payroll date.

Taxation

1. Do PPP Loans count as taxable income?

One benefit of the PPP Loans is that they are forgivable if the borrower meets certain criteria, and per the IRS (Notice 2020-32), the amount that is forgiven is not included in taxable income; however, because it is not included as taxable income, any expenses paid with forgiven loan proceeds are not tax deductible.

2. Have payroll and excise tax deadlines been extended?

No. Per the IRS website, payroll tax payment and report filing due dates have not been extended.

3. Explain the Employee Retention Credits available through the CARES Act.

Any eligible employers who meet the following may receive a refundable tax credit for payments to employees up to 50% of their wages up to \$10,000 until January 1, 2021.

Employers who received funding from the Payroll Protection Program are not eligible:

- Fully or partially suspends operation during any calendar quarter in 2020 due to orders from an appropriate governmental authority limiting commerce, travel, or group meetings (for commercial, social, religious, or other purposes) due to COVID-19; or
- Experiences a significant decline in gross receipts during the calendar quarter.

[Employee Retention Credit](#)

FFCRA Paid Leave

1. What is the Families First Coronavirus Response Act?

On March 18, the Families First Coronavirus Response Act (FFCRA) was signed into law. FFCRA will be **effective on April 1, 2020, until December 31, 2020**.

FFCRA has two major provisions that affect employers:

- **Emergency Paid Sick Leave**

- Applies to

- Private employers with fewer than 500 employees
- Public employers with 1 or more employees
- Exemptions may be granted to employers with less than 50 employees only if making the payments would jeopardize the viability of the business

- Benefit

- Employers must provide 2 weeks (80 hours) of paid sick leave for full-time employees.
- Part-time employees must be provided paid sick leave based on the average number of hours they work in a two-week period.
- This paid sick leave must be provided regardless of the length of employment.
- An employer is in compliance if the employer already has a paid leave policy that meets or exceeds the benefits specified in the FFCRA.

- Reasons for Leave

1. Employee is subject to a federal, state or local quarantine related to COVID-19.

2. Employee has been advised by a health care provider to self-quarantine.
 3. Employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis.
 4. Employee is caring for an individual who is subject to quarantine pursuant to 1 and 2.
 5. Employee must care for a child or children (under 18 years of age) whose school or care provider is unavailable due to COVID-19.
 6. Employee is experiencing a similar condition as specified by HHS, DOL or Treasury.
- Wage Requirements
 - For Reasons #1-3 above: Employees should be paid at their regular rate. Pay is capped at \$511/day and \$5,110 total.
 - For Reasons #4-6 above: Employees should be paid at 2/3 of their regular rate. Pay is capped at \$200/day and \$2,000 total.
 - Tax Credit
 - Private sector employers with fewer than 500 employees may obtain a credit for wage replacement: The paid sick leave credit offsets 100% of employer costs for providing mandated paid sick leave. The credit also offsets, uncapped, the employer contribution for health insurance premiums for the employee for the period of leave.
 - Self-employed individuals are provided refundable income tax credits in an amount of what they would have received if they had been an employee receiving paid leave benefits under the mandates. For a given day that a self-employed worker could not work, they can claim a "rough justice" tax credit in the amount of their average daily self-employment income for the year.
- **Emergency Family and Medical Leave**
 - Applies to
 - Private employers with fewer than 500 employees
 - Exemptions may be granted to employers with less than 50 employees if making the payments would jeopardize the viability of the business
 - Benefit
 - Employers must provide 10 weeks of paid family and medical leave for employees who have been employed for at least 30 days.
 - Reasons for Leave
 - Employee is unable to work (or telework) due to a need for leave to care for a son or daughter under 18 years of age if the school or place of care has been closed, or the child care provider is unavailable, due to a public health emergency.
 - Wage Requirements
 - Not less than 2/3 of regular rate of pay based on the typical number of hours scheduled to work. Pay is capped at \$200/day and \$10,000 total.
 - Tax Credit
 - Private sector employers with fewer than 500 employees may obtain a credit for wage replacement: The paid sick leave credit

offsets 100% of employer costs for providing mandated paid sick leave. The credit also offsets, uncapped, the employer contribution for health insurance premiums for the employee for the period of leave.

- Self-employed individuals are provided refundable income tax credits in an amount of what they would have received if they had been an employee receiving paid leave benefits under the mandates. For a given day that a self-employed worker could not work, they can claim a "rough justice" tax credit in the amount of their average daily self-employment income for the year.

2. Has the DOL provided any guidance on FFCRA?

The DOL has put out some guidance and resources on their website:

<https://www.dol.gov/agencies/whd/pandemic>

This information includes the following:

- Employer Fact Sheet: <https://www.dol.gov/agencies/whd/pandemic/ffcra-employer-paid-leave>
- Employee Fact Sheet: <https://www.dol.gov/agencies/whd/pandemic/ffcra-employee-paid-leave>
- FFCRA Q&A: <https://www.dol.gov/agencies/whd/pandemic/ffcra-questions>

Please note, the DOL is requiring that employers keep a posted notice about sick leave. The different versions of the poster are available at the main link above.

3. How should we track if an employee needs to go out on an FFCRA leave?

We are recommending clients set up separate GL accounts to track the wages, taxes, and benefit costs associated with FFCRA leaves.

If BFG is your payroll provider, please let us know as soon as someone goes out on one of these leaves, so we can set up the pay types and link them to whatever new GL accounts you create.

Our payroll system is now ready to track the leave mandated by the FFCRA.

4. In FFCRA, what is meant by “calculated based on the employee’s regular rate of pay for the number of hours the employee would otherwise be normally schedule to work”?

The lookback period is 6 months. If the employee did not work that long, then it reverts to, “the reasonable expectation of the employee at the time of hiring of the average number of hours per day the employee would normally be scheduled to work.” The Act is leaving it to the employee’s expected hours at the time of hire, not the employer’s.

5. If we have reduced hours and pay, on April 1st, would the FFCRA calculation be based on the reduction or prior to the reduction?

You would be taking a high risk by using the reduced wages and/or hours. If an employee were to file a complaint, the DOL could require the employer to turn over all current and past payroll records and possibly conduct employee interviews. If the DOL calculates it differently, an employer would at minimum owe the difference to everyone from April 1st forward.

6. My business is closed due to local and state emergency mandates. Are my employees eligible for the emergency sick leave established in FFCRA?

It depends on the order. The current San Antonio and Bexar County stay at home orders as they are currently written do not meet the requirements to be considered as a *quarantine* or *isolation* order, though some cities and states are drafting their orders so they would meet these criteria. Therefore, employees in Bexar County not working on April 1st for any reason other than one of the six listed in the EPSL are not eligible for sick pay under FFCRA's Emergency Paid Sick Leave (ESPL). If the employee is home because of the child care issue then the employer must begin paying them on April 1st because this is a qualifying reason.

7. I had to furlough my employees for economic reasons. Are they eligible for Paid Sick Leave under FFCRA?

Generally speaking, employees who are terminated or furloughed due to economic reasons after April 1st are not eligible for FFCRA's Emergency Paid Sick Leave (ESPL).

However, employees who were already home taking care of school-age children whose school or place of care is closed (or child care provider is unavailable) for reasons related to COVID-19, may be eligible for up to 12 weeks of leave (two weeks of paid sick leave followed by up to 10 weeks of paid expanded family & medical leave) at 40 hours a week, and a part-time employee is eligible for leave for the number of hours that the employee is normally scheduled to work over that period.

You may want to consult an HR Consultant or Attorney for how to handle your situation if these circumstances exist.

8. If my employees would qualify for 2/3 pay under FFCRA, could I supplement to bring them up to full pay?

Employers may elect to pay the additional 1/3 of pay through PTO, but they cannot get credit for it.

9. How does the expanded FMLA work?

The Emergency Family and Medical Leave Expansion (EFML) Act expands the FMLA's 12 weeks of job protected leave to include employers under 500 and employees with only 30 days of service, and adds to the list of qualifying reasons. The amendment is only effective from 4/1/20 to 12/31/2020. The EFML Act provides paid sick leave after the first two weeks at the greater of 2/3 regular pay, federal minimum wage, or the state or local minimum wage for 10 weeks. The act says the employee can choose from a list of paid time off options offered through the employer or take it unpaid. One of the options is "sick pay." Some policies define sick pay to only be used by the employee for their own illness. Because the government cannot change a company's sick pay policy, the Emergency Sick Pay Policy Act provides sick pay through the employer for reasons 1-6 (listed below). If the reason a person is out is to care for a school-age child while schools are closed due to COVID-19, the term "sick pay" includes EPSL up to 2/3 of the employee's regular pay. Therefore, beginning 4/1/20, the employee can receive up to 2/3 of their regular pay for up to 12 consecutive weeks. The first two through EPSL and the next 10 through EFML.

1. Employee is subject to a federal, state or local quarantine related to COVID-19.

2. Employee has been advised by a health care provider to self-quarantine.
3. Employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis.
4. Employee is caring for an individual who is subject to quarantine pursuant to 1 and 2.
5. Employee must care for a child or children (under 18 years of age) whose school or care provider is unavailable due to COVID-19.
6. Employee is experiencing a similar condition as specified by HHS, DOL or Treasury.

10. Has the IRS provided any guidance on FFCRA?

The IRS Guidance is available at: <https://www.irs.gov/newsroom/covid-19-related-tax-credits-for-required-paid-leave-provided-by-small-and-midsize-businesses-fags>.

Below are some highlights.

- Eligible employers will receive a credit for the amount of qualified sick leave wages paid to employees, qualified health plan expenses, and the employer's share of Medicare taxes imposed on those wages.
- Reimbursement: Employers will claim the tax credits on their federal income tax returns. If an advance is needed, employers should retain an amount of their employment taxes equal to the amount of paid sick leave and family leave wages rather than depositing these amounts with the IRS. Employers may not reduce their deposits of payroll taxes and request advance payments for anticipated tax credits. Where there are not sufficient payroll taxes to cover the cost of the EPSL and EFMLA leave tax credits, employers may file Form 7200 to request an advance payment from the IRS.
- Documentation: To support claims for tax credits, employers must be sure to retain all information provided by employees seeking to take either EPSL or EFMLA, including the following:
 - the employee's name
 - the dates for which leave is requested
 - a statement providing the reason for which the employee is requesting leave, along with written support (a note from the employee's medical provider, or the medical provider of the person for whom they are caring) for such reason
 - a statement that the employee is unable to work, including telework
 - In addition,
 - For leave based on a quarantine order or self-quarantine advice, documentation should include:
 - the name of the governmental entity ordering quarantine
 - the name of the healthcare professional advising self-quarantine
 - if the person subject to the quarantine is not the employee, that person's name and relation to the employee
 - For leave based on school closure or childcare provider's unavailability, documentation 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
 - a statement that no other person will be providing care for the child during the period of requested leave
 - for children older than 14 requiring care during daylight hours: an explanation of the special circumstances that exist requiring the employee to provide care

11. How is BFG's payroll system tracking Emergency Paid Sick Leave and Paid Family Leave?

Emergency Paid Sick Leave (PSL) is for someone who has been quarantined or is being treated for COVID-19. It is paid at their full pay rate, not to exceed \$511 per day or \$5,110 in total for all 80 hours.

Our clients will notice there is a new line on the bottom of the timecard showing hours of PSL that have been used. This will let clients know when an employee has reached their cap of -80 hours. Once it reaches the cap, you can still put it in by mistake, but the system will not pay it.

There is a second new pay type: PFL (Paid Family Leave). PFL is for someone who cannot work because their child's school is closed (child must be under 18), and they do not have access to day care, or they are caring for a child under the age of 18 who is being treated for COVID-19. It is paid at 2/3 of their regular pay rate, not to exceed \$200 per day or \$12,000 in total for up to 480 hours. (12 weeks).

PFL will be another new line on the bottom of the timecard showing the hours of PFL that have been used. This will let clients know when employees have reached their cap of -480 hours. Once it reaches the cap, you can still put it in by mistake, but the system will not pay it.

This information will flow into BFG's payroll system and will create the tax credit, which will equal the gross wages, employer Social Security and Medicare taxes, and the pro rata employer cost of medical insurance if the employer has it. The credit will be against the 941 payment for the payroll it runs in. Therefore, the company will be immediately reimbursed for the PSL/PFL.

Employer Tax Deferrals

1. Did the CARES Act provide for any employer tax deferral?

Effective beginning the 2nd Quarter 2020, almost all employers may defer the employee portion of Social Security (6.2%). The deferral is available through the end of 2020. Deferrals call for 50% payable by 12/31/2021 and the balance by 12/31/2022. It's basically an interest-free loan. Employers who received funding from the Paycheck Protection Program may participate up until the point they receive notice of partial or full forgiveness of their loan. Any deferrals made up until that time will remain deferred.

If you are a Payroll client of BFG, a simple email saying that you would like to begin this deferral effective as of a designated date is all we need to implement this on your behalf.

<https://www.irs.gov/newsroom/deferral-of-employment-tax-deposits-and-payments-through-december-31-2020>

Local Mandates and Stay at Home Orders

1. What does Governor Abbott declaring a statewide public health disaster mean to all of us in Texas?

Governor Greg Abbott has announced a statewide public health disaster for the first time in more than 100 years due to coronavirus. This is the first time a public health disaster has been issued in Texas since 1901.

The disaster declaration gives the state and local officials the tools and resources they need to combat coronavirus.

Abbott also issued an executive order that requires all Texas schools, bars, gyms and restaurant dining rooms to temporarily close. This order is not a shelter in place, Abbott said. "We as a country must swiftly elevate our response to COVID-19," the governor said. "It is essential that all Americans comply with the CDC standards."

Here's what falls under Abbott's executive order:

1. Every person in Texas must avoid social gatherings that have more than 10 people.
2. People should avoid eating and drinking at bars, restaurants and food courts or visiting gyms. There will be no dining at bars or restaurant dining rooms since they will be closed. Restaurants can still offer take-out options.
3. People shall not visit nursing homes, retiring centers or long-term care facilities unless they're providing critical care assistance.
4. All Texas schools must close temporarily. This does not mean that education stops. Superintendents will continue to work with the Texas Education Agency to continue online or additional educational options.

2. What does the City of San Antonio's Stay Home, Work Safe Order include?

Effective on March 24 at 11:59 PM is the Stay Home, Work Safe Order in both San Antonio and Bexar County.

Mayor Nirenberg and Judge Wolff ordered all businesses to close and stop operations other than allowing employees to work from home, maintaining security and maintenance of the business' property and facilitating information technology services that allow employees to work from home. This excludes businesses that are considered essential. A complete list of exemptions is available in the order:

<https://www.sanantonio.gov/Portals/0/Files/health/COVID19/Website%20Docs/Emergency%20Declaration%20No.%205.pdf?ver=2020-03-23-175107-393>

3. Does the WARN Act apply to businesses closed by the San Antonio Emergency Declaration?

Under the WARN Act, employers with 100 or more employees are required to provide 60 days' advance notice of a temporary shutdown if the shutdown will either affect 50 or more employees at a single site of employment and result in a layoff of the affected employees of at least 6 months or at least a 50 percent reduction in hours of work of the affected individual employees during each month of any 6-month period of the shutdown.

This notice is not required if the closure/shutdown is a result of a "natural disaster" or "unforeseeable business circumstances." WARN does not address whether a pandemic

fits within these definitions, although an “unanticipated and dramatic economic downturn” might be considered “not reasonably foreseeable.”

However, assuming that the COVID-19 situation qualifies above, it is still recommended that employers provide as much advance notice as possible. Following the mandated closure, if the business does not resume full operations due to loss of business revenue, WARN notification would be required for those who meet the criteria above.

4. I believe my business is considered “essential”: do I need to document that somehow?

We recommend that you provide your employees who will be working from your office with a letter explaining the category that your business falls in to be considered essential (as identified in the mandate), the duties performed by the overall company to deem it essential, and the skills, training, duties that employees perform in order to be determined as vital to the organization in carrying out the company’s obligations deemed essential by the ordinance. This letter should be customized for each employee and provide the employee’s name and address if the employee does not have a work-issued ID badge.

5. Explain Governor Abbott’s orders for re-opening Texas.

On May 1, retail stores, restaurants, and movie theaters were able to reopen with certain restrictions. Governor Abbott has since clarified that the restaurant seating capacity limitation of 25% applies only to indoor seating and does not apply to outdoor seating, but the same distancing standards apply to both.

On May 8, barber shops and salons were able to reopen with certain restrictions.

On May 18,

- Gyms will be able to reopen with certain conditions, including that they will only be able to operate at 25% capacity.
- Nonessential manufacturers and offices may reopen at reduced capacity (25%) if they follow minimum health standards, such as observing social distancing guidelines.

Time Off

1. Can a supervisor tell an employee to leave work if they are sick?

Yes. Doing so helps to reinforce the message that employees should stay home when they are sick. Employees who show symptoms of a potentially contagious illness can be asked to leave work and stay home until they are symptom free.

Because it is allergy season, remember that a simple cough may not be a sign of coronavirus or flu; however, having fever or shortness of breath in addition to cough may point to those more serious ailments. Employers should not ask too much so as to identify a specific condition an employee may be suffering from: Per the Society for Human Resource Management (SHRM), “The Americans with Disabilities Act prohibits disability-related inquiries unless they are job-related and consistent with business necessity. But such an inquiry may be job-related and consistent with business necessity if an ill employee poses a direct threat to the health of others.”

Employers should be consistent in enforcing any policy of asking employees to go home fairly and equally across their employee base so as not to be seen as having a bias against particular employees. Have the conversation with the employee in private, and it may be best to have both the frontline manager and a representative from HR or upper management present.

2. If an employee becomes sick with the virus and has to be quarantined or is under stay at home orders, how will PTO be used?

First, you'll want to establish if your employee is eligible for Emergency Paid Sick Leave (EPSL) under FFCRA. [FFCRA Paid Leave](#) is covered in a section above, including which employees are eligible and benefits.

a. If the employer has a PTO plan in place, will employees be required to use that up even if it is a mandated quarantine?

Depending on the company's PTO policy, hourly employees may choose to use PTO or take the time off without pay; however, the employer cannot force the employee to use their PTO before the mandated paid sick leave.

Because exempt employees have a guaranteed pay, the norm is to require the use of PTO during weeks when any work has been performed as well as weeks where no work was performed.

b. Do we have to pay employees if they run out of PTO? Do we have to pay nonexempt employees? If not, can we pay them something to help them out? If an employee has no PTO, do we need to extend PTO to cover the missed hours?

No, you do not have to pay employees if they run out of PTO though you could opt to do so. For example, you could enact a specific leave policy for employees affected by coronavirus if you'd like. However, if you opt to offer a special leave policy, you may want to set up that it will not be in force when this specific situation is no longer an emphasis.

Nonexempt employees who do not have paid sick leave are not required to be paid for their time off of work unless there is a collective bargaining agreement in place. If a nonexempt employee is quarantined during the course of business travel, they should still be paid for any time travelling home.

Be sure that employees who work remotely are paid for all time worked.

3. Are we required to pay an employee who refuses to come work because of concerns about contracting coronavirus?

While employees may be fearful of contracting coronavirus, employers do not need to provide another accommodation unless there is a real potential that the employee could contract the disease in performing their job. An employee may refuse to work, but per SHRM, "If the employer can establish that there is no basis for any exposure to the disease, the employee does not have to be paid during the time period the employee refuses to work."

4. We had an employee call into work because his wife is sick with flu-like symptoms. Should we be concerned? And what can we require of him before returning to work?

It is recommended that you allow the employee to stay home to care for her. If, by chance, his spouse does have something contagious, and he catches it, whether it be the flu or something else after he requested the time off, you would not want the exposure from other employees catching it because you made him come to work until he showed signs, such as a fever.

Find out how long the employee expects to be out. You will be fine asking general questions, such as has her doctor indicated if what she has is contagious or not, how long she is expected to need help with her care, and so on. You can also ask the employee to give you an update for each day he will be out if he doesn't give you a definite return date. It is also fine to require him to call before the end of the day each day to give you an update for the next day. This is a reasonable request because you need time to schedule others to cover his duties. You could ask all of this through email, but it may be quicker and more effective to have a phone call and then follow up with an email to summarize everything discussed and agreed upon.

If the employee is staying home to care for a family member, be mindful of FMLA requirements as well as the potential that this employee is eligible for paid leave if they meet the requirements of qualifying reasons for leave.

5. If we cut hours for the employees we have left, can we reject them trying to use vacation time to bring their hours up to the old rates?

Yes, you do not have to pay vacation for hours they are not scheduled to work. PTO is for paid time off from scheduled work.

Work from Home and Other Employment Arrangements

1. In the event employees will have to work from home, how can we ensure that they are being productive?

If you typically allow work from home, you may already have policies that address this topic. If not, employers can generally monitor the use of work email if there is a valid business purpose to do so. You might schedule conference calls to provide updates and/or ask the employee to send supervisors a periodic email with progress reports or other reporting that summarizes the work they completed along with the targeted deadlines for the period.

2. What should we do if an employee is unable to work from home because...?

a. the employee is too sick to perform the required duties from home

If the employee is too sick to work, allow the employee time to rest and recover. If they have PTO, allow them to use it.

b. the employee does not have the appropriate equipment needed (hardware, software, internet service, etc.)

If the employee is not equipped to work from home and you have closed your office, then the employee is not able to work until you reopen your office. You are only required to pay nonexempt, hourly employees for the time when they are performing work. If they have PTO, allow them to use it.

c. a position, such as a receptionist, requires the employee to be physically present in the workplace

Certain positions require that the employee be present in the office and cannot be performed remotely. You are only required to pay nonexempt, hourly employees for the time when they are performing work.

3. If there is not enough work for all of my employees, can I send them home?

Yes. There are several options to consider.

For industries that can't tell employees to work from home, such as manufacturing, retail, and hospitality, you could reduce the hours worked and possibly use staggered shifts.

You could also choose to either lay off some or all employees, temporarily or permanently, or to furlough them.

An employee furlough is a mandatory suspension from work typically without pay. It can be as brief or as long as the employer wants.

An employer will furlough employees as a cost-saving measure when it doesn't want to lay off staff but lacks the resources to continue paying them.

You can also furlough on a partial week basis. For instance, you could furlough one day per week so that the employee is only working and getting paid for four days per week. An advantage to this for exempt employees is that you are not technically changing the rate of pay.

During the furlough, the employee retains his or her job which means that he or she also retains benefits. After the furlough ends, the employee returns to work.

Be clear, think through all the possibilities, and be as transparent as possible with your employees. If you want them to return to work, it's important that they believe that this short-term solution will ensure a long-term, mutually beneficial relationship. They will need to believe that you are making a good decision and taking the best care of them possible, while ensuring business continuation for the organization.

4. If I do send employees home or close the office, must we keep paying employees who are not working?

Under the Fair Labor Standards Act (FLSA), for the most part the answer is "no." FLSA minimum-wage and overtime requirements attach to hours worked in a workweek, so employees who are not working are typically not entitled to the wages the FLSA requires. (See [Nonexempt and Exempt descriptions above](#)).

However, an employer may choose to continue paying employees on some basis at or less than their full rate of pay.

Additionally, you can create an expanded Paid Time Off (PTO) option that could be designed specifically for this situation. This would be in addition to the new FFCRA,

described below, and your current PTO plan. For this option, an additional week, 2 weeks or more could be added on top of the normal PTO that is in your handbook.

For hourly, nonexempt employees, you could also pay them their hourly pay rate for a set number of hours per week not to work. Keep in mind that they are entitled to be paid for any hours they do work if it exceeds the number of hours you agree to pay on a temporary basis.

For exempt, salaried employees, federal regulations require employers to pay their full weekly salary in any workweek in which they perform some work. If they are being temporarily furloughed so that no work will be performed, the same or a reduced pay could be offered.

5. Can we move employees from salary to hourly and reduce hours?

Yes, that is perfectly legal. We recommend doing it in writing and having your employees sign it, similar to a pay change form.

Unemployment

1. If employees seek unemployment benefits, does that change their status from inactive employees (furloughed) to terminated?

Employees who are laid off or furloughed are eligible for unemployment benefits if their weekly pay is reduced by more than 80% through no fault of their own. Therefore, they can still be employed and working or not working and be eligible for unemployment benefits. If they are still working, but only a few hours, the TWC will prorate their unemployment benefits according to their current wages. They will have to produce their pay checks on a periodic basis to continue receiving benefits.

2. How will Texas Workforce Commission be handling layoffs due to COVID-19?

The Texas Workforce Commission has determined that a Texas employer's account will not be charged for any claims filed due to COVID-19. Benefits paid to a former employee as a result of COVID-19 will not be included in the employer's future tax rate calculations.

Please note employers will receive a [Notice of Maximum Potential Chargeback](#) regarding the reason for claimant separation(s). Employers should provide a detailed reason to assist the TWC's Benefits Department in making any COVID-19 Chargeback determinations.

3. I need to temporarily close my business. What steps do I need to take with the TWC?

If a business has closed temporarily or permanently, a [Mass Claim](#) may need to be initiated.

If you expect to have 10 or may layoffs in the future, consider filing a Mass Claim with the Texas Workforce Commission (TWC). This could save you and your employees time. Some advantages:

- Can submit the layoff information before the layoff, which ensures a smooth transition for both employer and worker
- Can establish claims more efficiently than workers who submit their own unemployment benefits claims

- Can submit the worker's final week of earnings, helping to ensure proper payment
- Can submit information on severance pay or wages in lieu of notice of layoff, reducing subsequent contact by TWC
- Are not inundated with a written notice of application for each individual who applies for unemployment benefits
- Automatically become a party of interest to each claim filed

For reference, please see the following resources:

- BFG's Guide: [How to Submit a Mass Claim Request](#)
- TWC's Guide: <https://www.twc.texas.gov/businesses/mass-claims-unemployment-benefits#howToSubmitAMassClaimRequest>

4. I need to drastically reduce employee hours. What steps can I take with the TWC?

If employee hours are reduced, layoffs can potentially be avoided through [TWC's shared work program](#)

5. How does the TWC's Shared Work program work?

If you are able to reduce hours (rather than lay off employees), you can apply with TWC for their Shared Work Program, which will allow your employees to work and get benefits, ultimately resulting in higher income for them.

Employers must apply and be accepted to participate in the Shared Work program. Once selected, employers must submit included employees' information to the TWC. Eligible employees are assigned to work for other employers participating in the program by the TWC and can be disqualified from the program if they refuse an assignment. Participating employers and employees must report wages to the TWC. The TWC allows employees to work part-time outside of the program, and they are not required to report those wages. As you know, employers are required to report wages to the TWC along with the employee's name and SSN. Therefore, the expectation would be that the TWC is monitoring this and will contact the employee to refund any benefits they should not have received and refund employer accounts accordingly.

6. How does the CARES Act affect unemployment?

The CARES Act allows those who are collecting unemployment to receive an additional \$600 per week of federal funds in addition to their state unemployment benefits. Per the law, individuals who are covered under the Pandemic Unemployment Assistance (PUA) can collect for up to 39 weeks, though the Act states that this timeframe could be extended by future legislation.

7. Who can claim Pandemic Unemployment Assistance (PUA)? Are owners eligible?

The CARES Act expands who is covered under PUA. Unemployment is typically available to individuals who are otherwise able to work except for the fact that they are unemployed or partially employed. The CARES Act expands unemployment so that the individuals, who are unable or unavailable to work for the following reasons, would be eligible to receive PUA:

- the individual has been diagnosed with COVID-19 or is experiencing symptoms of COVID-19 and seeking a medical diagnosis
- a member of the individual's household has been diagnosed with COVID-19

- the individual is providing care for a family member or a member of the individual's household who has been diagnosed with COVID-19
- a child or other person in the household for which the individual has primary caregiving responsibility is unable to attend school or another facility that is closed as a direct result of the COVID-19 public health emergency and such school or facility care is required for the individual to work
- the individual is unable to reach the place of employment because of a quarantine imposed as a direct result of the COVID-19 public health emergency
- the individual is unable to reach the place of employment because the individual has been advised by a health care provider to self-quarantine due to concerns related to COVID-19
- the individual was scheduled to commence employment and does not have a job or is unable to reach the job as a direct result of the COVID-19 public health emergency
- the individual has become the breadwinner or major support for a household because the head of the household has died as a direct result of COVID-19
- the individual has to quit his or her job as a direct result of COVID-19
- the individual's place of employment is closed as a direct result of the COVID-19 public health emergency
- the individual is self-employed, is seeking part-time employment, does not have sufficient work history, or otherwise would not qualify for regular unemployment or extended benefits

Individuals who cannot claim PUA include the following:

- someone who has the ability to telework with pay
- someone who is receiving paid sick leave or other paid leave benefits, regardless of whether they meet any of the qualifications above

8. Has the TWC provided any extensions?

Due to COVID-19, the due date for the 1st Quarter 2020 tax reports and payments is extended to May 15, 2020.

Handling Benefits

1. How should we handle benefits for employees who are not working?

If you are temporarily suspending normal business operations or some employees are going to be on an unpaid leave of absence or furlough for an unspecified period of time, you should follow the policies in your Employee Handbook, which should be compliant with insurance regulations. Furloughed employees are still employed and eligible for benefits.

If employees remain eligible during the reduction in hours/furlough, the employer **will most likely want to collect the employee's share of the premiums.**

Your handbook may have a requirement for employees on leave to make arrangements to pay their portion of health premiums while they are not working. Depending on the circumstances, your options range from requiring someone to pay weekly, monthly, when they return, or forgive it entirely. The coverage will remain in place as long as you do not notify your broker or the carrier that the employee has been terminated.

For example, you pay your premiums in advance of each month and if you terminate someone before the end of the month, state law mandates their coverage to remain in place through the end of the month. If you fail to inform your carrier that an employee terminated in the prior month in less than three days into the following month, the insurance carrier will not refund your premium and will keep their coverage in place until the last day of the following month.

2. Because all of this COVID-19 is going on, we have some of our employees who are on a leave. I have 2 so far who have a 401K loan, and I need know what will happen with their loans. Do they need to keep paying on it while on leave? Does the payment stop until they return?

Currently, a 401(k) Plan loan must be paid according to (or more rapidly than) the loan's specified payment schedule. The loan will be considered in default at the end of the calendar quarter following the calendar quarter in which the participant misses a scheduled payment. So, if an employee stops payments on 4/8/20, he/she would be in default as of 9/30/2020. Under certain circumstances, a defaulted plan loan may be considered a distribution; the outstanding loan balance and accrued interest could be considered taxable income to the plan participant who borrowed the funds.

You could allow the employee to refinance the loan to reduce the payments, which would require the employee to pay another loan processing fee as well as some continuous payments.

Alternately, the new CARES Act allows employees to defer retirement plan loan payments up to one year from 12/31/2020; but it will probably require a plan amendment. If clients would like, we can check with the TPA to determine the cost of the amendment.

3. How do recent laws affect retirement plans?

Distributions from Retirement Accounts

The CARES Act creates Coronavirus-Related Distributions, which are defined as penalty-free distributions up to \$100,000 made from IRAs, employer-sponsored retirement plans, or a combination of both. These distributions need to be made in 2020, and the individual must have been impacted in one of the following ways:

- Have been diagnosed with COVID-19
- Have a spouse or dependent who has been diagnosed with COVID-19
- Experienced adverse financial consequences as a result of being quarantined, furloughed, being laid-off, or having work hours reduced because of the disease
- Are unable to work because they lack childcare as a result of the disease
- Own a business that has closed or operates under reduced hours because of the disease
- Or based on other factors as determined by the IRS

The tax benefits of Coronavirus-Related Distributions include individuals being able to spread the taxation of the withdrawn amount over the next three tax years (2020 to 2022), rather than including the full amount as taxable income in 2020. Individuals may also recontribute any amounts withdrawn under this provision at any time over the three-year period, tax free, even if the amount being returned exceeds the annual plan contribution limit.

Loans from Employer-Sponsored Retirement Plans

Many employer-sponsored plans (for example, 401(k), 403(b)) offer participants the option to take a loan on a portion of their retirement assets. For those individuals who have been impacted by the coronavirus (as defined in the section above), the CARES Act has modified the plan loan rules as follows:

- The CARES Act doubles the amount that may be borrowed from \$50,000 to \$100,000.
- 100% of the Vested Balance may be used. This differs from the normal rule which allows an individual with a vested balance that exceeds \$20,000 to take a loan up to 50% of the amount with a maximum limit of \$50,000.
- Loan payments taken in 2020 may be delayed for up to one year.

Temporary Waiver of Required Minimum Distribution for Certain Retirement Plans and Accounts

Under the CARES Act, all RMDs for 2020 are suspended. This applies to Traditional IRAs, SEP IRAs, SIMPLE IRAs, as well as 401(k), 403(b), and Government 457 plans. It also includes individuals who turned age 70½ in 2019 and were waiting until April 1, 2020, to take their first RMD. These individuals will also miss taking their second RMD which would normally be due before December 31, 2020.

If an individual has taken an RMD within the last 60 days, you may be able to return it to your retirement account without penalty before the expiration of 60 days. If you took your RMD more than 60 days ago, then it is likely you will need to qualify for a COVID-19-related distribution (as defined in the section above) in order to be able to return the distribution to the account without penalty.

The CARES Act suspension of RMDs for 2020 also impacts the 5 Year Rule that applies to Non-Designated Beneficiaries (e.g., charities, estates, trusts) who inherit a retirement account prior to the decedent reaching their required beginning date. Normal these beneficiaries would have to distribute the entire account balance within 5 years. The CARES Act, however, allows 2020 to be ignored for those beneficiaries provided the decedent died in any year between 2015 and 2019.

4. How do recent laws affect employee benefits?

COVID-19 Testing and Preventative Services

The Families First Coronavirus Response Act (FFCRA) requires that the costs of COVID-19 testing be covered by health insurance, and that no cost-sharing be imposed on the individuals receiving such tests, so long as the tests met certain requirements.

The CARES Act expands the testing that must be covered by health insurance without cost-sharing, and also includes rules about reimbursing testing providers. In addition, the CARES Act now requires health insurance to cover, without cost-sharing, any qualifying coronavirus preventative service, which is intended to prevent or mitigate COVID-19 and meets certain standards.

Certain Over-the-Counter Medical Products Now Qualified Medical Expenses

Many over-the-counter medical products are now considered qualified medical expenses and can be purchased using health savings accounts, Archer medical savings accounts, health flexible spending arrangements and health reimbursement arrangements.

5. Has the DOL granted any extensions for benefit plans?

The DOL's EBSA Disaster Relief Notice 2020-01 provides some extensions and relief for plan sponsors. The following is reported by the National Association of Health Underwriters:

For group health plans subject to ERISA or the Internal Revenue Code, the relief provides additional time to comply with certain deadlines affecting COBRA-continuation coverage, special enrollment periods, claims for benefits, appeals of denied claims and external review of certain claims. With regard to disability, retirement and other plans, the joint notice provides additional time for participants and beneficiaries to make claims for benefits and appeal denied claims. As we noted in our letter, without the extension, individuals might miss key deadlines during the COVID-19 outbreak that could result in the loss or lapse of group health coverage or the denial of a valid claim for benefits.

In addition, the DOL announced an extension of deadlines for furnishing other required notices or disclosures to plan participants, beneficiaries and other persons so that plan fiduciaries and plan sponsors have additional time to meet their obligations under Title I of ERISA during the COVID-19 outbreak. NAHU provided this suggestion as many groups may need to adjust their plans due to the pandemic but may not be able to comply with traditional notice requirements. This extension applies to the furnishing of notices, disclosures and other documents required by provisions of Title I of ERISA that are overseen by the DOL. An employee benefit plan and the responsible plan fiduciary will not be in violation of ERISA for a failure to timely furnish a notice, disclosure or document that must be furnished between March 1, 2020, and 60 days after the announced end of the COVID-19 National Emergency, if the plan and responsible fiduciary act in good faith and furnish the notice, disclosure or document as soon as administratively practicable under the circumstances. Good-faith acts include use of electronic alternative means of communicating with plan participants and beneficiaries who the plan fiduciary reasonably believes have effective access to electronic means of communication, including email, text messages and continuous access websites.

Another concern of NAHU was the deadline for Form 5500 filings. The Administration is providing Form 5500 Annual Return/Report filing relief in accordance with [IRS Sec. 7508](#) that allows for an extension in filing during a presidentially declared disaster. In addition, Form M-1 filings required for multiple employer welfare arrangements (MEWAs) and certain entities claiming exception (ECEs) are provided relief for the same period of time as the Form 5500 Annual Return/Report filing relief.

6. Do I need to take any action for my employees to be able to take advantage of a COVID-19 loan or other change?

Because the coronavirus-related distribution and loan limit increase provisions are optional, they will not go into effect unless the plan sponsor opts to affirmatively add them to their plan. A Plan Sponsor may implement and begin using a feature or option of the CARES Act at any time; however, they need to inform their third party administrator that they would like to add these provisions to their plan first.

Potential changes include in-service COVID-19 withdrawals, increase loan limits and delayed loan payments, and waived RMDs.

Communication with Employees

1. What can we do to help ensure business continuity?

Talk with your employees about what you are doing to ensure safety in the workplace. As part of that communication, remind employees to stay home when they are sick, wash their hands, use a tissue when they cough or sneeze, avoid people who are sick, and regularly clean their work station. Let your employees know if you are providing hand sanitizers and disinfectant cleaners and where to find them. And encourage them to come to you to discuss any concerns they may have so you can address them.

If you are having trouble with absenteeism, you could also consider providing incentives to healthy employees who show up to work.

2. I need to lay off a tenured employee. What is the best way to do that in the current situation?

We all know the best way to communicate bad news is often in a face-to-face conversation. If you are close to a tenured employee, you may be able to call them individually to let them know you have some very difficult news and give them the option to come into the office or let you tell them over the phone.

You should give them as much information as you can about the effect on the business, other employees, yourself, your deep concern for the health of them and their families, and you are doing everything you can to help everyone and keep the company financially stable in order to survive this, so everyone will have a place to come back to when it is over.

You can also let the employee know you are sending information to the TWC to expedite their unemployment payments and that they are welcome to go online or to a TWC office to file for unemployment themselves, and you will verify it is due to COVID-19. We are hearing the employer site is very hard to get through at this time, given all of the other companies that are in this same position.

Maintaining a Clean Environment

1. What steps should we take to minimize transmission of coronavirus and other communicable diseases in the workplace?

- ❖ Cover your mouth when you cough or sneeze. Use a tissue and dispose of it in the trash, but if you don't have one, use your arm or sleeve (not your hands) to cover.
- ❖ Wash your hands. Use soap and water and scrub for about 20 seconds. If you can't wash your hands, use hand sanitizer. You'll want to do this frequently, especially after using the restroom, before eating or preparing food, after caring for someone who is sick, after coughing or sneezing, and after handling animals or touching garbage.
- ❖ Clean shared surfaces, such as doorknobs, handles, copy machines, coffee makers, and the like, often with disinfectants.
- ❖ Avoid touching your eyes, nose and mouth.
- ❖ Stay home when you are sick. Go to the doctor if needed. If you suspect you have been exposed to the coronavirus, call your doctor to request instructions before heading into their office.
- ❖ Social distancing/remote work

- Recommend to clients who are high risk or who have high risk persons living in their home to either meet via phone or postpone meeting if possible.
- Avoid using handouts at meetings and instead deliver all meeting materials and handouts electronically.
- Refrain from shaking hands.
- Avoid serving lunch or drinks in glasses in the office.
- Regularly clean office conference rooms and commonly-touched surfaces in the office.

2. Has the CDC provided any guidance?

Here is a link to the CDC's Frequently Asked Questions page posted on their website:
<https://www.cdc.gov/coronavirus/2019-ncov/faq.html>

For Businesses Working with Coronavirus Patients

1. We work in the healthcare industry and may come into contact with coronavirus patients. Should we make any adjustments?

Consider your processes and how they can be enhanced to reduce the likelihood of spreading disease. For example, a doctor or nurse who sees one patient with coronavirus could have the potential to infect their other patients. Take steps to identify which patients/clients may have coronavirus and to minimize the transmission risk with these patients. We have more in-depth guidance on this topic. If needed, please contact our HR team.

Travel

1. If an employee goes out of the country, can we mandate that the employee be tested and/or quarantined before returning to work?

An employer may require that an employee self-quarantine if they have travelled to a country that may put them at high risk for contracting coronavirus (State Department Level 4 countries and CDC Level 2 and Level 3 countries). Employees who have traveled to countries with lower alert levels probably do not need to be quarantined unless they had a layover in a higher alert country, have been in close contact with someone who has coronavirus, or exhibit symptoms of coronavirus. Additionally, your industry may have specific protocols over and above general HR guidelines, such as the medical field.

For More Information

We will continue to monitor this situation and release updates. For more information or assistance, please contact our Human Resources team at **210-775-6082**, toll-free at **1-888-757-2104**, or HRManagement@BFGonline.com.



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