



## Q&A from the April 1, 2020, webinar *Leading Through COVID-19*



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*Note: this is general information only. It is not legal advice and no attorney-client relationship was formed or exists.*

**QUESTION 1:** *Are employees able to use sick leave during the shutdown if they're not sick? I felt like a member of the House was implying that the 8 weeks could be used to pay employees to not work regardless of health and COVID status.*

**ANSWER:** The [Oregon Bureau of Labor and Industries](#) says “yes” to that exact question.

“Q: If I don’t feel comfortable going to work because others at work are sick or I want to quarantine myself, can I use sick time?”

“Yes.”

Employees can take sick leave and protected Oregon Family Leave. And as BOLI pointed out, “Oregonians can use Oregon Family Leave to take protected time off to care for their children during official school closures to limit the spread of coronavirus.” This also applies if a child’s “place of care” is shut by government order.<sup>12</sup>

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<sup>1</sup> <https://www.oregon.gov/boli/WHD/OST/pages/index.aspx>, last accessed April 3, 2020.

<sup>2</sup> <https://www.oregon.gov/boli/pages/coronavirus-and-workplace-laws.aspx>, last accessed April 3, 2020.

Under the Families First Coronavirus Response Act employees of covered employers<sup>3</sup> may take two weeks (up to 80 hours) of paid sick leave at the employee's regular rate of pay where the employee is unable to work because the employee is quarantined (pursuant to Federal, State, or local government order or advice of a health care provider).

The employee can also take two weeks (up to 80 hours) of paid sick leave, at two-thirds the employee's regular rate of pay, because the employee is unable to work because of a bona fide need to care for an individual subject to quarantine (pursuant to Federal, State, or local government order or advice of a health care provider).

And finally, an employee can take two weeks of paid leave, at two-thirds the employee's regular rate of pay, to care for a child (under 18 years of age) whose school or child care provider is closed or unavailable for reasons related to COVID-19.

**QUESTION 2:** *if employees are working from home in Washington, do you have to pay B&O taxes in Washington for your Oregon business?*

**ANSWER:** On March 10, 2020, Mayor Durkan of Seattle announced that the department of Finance and Administrative Services (FAS) will defer business and occupation (B&O) tax collections for eligible business owners, allowing small business owners increased flexibility during a period of financial duress caused by the COVID-19 outbreak. You should consult with your tax advisor or CPA for additional information.

**QUESTION 3:** *Hi Laura, you had mentioned that if you are an employer in Oregon with Washington employees who are working from home, you may need to adjust payroll...what about vice versa? What adjustments are needed for a business is in Washington State with employees who are working from home in Portland Oregon?*

**ANSWER:** I would think it's a similar situation to those Oregon employers who have employees working in Washington, but you should consult with your payroll professional, tax advisor or CPA for additional information.

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<sup>3</sup> The paid sick leave and expanded family and medical leave provisions of the FFCRA apply to certain public employers, and private employers with fewer than 500 employees. Most employees of the federal government are covered by Title II of the Family and Medical Leave Act, which was not amended by this Act, and are therefore not covered by the expanded family and medical leave provisions of the FFCRA. However, federal employees covered by Title II of the Family and Medical Leave Act are covered by the paid sick leave provision.

Small businesses with fewer than 50 employees may qualify for exemption from the requirement to provide leave due to school closings or child care unavailability if the leave requirements would jeopardize the viability of the business as a going concern.

**QUESTION 4:** *For Laura, how does the new FMLA apply to a business that closed and laid off 95% of employees? Also, for employees with children then home, are they eligible for FMLA even if the business closed before the schools closed and childcare became necessary?*

**ANSWER:** Generally, if a business employs fewer than 500 employees, it is a covered employer that must provide paid sick leave and expanded family and medical leave. However, the FFCRA only applies to employees who requested to take leave after its effective date, April 1, 2020. If on April 1, the person was not an employee of the employer, they are not eligible to take leave. Similarly, if the employer sent employees home and stops paying them because it does not have work for them to do, they will not get paid sick leave or expanded family and medical leave. But they may be eligible for unemployment insurance benefits.

**QUESTION 5:** *For the FFCRA (Emergency sick leave) can employees use that to offset reduction in hours? Example: Reduction in hours from 40 to 32, can they use the emergency sick leave to make up the 8 hours?*

**ANSWER:** No. FFCRA applies for workers that are unable to work. If an employer reduces work hours due to lack of work, an employee may not use Emergency Paid Sick Leave (EPSL) or Public Health Emergency Leave (PHEL) to compensate for the reduction in hours. However, the employee may use EPSL or PHEL if a COVID-19 qualifying reason prevents the employee from working a full schedule.<sup>4</sup>

Note: Remember that the FFCRA's effective date is April 1, 2020.

**QUESTION 6:** Do the State [or Oregon] stay at home orders fulfill the requirement for leave if you can't work under a quarantine?

**ANSWER:** Yes. For purposes of the Families First Coronavirus Response Act, State or local quarantine or isolation order includes quarantine or isolation orders, as well as shelter-in-place or stay-at-home orders, issued by any State or local government authority that causes an employee to be unable to work (or to telework), even though the employer has work that the employer could perform but for the order. But, if the employer does not have work for the employee because of a shelter-in-place or a stay-at-home order, the employee may not take paid sick leave for this qualifying reason.

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<sup>4</sup> <https://www.dol.gov/agencies/whd/pandemic/ffcra-employee-paid-leave>

**QUESTION 7:** *re paycheck protection act...what makes up Average Monthly payroll...just gross wages or wages and benefits?*

**ANSWER:** When calculating payroll for the Payroll Protection Program loan, payroll expenses include:

- Compensation such as salary, wages, commission, or similar compensation
- Payment for vacation, family, medical, and sick leave
- Allowance for employee dismissal or separation
- Payment for group health-care benefits, including insurance premiums
- Payment of employee retirement benefits
- Payment of state and local taxes imposed on the compensation of employees
- For a sole proprietor or independent contractor: wages, commissions, income, or net earnings from self-employment, capped at \$100,000 on an annualized basis for each employee<sup>5</sup>

However, the PPP does not count the following expenses when calculating the total PPP reimbursement amount:

- Any compensation over \$100,000 per employee
- Taxes imposed under Internal Revenue Code chapters 21 (payroll taxes), 22 (railroad taxes and retirement benefits), and 24 (income taxes withheld on wages)
- Compensation of employees whose principal place of residence is outside the United States
- Qualified sick and family leave for which a credit is already allowed under other sections (*i.e.*, 7001 and 7003) of the Family First Coronavirus Response Act
- Loans used for duplicate purposes of another SBA loan program already claimed by the applicant

**QUESTION 8:** *If we have an hourly employee who teaches in-person classes, but there are no in-person classes to teach. Could she use her sick leave during the in-person shut down?*

**ANSWER:** No. If an employer closes the worksite, even for a short period of time, the employee is not entitled to take paid sick leave or expanded family and medical leave. If an employer closes after the FFCRA's effective date, April 1, 2020, (even if the employee requested leave prior to the closure), the employee will not get paid sick leave or expanded family and medical leave, but they may be eligible for unemployment insurance benefits. This is true whether the employer closes the worksite for lack of business or because it was required to close pursuant to a Federal, State or local directive. The employee should contact its state agency for information about unemployment benefits.<sup>6</sup>

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<sup>5</sup> <https://home.treasury.gov/system/files/136/PPP%20Borrower%20Information%20Fact%20Sheet.pdf>

<sup>6</sup> <https://www.dol.gov/agencies/whd/pandemic/ffcra-questions#23> (23-25)

**QUESTION 9:** *Regarding the stimulus package for unemployment (\$600) would the Oregon Employment Department automatically "add" the \$600 or is that a separate application?*

**ANSWER:** This \$600 a week Unemployment Compensation is paid in addition to and at the same time (but not necessarily in the same check) as regular state Unemployment Compensation benefits; if you've already applied for Unemployment, you do not need to reapply for the additional compensation. This additional payment does not affect eligibility for Medicaid or the Children's Health Insurance Program and is only available through July 31, 2020.<sup>7</sup>

**QUESTION 10:** *Are there provisions for those whose salary consists of commissions?*

**ANSWER:** For purposes of the FFCRA, the regular rate of pay used to calculate an employee's paid leave is the average of their regular rate over a period of up to six months prior to the date on which the employee takes leave. If the employee has not worked for their current employer for six months, the regular rate used to calculate their paid leave is the average of the employee's regular rate of pay for each week they have worked for the current employer.

If an employee is paid with commissions, tips, or piece rates, these amounts will be incorporated into the above calculation to the same extent they are included in the calculation of the regular rate under the FLSA.

You can also compute this amount for each employee by adding all compensation that is part of the regular rate over the above period and divide that sum by all hours actually worked in the same period.<sup>8</sup>

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<sup>7</sup> <https://blumenauer.house.gov/covid-19-economic-stabilization-resources>

<sup>8</sup> <https://www.dol.gov/agencies/whd/pandemic/ffcra-questions#8>