



## HR & COVID-19 Legislation Part I:

# Navigating FFCRA, Work Rules and Benefits in the Coronavirus World



# Jode Frick-Formiller

*PHR, SHRM-CP*

## **Firm Administrator Director of Human Resources**

### **Education**

Bachelors of Science in Management - Park University -  
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Bachelors of Science in Management, Human Resources  
Development - Park University - Parkville, MO

### **Accreditation**

PHR - Human Resources Certificate Institute

SHRM-CP - Society for Human Resources Management

### **Professional Memberships**

Society of Human Resource Management

Twin Cities Society of Human Resource Management

MN Society of Human Resource Management

Certified Public Accounting Firm Managers Association

Jode joined Boyum Barencheer in May 2019 as the Firm Administrator/Human Resources Director.

She has degrees in HR Development and Business Administration along with her PHR and SHRM-CP HR credentials.

Prior to BB, Jode worked in the Human Services Not-For-Profit field, Government Sector and For-Profit companies. As the head of HR, Jode works closely with all Departments to ensure the highest level of excellence in recruitment, training, compliance and employee retention.

Her passion is to develop and empower employees to make BB the industry leader. As the Firm Administrator, her goal is to create a work environment that is conducive to BB's values of trust, collaboration, determination, insight and curiosity.

Jode and her husband RJ enjoy spending time together traveling, exercising and spending as much time as possible with their two adult sons and their families.

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# Barb Sawdy

*CPA, CGMA*

Barb Sawdy came to Boyum Baren Scheer over 10 years ago with 15+ years of business, controller, and accounting experience. She has evolved into the firm's leader in complex sales tax, payroll, and accounting software issues. She also plays a vital role in the firm's Business Advisory Services department with training and assisting our accountants as they begin their careers. She likes being part of the widely-varied, experienced BB team working with clients and the diversity of businesses they represent. She said working at BB feels like family.

## Business Advisory Services Partner

### Education

- Bachelor of Business Administration, University of WI – Oshkosh

### Accreditation

- Certified Public Accountant
- Chartered Global Management Accountant

### Professional Memberships

- American Institute of Certified Public Accountants (AICPA)
- MN Society of Certified Public Accountants (MNCPA)
- Treasurer, Women of Today – Burnsville Chapter

Barb is a member of the Burnsville Chapter of Women of Today, a non-profit women's organization. She previously held the Board's Treasurer position.

When not quilting or reading, Barb is spending her extra time with family activities. She loves to travel and while she is an experienced traveler, she hopes to someday take a more extensive European vacation.

Barb and her husband, Bob are the parents of two children and live in Burnsville, Minnesota.

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*Penelope (Penny) Phillips focuses exclusively on counseling and representing employers in all areas of employment law, including FMLA, wage and hour, employment discrimination claims (including gender, age, religion, disability, national origin, and race), defamation, whistleblower, breach of contract and wrongful discharge. She also investigates complaints of employee misconduct (including harassment and offensive behavior). Penny has worked with and practiced before the state and federal courts, various state and federal agencies, including the Department of Labor, the Equal Employment Opportunity Commission, and state and local fair employment practices agencies.*

*Penny strongly believes in providing her clients with strategies and solutions (not just answers) based on quality human resources practices. She has a particular emphasis on wage and hour/FLSA matters. While an in-house attorney at SUPERVALU, she defended wage and hour cases throughout the country. She frequently conducts FLSA audits for companies, and is the author of the 2007 Wage & Hour Answer Book, A Guide for Human Resource Professionals, published by Aspen Publishers (a leading information provider for attorneys, business professionals and law students).*

*Penny is also a frequent teacher and trainer on employment issues. She provides ongoing training to employers, managers, human resource personnel and other lawyers on matters such as the FMLA, ADA, wage and hour laws, hiring and firing, sexual and unlawful harassment, discrimination, conducting investigations, alcohol and drug testing, and reductions-in-force. She has spoken to companies and organizations throughout Minnesota, the Midwest, and the United States.*

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## FFCRA Basics

- Enacted March 18, 2020
- Effective **April 1, 2020**
- Two New Paid Leave Provisions:
  - Public Health Emergency Leave (“E-FMLA”)**
  - Emergency Paid Sick Leave (“EPSL”)**
- Leaves expire on December 31, 2020.

## FFCRA Basics (cont.)

- Costs of providing paid E-FMLA and EPSL are designed to be offset 100% by payroll tax credits.
- Credits are capped, but the caps are designed to align with the maximum payouts to employees under the FFCRA.

## Who's Covered?

- All ***private*** employers with “***fewer*** than 500 employees”
  - Includes all FT, PT, temp, employees on leave, and jointly employed employees.
  - Include employees of a related company if you meet “integrated employer test.”
  - Calculated “at the time the EE would take leave.”



## Who's Exempt?

- Small employers with fewer than 50 employees can be exempted **only if** the employer meets (and can document) one of the following:
  - (i) Providing the requested leave would result in the business's "expenses and financial obligations exceeding available business revenues and cause the small business to cease operating at a minimal capacity";

## Exempt Employers (cont.)

- (ii) The employee’s absence would entail a “substantial risk to the financial health or operational capabilities of the business because of their specialized skills, knowledge of the business, or responsibilities”; or
- (iii) “There are not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services provided by the Employee or Employees requesting [E-FMLA or EPSL], and these labor or services are needed for the small business to operate at a minimal capacity.”

## Are any Employees Exempt?

- Discretionary exemption for “**Health Care Providers**” and “**Emergency Responders.**”

## E-FMLA

- The FFCRA amends the FMLA to provide employees with up to 12 weeks of job-protected E-FMLA leave between April 1 and Dec. 31.
- Eligibility Expanded:
  - Employee must be on payroll for last 30 days.
  - Includes rehired employees laid off after March 1 who worked 30 of preceding 60 days.

## E-FMLA (cont.)

- Available **only if** employee can't work because child's school is closed or daycare is unavailable "due to COVID-19 related reasons."
- Total of 12 weeks of E-FMLA:
  - First 10 days (or 2 weeks) are unpaid.
  - Remaining leave (up to 10 weeks) are paid at 2/3 of "average regular rate."
- Pay is capped at \$200 per employee per day (or \$10,000 in total).

## EPSL

- Employers must provide **all** employees with a **new** bank of EPSL that can be used as a result of absences related to COVID-19.
- EPSL Bank (up to 80 hours):
  - Full-time = 80 hours
  - Part-Time = Weekly Scheduled Hours x 2
  - 6 month average for irregular hours.

## EPSL Uses

### **Employee is unable to work or telework because:**

1. EE is subject to a federal, state, or local quarantine or isolation order related to COVID-19;
2. EE has been advised by a health care provider to self-quarantine because of COVID-19;
3. EE is experiencing symptoms of COVID-19 and is seeking a medical diagnosis;

## EPSL Uses (cont.)

**Employee is unable to work or telework because:**  
(cont.)

4. EE is ***caring for*** an individual subject or advised to quarantine or isolation;
5. EE is ***caring for*** a son or daughter whose school or place of care is closed, or child care provider is unavailable, due to COVID-19; or
6. EE is experiencing substantially similar conditions.



## EPSL Uses (cont.)

- “Quarantine or Isolation Order”
  - Includes “orders that advise some or all citizens to ***shelter in place***, stay at home, quarantine, or otherwise restrict their own mobility.”
- An employee is eligible for EPSL ***only if*** being subject to the order prevents the employee from working or teleworking.



- **Key Question:** “Is the employee able to work ‘*but for*’ being required to comply with a quarantine or isolation order?”

## EPSL Uses (cont.)

- “Advised by HCP to Self-Quarantine”
  - May be based on HCP’s belief that EE “***is particularly vulnerable*** to COVID-19.”
- An employee is eligible for EPSL ***only if*** self-quarantining prevents the employee from working or teleworking.
  - Can the employee still telework?

## EPSL Uses (cont.)

- “Care for Son or Daughter if School is Closed or Place of Care is Unavailable”
  - Same as E-FMLA.
- Only available if “the employee needs to, and actually is, caring for his or her child.”
- “An employee does not need to take such leave if another suitable individual – such as a co-parent, co-guardian, or the usual child care provider – is available to provide care.”

## EPSL Pay

- Paid at the employee's "average regular rate" over a 6 month period.
  - "Regular rate" is defined by FLSA.
- EPSL is capped depending on usage:
  - \$511 per day (\$5,110 in the aggregate) if the leave is taken for an employee's own illness or quarantine.
  - \$200 per day (\$2,000 in the aggregate) if the leave is taken for the care for others or school closures.

## Coordinating E-FMLA and EPSL

- During first 2 weeks of E-FMLA, employee may **elect** to use EPSL (also paid at 2/3 of the “average regular rate”).
- During E-FMLA period, the employer and employee may agree to “supplement” the 2/3 wages with existing PTO or other accrued leave.

## Laid-Off or Furloughed Workers

- Employees are not eligible for EPSL or E-FMLA if they are laid off or if their employer does not otherwise have work for them.
- DOL FAQ #26:
  - “If your employer furloughs you because it does not have enough work or business for you, you are not entitled to then take paid sick leave or expanded family and medical leave. However, you may be eligible for unemployment insurance benefits.”

## Layoffs or Furloughs (cont.)

- The same is true if the employee's worksite closes (regardless of reason).
  - “If your employer closes your worksite, even for a short period of time, you are not entitled to take paid sick leave or expanded family and medical leave. However, you may be eligible for unemployment insurance benefits. This is true whether your employer closes your worksite for lack of business **or** because it was required to close pursuant to a Federal, State, or local directive.”



## Intermittent Leave

- Allowed for EPSL or E-FMLA *only if* the employer agrees.
  - If employee is teleworking, then employer and employee can agree to any increment of usage.
  - If employee is working in the office, the employee can only use EPSL or E-FMLA to care for a child whose school or place of care is closed.

## Continuation of Health Insurance

- Regulations require continuation of “group health insurance” during E-FMLA and EPSL:
- Additional tax credits for “qualified health plan expenses.”

## Documentation

- Employers should, at the very least, maintain:
  - The employee's name;
  - The date or dates for which leave is requested;
  - A statement of the COVID-19 related reason the employee is requesting leave and written support for such reason; and
  - A statement that the employee is unable to work, including by means of telework, for such reason.
- Additional documentation depending on the type of leave (e.g., name of HCP, name of school, etc.)

## Poster

- Notice must be posted “in a conspicuous place where employees or job applicants at a worksite may view it.”
  - Available at:  
[https://www.dol.gov/sites/dolgov/files/WHD/Pandemic/FFCRA-Employee Paid Leave Rights.pdf](https://www.dol.gov/sites/dolgov/files/WHD/Pandemic/FFCRA-Employee_Paid_Leave_Rights.pdf).
- Employer can also comply by distributing electronically (e.g., email or intranet) or via U.S. mail.

## Potential Liability

- E-FMLA
  - Employer is subject to same liability provisions under the FMLA, except that employers smaller than 50 employees are exempt from a private action.
- EPSL
  - Employer is considered to have failed to pay minimum wages under FLSA.

## Don't Forget About Paid Sick Leave

- Minneapolis PSL
  - SST Continues to apply as long as employees remain employed by their employer (i.e., no furloughs or layoffs).
  - Uses of SST include “closure by public official” and child’s “place of care” is closed.
  - Ordinance is triggered if the employee believes he is infected, but preemptive self-quarantines are not covered.
- No updates from St. Paul.

## What about Wage Theft?

- Wage Theft Notices
  - Required if the employer makes changes to “paid vacation, sick time, or other paid time-off accruals and terms of use.”
  - If original Wage Notice was already provided, then subsequent notice can simply be an email or document informing employees of their rights.
  - Minneapolis requires a signature, but is willing to be flexible given the pandemic.

## Example #1

- An employee is afraid to come to work because of contracting COVID-19.
  - Is the employee eligible for leave?
- Protected Leave Analysis
  - E-FMLA?
  - EPSL?
  - FMLA?
  - ADA/MHRA?





## **EEOC FAQs**

### ***Can an employee stay home under FMLA leave to avoid getting pandemic influenza?***

*The FMLA protects eligible employees who are incapacitated by a serious health condition, as may be the case with the flu where complications arise, or who are needed to care for covered family members who are incapacitated by a serious health condition. Leave taken by an employee for the purpose of avoiding exposure to the flu would not be protected under the FMLA. Employers should encourage employees who are ill with pandemic influenza or are exposed to ill family members to stay home and should consider flexible leave policies for their employees in these circumstances.*

## Example #2

- A pregnant employee receive a doctor's note advising her not to come to work until after the baby is born due to concerns related to COVID-19.
  - Is the employee eligible for leave?
- Protected Leave Analysis
  - E-FMLA?
  - EPSL?
  - FMLA?
  - ADA?
  - State requirements



# FURLOUGH VERSUS LAYOFF

What's the difference?



- Furlough – A short term leave of absence or temporary layoff.
- Lay-off – typically suggests that its permanent.

# UNEMPLOYMENT

- Are employees eligible for unemployment if I put them on a furlough?



# MINNESOTA UNEMPLOYMENT

## **Two Requirements for Eligibility:**

- Employee must work less than 32 hours
- Employee must receive less in earnings than his/her weekly unemployment benefit amount.

## **Weekly Unemployment Benefit Amount:**

- 50% of the employee's average weekly wage
- Capped at \$740 per week

## **Length of Benefits: 26 Weeks**

**Impact of Earnings:** If eligible to receive unemployment, 50% of any earnings deducted from weekly benefit amount.



## EXAMPLE CALCULATIONS

### Employee Weekly Wages @ \$1,500 (\$78,000 per year)

100% Furlough:

Yes, Eligible

Would receive \$740 per week plus \$600 under CARES Act

(\$1,500 \* 50% = \$750, so \$740 cap applies)



## EXAMPLE CALCULATIONS

### Employee Weekly Wages @ \$1,500 (\$78,000 per year)

25% Reduction in Pay (40 Hours to 30 Hours Per Week)

Not Eligible Because Employee Would Receive MORE Than His/Her Weekly Benefit Amount

(Weekly Benefit is \$740. At 75% of normal pay, employee would receive \$1,125 per week from the employer.)

50% Reduction in Pay (40 Hours to 20 Hours Per Week)

Not Eligible Because Employee Earning \$750 per week





## EXAMPLE CALCULATIONS

### Employee Weekly Wages @ \$1,500 (\$78,000 per year)

75% Reduction in Pay (40 Hours to 10 Hours Per Week)

Yes, Eligible

Would receive \$552.50 per week plus \$600 under CARES Act

(Weekly Benefit is \$740. At 25% of normal pay, employee would receive \$375 per week from the employer. 50% of those earnings (\$187.50) are deducted from the weekly benefit amount of \$740, which equals \$552.50.)

# BENEFITS

- What benefits am I required to offer if I place an employee on furlough?



# LAYOFF/FURLOUGH DOS AND DON'TS

- Don't be discriminatory in how you choose employees for a furlough or layoff.
- This is not the time to say, “Oh by the way, I've been meaning to talk to you about your performance. . . .”



# WHAT SHOULD YOU SAY?

- “We have made the difficult decision to place you on furlough.
- You are eligible for the following benefits . . .
- We encourage you to apply for unemployment. Here is the link . . .
- New notice to employees required by Government.



# WAGE AND HOUR ISSUES

## From the DOL

- If your business has a shortage of workers and is looking to “volunteers” to help out, be aware that the FLSA has stringent requirements with respect to the use of volunteers.
- In general, covered workers working for private, for-profit employers have to be paid at least the minimum wage and cannot volunteer their services.

# PAYMENT OF HOURLY EMPLOYEES

- Hourly employees must be paid minimum wage and overtime



## PAYMENT OF EXEMPT SALARIED EMPLOYEES

- The FLSA requires payment of at least \$684 per week on a "salary" basis for those employed as an exempt employee.
- A salary is a predetermined amount constituting all or part of the employee's compensation, which is not subject to reduction because of variations in the quality or quantity of the work performed.



- An employer must pay an exempt employee the full predetermined salary amount "free and clear" for any week in which the employee performs any work without regard to the number of days or hours worked.
- Deductions may not be made from the employee's predetermined salary for absences occasioned by the employer or by the operating requirements of the business.





- If the employee is ready, willing, and able to work, deductions may not be made for time when work is not available.
- All the rules above are subject to the general rule: There is no requirement that the predetermined salary be paid if the employee performs no work for an entire workweek.



# WHAT CAN I DO TO REDUCE COSTS?

- Full Week absences
  - One week on, one week off
- Reduced Pay - An employer may need to reduce the pay of an exempt employee but keep the hours the same
- Voluntary reductions in hours – an employer may seek volunteers to take time off due to lack of work.
  - The employee must volunteer to take the time and it must truly be completely voluntary.



## PROSPECTIVE REDUCTIONS IN PAY FOR A SALARIED EXEMPT EMPLOYEE DUE TO COVID-19

- An employer is not prohibited from **prospectively** reducing the predetermined salary amount to be paid regularly exempt employee during a business or economic slowdown.
- The reduction must be bona fide and not used as a device to evade the salary basis requirements.
- Such a predetermined regular salary reduction, not related to the quantity or quality of work performed, will not result in loss of the exemption, as long as the employee still receives on a salary basis at least \$684\* per week.



## PROSPECTIVE REDUCTIONS IN PAY FOR A SALARIED EXEMPT EMPLOYEE DUE TO COVID-19

- But, deductions from predetermined pay occasioned by day-to-day or week-to-week determinations of the operating requirements of the business constitute impermissible deductions from the predetermined salary and would result in loss of the exemption.
- The difference is that the first instance involves a prospective reduction in the predetermined pay to reflect the long term business needs, rather than a short-term, day-to-day or week-to-week deduction from the fixed salary for absences from scheduled work occasioned by the employer or its business operations.

# Questions from Chat

Disclaimer – we will get through as many as we can in the half hour allotted and will be posting the slides, tools and video recording within 24 hours of this webinar on our website. We will be working on posting up the Questions and Answers as fast as we can and also responding to emails and phone calls, please allow 36 hours for this. We apologize in advance for our delay. Thank you again for joining.

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