



Frequently Asked Questions For California Agriculture Employers During The COVID-19 Coronavirus Outbreak

A. Governor Newsom's Executive Order

1. Are we allowed to continue our agricultural operations? Agricultural employers are part of our Essential Critical Infrastructure Workforce. They are therefore permitted and indeed encouraged to continue to operate following the Governor's Executive Order. The U.S. Department of Homeland Security has determined that critical infrastructure describes the physical and cyber systems and assets that are so vital to the United States that their incapacity or destruction would have a debilitating impact on our physical or economic security or public health or safety. The nation's critical infrastructure provides the essential services that underpin American society. **We applaud and thank those critical infrastructure employers and workers for ensuring the stability of our Country during this period of time.**

Late on March 20, 2020, the Governor's office issued a list of "Essential Critical Infrastructure Workers" who are permitted to continue working while the Executive Order is in effect. That list may be found at <https://covid19.ca.gov/img/EssentialCriticalInfrastructureWorkers.pdf>

Aspects of the "Food and Agriculture" industry that are exempted from the Executive Order includes many aspects of agricultural operations. These include:

- Farm workers to include those employed in animal food, feed, and ingredient production, packaging, and distribution; manufacturing, packaging, and distribution of veterinary drugs; truck delivery and transport; farm and fishery labor needed to produce our food supply domestically.
- Farm workers and support service workers to include those who field crops; commodity inspection; fuel ethanol facilities; storage facilities; and other agricultural inputs.
- Animal agriculture workers to include those employed in veterinary health; manufacturing and distribution of animal medical materials, animal vaccines, animal drugs, feed ingredients, feed, and bedding, etc.; transportation of live animals, animal medical materials; transportation of deceased animals for disposal; raising of animals for food; animal production operations; slaughter and packing plants and associated regulatory and government workforce.
- Employees engaged in the manufacture and maintenance of equipment and other infrastructure necessary to agricultural production and distribution.

- Food manufacturer employees and their supplier employees—to include those employed in food processing (packers, meat processing, cheese plants, milk plants, produce, etc.) facilities; livestock, poultry, seafood slaughter facilities; pet and animal feed processing facilities; human food facilities producing by-products for animal food; beverage production facilities; the production of food packaging;
- Employees and firms supporting food, feed, and beverage distribution (including curbside distribution and deliveries), including warehouse workers, vendor-managed inventory controllers, blockchain managers, distribution.
- Workers supporting the sanitation of all food manufacturing processes and operations from wholesale to retail.
- Company cafeterias - in-plant cafeterias used to feed employees.
- Workers in food testing labs in private industries and in institutions of higher education.
- Employees of companies engaged in the production of chemicals, medicines, vaccines, and other substances used by the food and agriculture industry, including pesticides, herbicides, fertilizers, minerals, enrichments, and other agricultural production aids.

Any employees continuing to work at the agricultural employer should practice “social distancing” and their work stations should be at least six feet away from the work stations of other employees.

Violations of the Executive Order are subject to criminal penalties and civil liability might also apply if a agricultural employer remains fully open for business in violation of the Executive Order, especially if an employee or customer contracts COVID-19 as a result.

2. How long will the Executive Order remain in effect? There is no stated expiration date. It likely will remain in effect until the spread of the Coronavirus begins to diminish and/or the business community is able to convince state and local government leaders that the benefit of the restrictions is outweighed by the severe damage being inflicted on the economy.

B. Furloughs and Layoffs

1. What’s the difference between a furlough and a layoff? Neither term has any specific legal definition. In popular usage, “furlough” tends to describe a situation in which an employee’s hours are reduced, or even where the employee is not working at all, but the employee has not been terminated and remains eligible for benefits. It also suggests a short-term break in service where the employee is expected to return to work in the near future. A “layoff,” by contrast, refers to a termination of employment for economic reasons or business restructuring. The employment relationship is ended, not merely paused.

2. What are the pros and cons of furloughing employees? The pros are that furloughed employees are more likely to return to the agricultural employer when invited back, and you may be able to continue employees’ insurance coverage while they are on furlough without them having to pay COBRA premiums (but check with your insurance broker to ensure that this is permissible under your health insurance plan). Employees also may be eligible for unemployment benefits through the EDD for a furlough.

The cons are that you will likely have to pay out accrued vacation or PTO on the employee's last day prior to the furlough, as the Division of Labor Standards Enforcement takes the position that a furlough lasting more than two weeks amounts to a termination of employment. If a furlough were to run longer, you might become liable for "waiting time penalties" for not providing employees with final paychecks on their last day of work. Extended furloughs may also trigger notice obligations under the WARN Act, as discussed below. The other significant negative of furloughing employees is that they technical remain employees and can apply for paid federal sick leave and/or extended Family and Medical Leave Act leave under the new federal law on or after April 2, 2020.

3. If I lay off employees prior to April 2, 2020, will they be eligible for the new paid federal sick leave and extended paid FMLA benefit? No. The new law does not go into effect until April 2, 2020 and their termination of employment will have occurred before then.

4. If I lay off employees, will I need to provide advance notice under the WARN Act? You might have to provide WARN notices but under a recent modification of California's WARN Act for layoffs related to the Coronavirus situation you will not need to wait for 60 days to effect the layoff. If your agricultural employer has had 75 or more employees (including turnover) in the last year and you lay off 50 or more employees, you will need to provide notice under California's WARN Act to each affected employee (or to their union if they have one), chief elected official of the city and county governments where the agricultural facility is located, the local workforce development board, and the Employment Development Department. Those notices must state that the reason for the layoff is Governor Newsom's order and the notices to employees must advise them of their right to apply for unemployment benefits. If the layoff will affect fewer than 50 employees you might not need to issue WARN notices but be aware that under California's WARN Act, if 50 or more employees are laid off in any 30 day period notice must be provided, and under the federal WARN Act layoffs of more than 50 employees in a 90 day period for the same reason (such as the Coronavirus) will trigger WARN notice obligations retroactive to the first layoff.

5. If I lay off employees what must I pay them? You must pay their wages through the date of termination and their accrued vacation or PTO balance. You must pay any bonuses or incentives that are calculable at that time as well, or when they become calculable.

6. Must I provide severance pay? No. There is no legal requirement that you provide severance pay, and in most cases it will make no sense to do so if you plan to reinstate the employees as soon as you are able to reopen your agricultural employer. Severance pay might be a good idea, however, in the event you plan to permanently separate an employee and you get a signed release of claims in exchange.



7. If I lay off employees will they be eligible for unemployment benefits? Yes. California recently eliminated the week waiting period for unemployment benefits so benefits are available starting on the first day of unemployment.

8. If I lay off employees must we continue providing them health insurance? Each laid off employee who is a participant in your health plan must receive a COBRA notice, but if employees elect COBRA continuation coverage they will have to bear the cost.

9. Can I reduce the salary or hourly pay of employees who remain working at the agricultural employer? Yes. The only requirements are that (1) you provide advance notice prior to the pay period in which the reduction becomes effective, (2) you do not reduce hourly pay below the minimum wage (\$13.00 per hour, unless your local city minimum wage is higher), and (3) you do not reduce the salary of exempt employees lower than \$54,080.

C. Paid Sick Leave and Paid FMLA

1. Who is a “covered employer” subject to the new federal paid leave law? All private employers with fewer than 500 employees are subject to the law.

2. What does the new federal paid leave law require? The law requires that eligible employees receive paid sick leave for up to 80 hours, and that an additional 10 weeks of paid leave be provided to parents of children under age 18 whose school or daycare facility is closed because of the Coronavirus.

3. What makes an employee eligible for paid sick leave? Any employee, regardless of the amount of time the employee has worked for your agricultural employer, qualifies for the federal paid sick leave if one or more of the following conditions are met: (1) the employee is subject to a federal, state or local quarantine or isolation order; (2) the employee has been advised by a health care provider to self-quarantine; (3) the employee is experiencing symptoms of the virus and is seeking a medical diagnosis; (4) the employee is caring for an individual who is subject to an order of self-quarantine or who has been advised by a health care provider to self-quarantine; (5) the employee is caring for a son or daughter if school or child care is closed or unavailable; (6) the employee is experiencing “any other substantially similar condition” specified by the Department of Health and Human Services.

4. What is the rate of pay for the federal paid sick leave? For reasons (1) through (3) above, the rate of pay is 100% of the higher of the employee’s regular rate of pay, the federal minimum wage, or the local minimum wage. For reasons (4) through (6) above, the rate of pay is 2/3 of the higher of the employee’s regular rate of pay, the federal minimum wage, or local minimum wage. Both of these rates have both hourly and cumulative caps.



5. Are all employees eligible for the full 80 hours of emergency paid sick leave assuming they qualify? No. Full-time employees who qualify are paid for 80 hours. Part-time or irregularly scheduled employees should be paid for two weeks based on the average number of hours the employee worked during the last six months. If the part-time or irregularly scheduled employee has worked less than six months, the number of hours of paid sick leave is the reasonable expectation of the number of hours for which the employee was hired to work.

6. How does federal paid sick leave interact with other paid sick leave I provide to employees? The federal paid sick leave is in addition to other paid sick leave or PTO you provide. However, federal paid sick leave will not carry over to 2021. You may not require employees to use the other sick leave you provide before taking federal paid sick leave.

7. Which employees will be eligible for the new paid FMLA leave? This leave applies to employees who have been employed for only 30 days, unlike regular FMLA which requires employment for at least a year.

8. Which employees will qualify for the new paid FMLA leave? This leave may be taken only by an employee who is unable to work (or telework) due to the need to care for a son or daughter under 18 years of age because the child's school or daycare has been closed, or the child care provider is unavailable, due to the Coronavirus emergency.

9. How long may an employee take paid FMLA leave? For up to 12 weeks, but the first two weeks are unpaid. The employee may use federal paid sick leave or other accrued leave to cover those two weeks.

10. At what rate is paid FMLA paid? After the first 10 days, an employee is compensated at 2/3 of their regular rate of pay or regular salary subject to daily and cumulative caps.

11. How do I determine the "regular rate" for an hourly employee who is eligible for paid leave? The "regular rate" is determined the same way it is determined for payment of overtime. Combine hourly pay plus bonuses, incentive pay, and piece rate pay and divide by the number of hours worked during the applicable period. If an employee is not paid bonuses, commissions or piece rate pay, the "regular rate" is simply the hourly pay rate.

12. Do I have to restore an employee to his or her position after paid FMLA leave? Generally, yes. For employers with 25 or more employees, you have the same obligation as under traditional FMLA to return any employee who has taken paid FMLA leave to the same or equivalent position upon returning to work. Employers with fewer than 25 employees may be excluded from this requirement if the employee's position no longer exists due to an economic downturn or other circumstances caused by the Coronavirus situation. This exclusion is subject to the employer making reasonable attempts to return the employee to an equivalent position and requires an employer to make efforts to return the employee to work for up to a year following the employee's leave.



13. Can I apply for an exemption under this new law so I do not have to pay employees for either federal paid sick leave or paid FMLA leave. Yes, but only if you have fewer than 50 employees. An exemption will have to be requested from the U.S. Department of Labor. At this time there is no official guidance as to what documents or information you will need to present in order to request an exemption.

14. How do I know if an employee needs to take leave? Employees should make a specific request to take paid federal sick leave or paid FMLA leave. If the need for leave is foreseeable, the employee should provide notice to you as soon as is practical under the circumstances.

15. May I require the employee to show proof of the need for leave? Generally, yes. Forthcoming guidance from the U.S. Department of Labor will likely describe what kind of proof you may require, but there is a growing trend to disallow employers from asking for doctor's notes due to concern about the already overburdened health care system.

16. Will I be reimbursed for the paid federal sick leave and paid FMLA leave I provide? Yes, through a payroll tax credit when your next quarterly tax payment is made. If paid sick leave exceeds payroll taxes due, the Internal Revenue Service will issue a refund.

17. Do I have to post notices in the workplace about this new paid leave? Yes. The U.S. Department of Labor will issue model notices to be posted in the workplace.

D. General Employment Matters

1. What should we do if an employee notifies us that he or she has tested positive for Coronavirus? The employee should not be allowed to return to work without a medical clearance. Meanwhile, you must notify all employees (and customers, if known) who interacted with the employee in the past 14 days that an employee with whom they interacted has tested positive. *Do not reveal the name of the employee, though.* Deep-clean and sanitize the employee's work area and report the positive test result to the county health department for guidance regarding what additional steps might need to be taken.

2. What should we do if an employee tells us he or she has been exposed to someone who has tested positive for Coronavirus? If the employee is still working, send him or her home for 14 days of self-quarantine, and advise the employee to get medical attention (but do not require it as a condition of continued employment).

3. What should we do if we learn that an employee has recently returned from a trip to China, Iran, South Korea or Italy? Send the employee home for 14 days of self-quarantine, and advise the employee to get medical attention (but do not require it as a condition of continued employment).



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4. What should we do if an employee comes to work appearing sick with cold or flu symptoms but denies being exposed to someone known to have been diagnosed with Coronavirus? Send the employee home until he or she is better.

5. If an employee is absent for more than 3 days for an illness, can we require a doctor's note prior to the employee's return to work per our employee handbook? No. The Orange County Health Officer's Amended Health Order prohibits employers from requiring a doctor's note prior to returning to work from absence due to a respiratory illness, on account of the difficulty of getting in to see a doctor. If the employee was diagnosed with Coronavirus, however, a medical clearance should be required before the employee returns to work.

6. If an employee refuses to work out of a general fear of contracting Coronavirus virus, what should we do? Strictly speaking, employees may not refuse to work unless the work presents an imminent threat of death or serious injury, and the possibility of exposure to Coronavirus is not currently considered to meet that threshold. If the employee is 65 years of age or older or is otherwise at higher risk for serious complications from COVID-19, the employee should be allowed to take accrued leave or unpaid time off.

7. Must I allow employees to work at home? Generally, no, unless it is as a reasonable accommodation under the Americans with Disabilities Act. Many jobs at agricultural employers are not capable of being performed at home.

8. May I require employees to work from home? Yes. If employees work at home using their own computer, cell phone and/or internet connection, they will need to be reimbursed a portion of the cost. You should also implement and have employees sign a Remote Work Policy that sets forth the terms of the work-at-home arrangement in terms of no overtime without express permission, meal and rest breaks, and applicability of the agricultural employer's attendance, harassment, internet and computer policies, among others.

Should you have questions or need further information, contact Alden Parker at (916) 210-0404 or aparker@fisherphillips.com. For more information on the Coronavirus and COVID-19, go to www.fisherphillips.com.

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