



California Auto Dealers' Workplace FAQs Regarding COVID-19 Coronavirus

Insights

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California is under a shelter-in-place order that threatens to impact businesses throughout the state. Meanwhile, the “[Families First Coronavirus Response Act](#)” will take effect on April 1, 2020, ushering in an emergency expansion of the federal Family and Medical Leave Act and federal paid sick, among other things. The [Fisher Phillips Automotive Dealership Practice Group](#) has collected the most frequently asked questions from California dealerships and assembled our best guidance in one source. For an in-depth discussion of many of these topics, you can access our firm’s [Comprehensive and Updated FAQ for Employers on the Covid-19 Coronavirus](#).

CALIFORNIA’S EXECUTIVE ORDER

Are we allowed to continue operating our dealership?

This is an evolving subject as there are inconsistent state and county orders. A blanket exception for automobile dealerships to remain open does not exist in Governor Newsom’s March 19 Executive Order, but service and parts departments were authorized as essential. On March 20, the state provided updated guidance.

In addition to confirming that automotive “repair and maintenance” facilities provide essential services and should stay open, additional guidance indicated that counties could not provide broader rights to conduct business but could be more restrictive. Under the updated guidance, there is far less certainty that sales departments can operate as normal anywhere in the state.

Violations of the Executive Order are subject to criminal penalties, and various theories of civil liability might also apply if a dealership remains open for business, especially if an employee or customer contracts COVID-19 as a result. Because of this, sales operations should be reduced to a minimum or closed. To the extent employees are able to work remotely they should do so. Having only managers and necessary accounting and administrative employees working at the dealership would be less risky than having your dealership sales department open to the public for business. Of course, any employees working at the dealership should practice “social distancing” and their work stations should be at least six feet away from the work stations of other employees.

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 COVID-19 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.

FURLUOUGHs AND LAYOFFS

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 the 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 or business restructuring. The employment relationship is ended, not merely paused.

What are the pros and cons of furloughing employees?

The pros are that furloughed employees are more likely to return to the dealership 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 such is permissible under your health insurance plan). Employees may also be eligible for unemployment benefits through the EDD for either type of 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 technically 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 1, 2020.

If I lay off employees prior to April 1, 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 1, 2020 and their termination of employment will have occurred before then.

If I lay off employees, will I need to provide advance notice under the WARN Act?

You might have to provide WARN notices but you will not need to wait for 60 days to effect the layoff. If your dealership 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, to the Local Workforce Development Board, and the chief elected official of each city and county government. Those notices have detailed requirements, and the recent Executive Order added two new components: the notice 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.

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 commissions that are calculable at that time as well, or when they become calculable.

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 dealership. Severance pay might be a good idea in the event you plan to permanently separate an employee and you get a signed release of claims in exchange.

If I lay off employees will they be eligible for unemployment benefits?

Yes. California recently eliminated the week-long waiting period for unemployment benefits so they are available starting on the first day of unemployment.

If I lay off employees must we continue providing them health insurance?

Each laid off employee must receive a COBRA notice, but if employees elect COBRA continuation coverage, they will have to bear the cost.

Can I reduce the salary or hourly pay of employees who remain working at the dealership?

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), and (3) you do not reduce the salary of exempt employees lower than \$54,080.

PAID SICK LEAVE AND PAID FMLA

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. For most dealerships and dealer groups that have a combined total of fewer than 500 employees, this is an easy analysis. For dealer groups with multiple stores and an aggregate employee count in excess of 499 employees, whether they are a covered employer depends on many factors under what are referred to as the "integrated" and "joint employer" tests. Consult with your labor attorney if you need to determine whether you are a covered employer under the emergency law.

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 COVID-19 coronavirus.

What makes an employee eligible for paid sick leave?

Any employee, regardless of the amount of time the employee has worked for your dealership, 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.

What is the rate of pay for the emergency 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.

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.

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 sick leave you provide before taking federal paid sick leave.

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.

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.

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.

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.

How do I determine the “regular rate” for an 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 or commissions paid 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.

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 COVID-19 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.

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.

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 is practical under the circumstances.

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. However, this may change as there is a growing trend to disallow employers from asking for doctor’s notes due to concern about the already overburdened system.

Will I be reimbursed for the paid federal sick leave and paid FMLA leave I provide?

Yes, and far faster than originally projected. On the evening of March 20, the Department of the Treasury published guidance that explained the process by which dealers could be reimbursed. The guidance indicated the tax credits were designed to “immediately and fully” reimburse employers, and not require waiting for quarterly tax payments. Dealers should consult their tax advisors as to the specific of the tax credit procedure outlined.

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.

GENERAL EMPLOYMENT MATTERS**What should we do if an employee notifies us that they have tested positive for COVID-19 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.

What should we do if an employee tells us they have been exposed to someone who has tested positive for COVID-19 coronavirus?

If the employee is still working, send them 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).

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).

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 COVID-19 coronavirus?

Send the employee home until they are better.

What if a customer informs us that they have been diagnosed with COVID-19 coronavirus?

Notify the employee(s) who interacted with the customer that the customer has tested positive. Send those employees home for 14 days of self-quarantine and advise them to get medical attention (but do not require it as a condition of continued employment). If the customer test drove but did not purchase a vehicle, deep clean and sanitize the vehicle. Report the customer's positive test result to the county health department for guidance regarding what additional steps might need to be taken.

If an employee is absent for more than three days for an illness, can we require a doctor's note prior to the employee's return to work per our employee handbook?

Not likely. The Orange County Health Officer's Amended Health Order, for example, 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 COVID-19 coronavirus, however, a medical clearance should be required before the employee returns to work.

If an employee refuses to work out of a general fear of contracting COVID-19 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 COVID-19 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.

Must I allow employees to work at home?

Generally, no, unless it is as a reasonable accommodation under the Americans with Disabilities Act (ADA). Many jobs are not capable of being performed at home.

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 dealership's attendance, harassment, internet and computer policies, among others.

CONCLUSION

We will continue to monitor this rapidly developing situation and provide updates as appropriate. Make sure you are subscribed to [Fisher Phillips' alert system](#) to gather the most up-to-date information. If you have any questions about this situation or how it may affect your school, please contact your Fisher Phillips attorney, any attorney in [our California offices](#), or any member of our [Dealership Practice Group](#). You can also review our nationwide [Comprehensive and Updated FAQs for Employers on the COVID-19 Coronavirus](#) and our [FP Resource Center For Employers](#), maintained by our Taskforce.

This Legal Alert provides an overview of a specific developing situation. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.

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