



# Fisher Phillips Dealership Practice Group Updated FAQs On COVID-19 For Automobile Dealerships

Insights

3.30.20

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 dealerships across the country and assembled our best guidance in one source, **fully updated as of March 30, 2020.**

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](#). Please note that this FAQ for Dealerships is of general applicability and state laws may also apply. Call your Fisher Phillips attorney if you need clarification on any topic discussed in this FAQ or to discuss specific state laws that may apply.

## FEDERAL PAID SICK LEAVE AND EXPANDED FMLA

### Who is a “covered employer” subject to the federal emergency law?

All private employers with “fewer than 500 employees” are subject to the law. For most dealerships and dealership groups that have a combined total of fewer than 500 employees, this is an easy analysis. For dealership groups with multiple stores with 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 Fisher Phillips attorney if you need to discuss whether you are a covered employer under the emergency law.

### UPDATED ANSWER (3/30/20)

#### What does the emergency law require me to do with respect to employees?

The primary impact upon dealerships are the two different requirements to pay *eligible* employees for absences occasioned by the emergency. One provision is “emergency paid sick leave” up to 80 hours at the employee’s regular rate or weekly salary. The other provision requires employers to provide up to 12 weeks of “expanded family and medical leave” to eligible employees. The FFCRA goes into effect on April 1, 2020 and the law is not retroactive.

#### How does an employee qualify for emergency paid sick leave?

Any employee, regardless of the amount of time they have worked for the dealership, qualifies for the emergency 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.

### **UPDATED ANSWER (3/30/20)**

#### **What is the rate of pay for the emergency paid sick leave?**

For reasons 1-3 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 4-6 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. Due to various methods for paying dealership employees, we advise seeking guidance when calculating pay required under this emergency law.

#### **Are there caps on the amount of emergency paid sick leave for each employee?**

Yes. For reasons 1-3 above, the cap is \$511 per day and \$5,110 in the aggregate per employee. For reasons 4-6, the cap is \$200 per day or \$2,000 in the aggregate per employee.

#### **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 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 emergency paid sick leave interact with other paid sick leave I provide to employees?**

The emergency paid sick leave is in addition to other paid sick leave you provide. However, emergency paid sick leave will not carry over to 2021. Employers cannot require employees to take employer provided leave in lieu the emergency paid leave.

#### **Does the expanded family and medical leave law supplant the traditional Family and Medical Leave Act (FMLA)?**

No. The expanded family and medical leave is in addition to your obligations under the traditional Family and Medical Leave Act (FMLA). In most situations, the traditional FMLA rules and requirements apply to expanded family and medical leave.

### **UPDATED ANSWER (3/30/20)**

#### **Which employees will be eligible for expanded family and medical leave?**

This leave applies to employees who have been employed for at least 30 calendar days immediately prior to the day the employee's leave would begin. For example, if an employee wants to take leave on April 1, 2020, the employee would need to have been on your payroll as of March 2, 2020. Employees who are laid off and later rehired will be able to count their previous stint of employment towards the 30-day threshold.

### **UPDATED ANSWER (3/30/20)**

#### **Which employees will qualify for expanded family and medical leave?**

An eligible employee is entitled to 12 weeks of job protected paid leave only if the employee is unable to work (or telework) due to the 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 care provider is unavailable, due to the public health emergency as declared by a federal, state, or local authority. A "son or daughter" is the employee's own child, which includes a biological, adopted, or foster child, a stepchild, a legal ward, or a child for whom the employee has standing in loco parentis – someone with day-to-day responsibilities to care for or financially support a child. Under the FFCRA a "son or daughter" is also an adult son or daughter (i.e., one who is 18 years of age or older), who (1) has a mental or physical disability, and (2) is incapable of self-care because of that disability.

### **UPDATED ANSWER (3/30/20)**

#### **Are there limits or a cap on expanded family and medical leave?**

Yes. The first 10 days of expanded family and medical leave is unpaid. However, an employee may elect (but cannot be required) to substitute any accrued paid leave such as vacation or other sick leave to cover some or all of the 10-day unpaid period. If the employee is eligible for 80 hours of the emergency paid sick leave, this 80 hour period can be used for the first 10 days of expanded family and medical leave. After the first 10 days, an employee is compensated at 2/3 of their regular rate of pay. The total cap is \$200 per day or \$10,000 in the aggregate per employee.

#### **Do I have to restore an employee to their position after the emergency paid sick leave and expanded family and medical 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 emergency FMLA 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 public health emergency.

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.

### **UPDATED QUESTION AND ANSWER (3/30/20)**

#### **If I have fewer than 50 employees, can I completely exempt my business from the requirements**

## of the FFCRA?

No. There is an exemption for a business with fewer than 50 employees, but the only way to invoke the exemption is if an employee seeks emergency paid sick leave or expanded family and medical leave for child-care, which is qualifying reason #5 under the emergency paid sick leave provision. If your employee has any of the other qualifying reasons for emergency paid sick leave, the employee can request paid leave.

Solely for the child care reason, you do not have to grant either emergency paid sick leave or expanded family and medical leave to an employee if doing so would jeopardize the viability of your business as a going concern. You may claim this exemption if an authorized officer of your business has determined that: 1) the provision of emergency paid sick leave or expanded family and medical leave would result in the business's expenses and financial obligations exceeding available business revenues and cause your business to cease operating at a minimal capacity; 2) the absence of the employee or employees requesting paid leave 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 3) 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 paid leave, and these labor or services are needed for the small business to operate at a minimal capacity. You do not have to apply for an exemption with the Secretary of Labor.

## UPDATED ANSWER (3/30/20)

### How do I determine the “regular rate” for an employee who is eligible for paid leave?

The regular rate of pay used to calculate paid leave is the average of an employee's regular rate over a period of up to six months prior to the date on which leave is taken. If an employee has not worked for an employer for six months, the regular rate used to calculate the paid leave is the average of the regular rate of pay for each week the employee has worked for the employer.

Dealerships should continue to follow employee pay plans. Where a pay plan provides for a guarantee, bonus, or commission, it should be paid unless the plan provides otherwise. Salaried, exempt employees have a salary/guarantee requirement that must be met each week to maintain the exemption such that if any work is performed in the workweek, the dealership must pay the salary and can only dock it (without supplementing from PTO, vacation, sick, etc.) in limited circumstances.

All other employees are generally paid only for work performed and/or produced. For example, an hourly employee must only be paid for hours worked and a commissioned employee must only be paid on commissions generated. However, employees subject to minimum wage (and, if applicable, overtime requirements) must still be compensated properly for all hours worked. If employees are placed on furlough or terminated, state law may require payment as early as the last day worked.

Any changes to pay plans should only be made prospectively and in writing signed by the employee.

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### **NEW QUESTION AND ANSWER (3/30/20)**

#### **When calculating pay due to employees, are overtime hours included?**

Yes. The FFRCA requires you to pay an employee for hours the employee would have been normally scheduled to work even if that is more than 40 hours in a week. However, the emergency paid sick leave requires paid sick leave only up to 80 hours over a two-week period. For example, an employee who is scheduled to work 50 hours a week may take 50 hours of paid sick leave in the first week and 30 hours of paid sick leave in the second week. In any event, the total number of hours paid under the Emergency Paid Sick Leave Act is capped at 80.

### **NEW QUESTION AND ANSWER (3/30/20)**

#### **Does the emergency law change pay days?**

No. Dealerships should continue to pay employees on their regularly set pay dates. At this time, we are not aware of any laws providing for delayed payments.

#### **How do I know if an employee needs to take leave?**

Employees should make a specific request to take emergency paid leave. If the need for leave is foreseeable, the employee should provide notice to you as is practical under the circumstances.

### **NEW QUESTION AND ANSWER (3/30/20)**

#### **Is an employee required to provide documentation supporting the need to take leave under the emergency law?**

You can require that an employee provide documentation in support of the paid leave that is requested, as specified in applicable IRS forms, instructions, and information. For expanded family and medical leave, you can require the employee to provide additional information in support when the leave is requested to care for a child whose school or place of care is closed, or child care provider is unavailable, due to COVID-19-related reasons. For example, this may include a notice of closure or unavailability from the child's school, place of care, or child care provider, including a notice that may have been posted on a government, school, or day care website, published in a newspaper, or emailed from an employee or official of the school, place of care, or child care provider.

If an employee requests leave but is unable to provide, at that time, certification from a health care provider of the need for leave, then document your conversations with the employee (including the date the conversation occurred and substance of the conversation) and maintain these notes for future use.

### **NEW QUESTION AND ANSWER (3/30/20)**

#### **What records do I need to keep when my employee takes paid sick leave or expanded family and medical leave?**

Employers that provide emergency paid sick leave and expanded family and medical leave are eligible for reimbursement of the costs of that leave through refundable tax credits. If you intend to claim a tax credit for your payment of the wages, you should retain appropriate documentation in your records. You should consult Internal Revenue Service (IRS) applicable forms, instructions, and information for the procedures that must be followed to claim a tax credit, including any needed substantiation to be retained to support the credit. You are not required to provide leave if materials sufficient to support the applicable tax credit have not been provided.

If an employee takes expanded family and medical leave to care for his or her child whose school or place of care is closed, or child care provider is unavailable, you may also require your employee to provide you with any additional documentation in support of such leave, to the extent permitted under the certification rules for conventional FMLA leave requests. For example, this could include a notice that has been posted on a government, school, or day care website, or published in a newspaper, or an email from an employee or official of the school, place of care, or child care provider.

#### **UPDATED ANSWER (3/30/20)**

##### **Do I have to post notices in the workplace about the emergency paid leave?**

Yes. The Department of Labor issued a notice on March 25, 2020 that needs to be posted in the workplace. Each covered employer must post the notice in a conspicuous place on its premises. An employer may satisfy this requirement by emailing or direct mailing this notice to employees or posting this notice on an employee information internal or external website. You are not required to post this notice in multiple languages, but the Department of Labor is working to translate it into other languages. There is no requirement that the notice be sent to employees who are laid off prior to April 1, 2020.

##### **Can an employee refuse to report to work even if the employee is not eligible for paid leave under the emergency law?**

Generally, no. As long as the dealership remains open, you have the right to expect that employees who do not need to take emergency leave or who are ineligible to take emergency leave will continue to report to work. However, please note that Occupational Safety and Health Administration (OSHA) and National Labor Relations Act (NLRA) considerations may apply in this scenario – check our [Comprehensive FAQs](#) for a more detailed discussion.

#### **UPDATED ANSWER (3/30/20)**

##### **How do I get reimbursed for this paid leave from the federal government?**

Employers are entitled to a refundable tax credit against the employer portion of Social Security taxes equal to 100% of the qualified sick leave wages paid for each calendar quarter. Only employers with fewer than 500 employees are eligible for this tax credit. Under the recently passed CARES Act, employers may be eligible for government backed loans to cover payroll costs and other expenses.



This CARES Act is complex. If you need guidance on how to apply for a loan under the CARES Act, please contact your Fisher Phillips attorney.

**If an employee does not need to take paid leave, can I offer an incentive for an employee to come to work so I can stay open?**

Probably yes. But, if an employee qualifies for the paid emergency sick leave or emergency family and medical leave, we do not advise offering an incentive for the employee to remain working in lieu of taking the paid leave that the employee is entitled to take. This could be viewed as coercion or interference with an employee's legal rights.

## **REMOTE WORK**

**Can I allow employees to work from home?**

Yes, where this is practical. If hourly paid employees are allowed to work from home, the employees must accurately record their work time. All employees who are allowed to work remotely should be informed that regular workplace policies apply to them. If an employee's job duties are such that they cannot work from home and perform their duties, you are under no obligation to allow the employee to work from home. Call your Fisher Phillips attorney to determine whether you should have employees who work from home sign a "Emergency Remote Work" policy.

**Am I required to allow employees to work from home?**

This law imposes no such requirement, but you may have consider doing so as an accommodation under the Americans with Disabilities Act (ADA).

## **NEW QUESTION AND ANSWER (3/30/20)**

**Can an employee request to take emergency paid sick leave or expanded family and medical leave intermittently rather than in full day blocks?**

Generally, no. Unless an employee can telework, emergency paid sick leave for qualifying reasons related to COVID-19 must be taken in full day increments for qualifying reasons ##1, 2, 3, 4, and 6.

For qualifying reason #5, the child care reason, intermittent leave may be taken but only if the employer consents to the arrangement. For example, if an employee needs to take paid leave related to child care on Monday, Wednesday, and Friday, but can work on Tuesday and Thursday, the employer may allow this arrangement. The Department of Labor encourages employers and employees to collaborate to achieve flexibility and meet mutual needs, and the DOL will be supportive of voluntary arrangements that combine telework and intermittent leave for child care.

## **WORKPLACE SAFETY**

**Do I have to allow an employee to wear a mask or gloves while at work?**

No, generally this is not required. As a practical matter, employers should consider allowing these types of personal protective equipment if it will not unduly interfere with your business operations.

**What should I do if an employee informs me that they are sick but they are not sure if they have the virus?**

First, you should instruct the employee to stay home, consult with a healthcare professional when they can do so, and stay in communication with the dealership. Second, to the extent the employee routinely works in close proximity to other employees, you can inform the other employees that someone (without specifically identifying the employee) is at home sick and the other employees may take off from work if they feel the need to do so.

**Can I take the temperature of an employee prior to allowing the employee to work at the facility?**

Generally, yes, at least for now. We advise that employees should be presented with a notification form that contains a waiver. Contact your Fisher Phillips attorney if you want to take the temperature of employees.

**What should I do if an employee reports that they have the virus or if they suspect they have the virus and is under a quarantine order?**

This scenario elevates the notification requirements for other employees in the workplace. For other employees who routinely work in close proximity with the quarantined employee or who came into close contact with the employee during the previous 14 days, those employees should be informed, and they should be instructed to stay at home for at least 14 days and consult with a healthcare provider when they can. For other employees who did not work in close proximity with the sick employee, those employees should likewise be informed but there is no requirement that those employees stay home unless they too are feeling sick. The sick employee's workspace should be shut down and disinfected, preferably with the use of an outside service.

**What can I request of customers who visit the dealership?**

Hopefully, customers who are sick or exhibiting symptoms of the virus will not visit your dealership. Under some circumstances, you can inform the customer that you want to take their temperature before coming into a facility. Customers should also be informed that employees have been instructed to practice social distancing with customers. You may consider temporarily halting test drives for a few weeks so that an employee and a customer are not in close proximity in a car during a test drive.

**NEW QUESTION AND ANSWER (3/30/20)**

**What is our liability or exposure to employees that are interacting with customers or driving and may get sick with COVID-19 as a result of that work?**

If an employee claims that they contracted COVID-19 at work or because of work, that claim should be immediately reported to your workers' compensation carrier for handling. Obviously, if an employee believes that they were exposed to COVID-19 or is experiencing symptoms related to COVID-19, that employee should stay home and consult with a health care provider as soon as possible.



## **WORK REDUCTIONS AND LAY-OFFS**

**UPDATED ANSWER (3/30/20)**

### **What is the difference between a “furlough” and a “layoff”?**

Many people use these terms interchangeably. In most instances, the type of action you take is more important than the term you use.

**Furlough** is a term most commonly associated with continued employment with a reduced schedule and a reduction in hours. In other words, the employee remains actively employed even if working in a greatly limited capacity. Employees in this status would be considered employed for purposes of emergency paid sick leave and EFMLA. Generally, the employer expects the furloughed employee to return to full time status at some point.

**Layoff** is a term generally used when an employer cut ties with an employee and the employee is providing no services nor receiving no wages or other benefits from the employer while laid off. In other words, the employment relationship is over, at least for now. The employer may decide to return the laid off employee back to her previous status but that outcome is to be determined. Someone in layoff status as described herein generally would not be eligible for paid sick leave.

### **Can I furlough employees during this public health emergency before or after 4/1?**

Generally, yes. However, the emergency paid sick leave and expanded family and medical leave will apply to an employee if the furlough occurs after April 1, 2020 and an employee has already qualified for paid leave and is taking paid leave. In this case, you would be required to pay the leave up to the furlough date. Also, other laws will apply, such as Title VII and the Fair Labor Standards Act (FLSA). Before you engage in a furlough of employees, we recommend that you first consult with your Fisher Phillips attorney.

### **Can I lay off employees during this public health emergency before or after 4/1?**

Generally, yes. However, the emergency paid sick leave and expanded family and medical leave will apply to an employee if the lay-off occurs after April 1, 2020 and an employee requested emergency paid leave or is taking the leave prior to the announcement of the lay-off. In this case, you would be required to pay the leave up to the lay-off date. Also, other laws will apply, such as Title VII of the Civil Rights Act. Before you engage in a lay-off of employees, we recommend that you first consult with your Fisher Phillips attorney.

### **If our employees are no longer working, are they still entitled to group health plan coverage?**

First, you must determine what type of employment action is taken. If an employee is being told that a layoff or furlough is temporary and that they may return after a short period, such as two to four weeks, then it is not likely a termination, but rather, a temporary period where the employee is being asked to not work. If a layoff or furlough is being communicated in such a way that the employee may or may not be called back to work, then it is likely a termination. Each situation should be

analyzed carefully, and it is possible that an employer will treat different groups of employees differently.

Second, the employer must apply the terms of the group health plan based upon the type of employment action being taken. If the employee is terminated, then COBRA should be offered pursuant to the terms of the group health plan. If an employee is not being terminated, then you must check your group health plan document (or certificate of coverage if your plan is fully insured) to determine how long employees who are not actively working may remain covered by your group health plan. Once this period expires, active employee coverage must be terminated (unless the insurance carrier or self-funded plan sponsor otherwise agrees to temporarily waive applicable eligibility provisions), and a COBRA notice must be sent.

If you would like to waive applicable plan eligibility provisions, you should first make sure that any insurance carriers or stop-loss coverage insurance carriers agree to cover claims relating to participants who would otherwise be ineligible for coverage.

### **What happens to group health plan coverage if employees are not working and unable to pay their share of premiums?**

In the normal course of events, group health plan coverage will cease when an employee's share of premiums is not timely paid. However, several actions might be taken that could allow coverage to continue. The insurance carrier providing the health coverage may voluntarily continue the coverage while the emergency is sorted out and until an employer reopens its doors. More likely, the employer may arrange with the insurance carrier providing health coverage to pay the employees' share of premiums to keep coverage in place (at least temporarily) and possibly until the employer can reopen its doors. Each situation will be different, depending upon the insurance carrier and the relationship between the employer and the insurance carrier. Therefore, each factual situation will need to be individually assessed.

### **If an employee is laid off or furloughed, can the employee apply for unemployment compensation?**

Yes. Unemployment compensation is governed by state law and administered by state agencies. Under this emergency law and the recently passed CARES Act, it is likely that states will relax certain rules and regulations so that affected workers will be eligible for unemployment benefits.

### **Do I have WARN notice obligations if I have a mass lay off or business closure?**

It depends. The federal WARN law contains exceptions for unforeseeable business circumstances. However, because the length of the shutdown or lay-off will be unknown, you should consult with your Fisher Phillips attorney to determine whether the federal WARN law applies and whether a state WARN law applies.

### **UPDATED ANSWER (3/30/20)**

### **If I am ordered by a state or local authority to close my dealership, do I have to pay my employees for any length of time?**

Many states and municipalities are issuing “stay at home” or “shelter in place” orders or proclamations. Generally, these orders have deemed a dealership service department an “essential” business and, therefore, employees who work in or support the service department are deemed essential and can continue to report to work. Some of these orders state that a dealership sales department is not essential and, therefore, the sales employees are non-essential employees and must not report to work.

Recently updated information from the Department of Labor suggests that a government mandated closure or a “stay at home” order for non-essential employees is not a qualifying reason for paid leave under the FFCRA. Keep in mind, however, that the DOL has not yet issued formal regulations and the answer to this question is subject to change.

### **If I have to close, will my business disruption insurance apply to protect me?**

The answer to this question depends on the specific language of your insurance policy or policies. You should direct this question to your insurance broker. Our collective experience is that most business disruption insurance policies contain exclusions for public health emergencies.

## **MISCELLANEOUS**

### **Can I modify pay plans for employees during the emergency?**

Generally, yes. However, if the pay plan is designated as a contract of employment, you will have to continue to abide by its terms. This is one area where state laws may have a significant impact on what you can do. Any changes to pay plans should only be made prospectively and in writing signed by the employee. Please consult your Fisher Phillips attorney if you are considering making changes to pay plans.

## **NEW QUESTION AND ANSWER (3/30/20)**

### **What are requirements for any new hires after 4/1?**

New hires are basically treated the same with one exception as noted below. For example, a new hire who is hired on April 4 can request emergency paid sick leave on April 5, as long as the new hire has a qualifying reason. For expanded family and medical leave, however, the new hire would not be able to request the expanded leave until the new hire has worked at least 30 days. And, keep in mind that the only qualifying reason for expanded family medical leave is the child-care reason.

## **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 any member of our Dealership Practice Group or your Fisher Phillips attorney. 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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