



# 10-Point Plan For Restaurant And Hospitality Employers During The COVID-19 Coronavirus Outbreak

Insights

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Restaurants and hospitality businesses are on the front lines of dealing with the COVID-19 coronavirus outbreak. What should you consider in the coming days, weeks, and months to deal with the COVID-19 coronavirus crisis? Below we have provided both an update on the latest federal and state rules relating to coronavirus and a 10-point plan you should review and consider adopting.

## **Families First Coronavirus Response Act Ushers In Paid Sick Leave and Emergency Family and Medical Leave**

In an effort to boost the government's response to the COVID-19 coronavirus outbreak, the Families First Coronavirus Response Act (FFCRA) was signed into law on March 18, 2020. It includes many provisions which would drastically affect restaurant and hospitality employers, such as paid sick leave for employees impacted by COVID-19 and those serving as caregivers for individuals with COVID-19. Here are some of the highlights of the law.

### **Paid And Unpaid Leave For Coronavirus-Related Reasons**

There are several provisions relating to employees who are forced to miss work because of the COVID-19 outbreak, including an emergency expansion of the Family Medical Leave Act (FMLA), a new federal paid sick leave law, and other new rights.

### ***Emergency Family And Medical Leave Expansion Act***

- **Expanded Coverage And Eligibility** – The Act significantly amends and expands the FMLA on a temporary basis. The current employee threshold for coverage would be changed from only covering employers with 50 or more to employers covering any workplace with fewer than 500 employees. It also lowers the eligibility requirement such that an employee who has worked for the employer for at least 30 days prior to the designated leave (those hired on or before March 2, 2020) is eligible to receive paid family and medical leave. This means that thousands of employers not previously subject to the FMLA must provide job-protected leave to employees for a COVID-19 coronavirus-designated reason.
- **Reasons For Emergency Leave** – Specifically, any individual employed by the employer for at least 30 days (before the first day of leave) may take up to 12 weeks of paid, job-protected leave to allow the employee to care for the employee's child if the child's school or place of care (including if the childcare provider is unavailable) has been closed due to a public emergency. Initially the bill contained additional reasons for the emergency paid FMLA leave. However, the

bill was amended and now only has one reason why an employee may qualify for the paid FMLA leave. The U.S. Department of Labor has also issued guidance that suggests that if employers send home workers and stop paying them, these workers are not eligible for emergency family and medical leave. These reasons include because the employer has no work for the employee, has closed its business or pursuant to a federal, state, or local directive.

- **Paid Leave** – The first 10 days of Emergency FMLA may be unpaid, but an employee may elect to substitute any accrued paid time off, including vacation or sick leave, to cover some or all of the 10-day unpaid period. After the 10-day period, the employer must pay full-time employees at two-thirds the employee's regular rate for the number of hours the employee would otherwise be normally scheduled. This pay is capped at \$200 per day and \$10,000 in the aggregate, per person. Employees who work a part-time or irregular schedule are entitled to be paid based on the average number of hours the employee worked for the six months prior to taking Emergency FMLA. Employees who have worked for less than six months prior to leave are entitled to the average number of hours the employee would normally be scheduled to work. Employers with bargaining unit employees would apply the Emergency FMLA provisions consistent with the bargaining agreement.
- **Expanded Definitions** – The Act also expands the definition of who is eligible as a "parent" under FMLA, which includes a parent-in-law of the employee, a parent of a domestic partner of the employee, and a legal guardian or other person who served as the employee's parent (also known as in loco parentis) when the employee was a child.
- **Small Business And Other Exemptions** – The bill also gives the Secretary of Labor the authority to issue regulations to exempt some small business with fewer than 50 employees (when the imposition of such requirements would jeopardize the viability of the business as a going concern), and to exclude certain healthcare providers and emergency responders from the list of those employees eligible for leave. Based on its recent guidance, the DOL appears to intend to provide criteria for meeting this exemption in forthcoming regulations.
- **Effective Date And Expiration** – This program will become effective on April 1, 2020 and remain in effect until December 31, 2020.

### ***Emergency Paid Sick Leave Act***

This provision requires employers with fewer than 500 employees to provide employees (regardless of the employee's duration of employment prior to leave) with 80 hours of paid sick leave at the employee's regular rate for leave for reasons 1, 2 and 3 listed below (capped at \$511 per day and \$5,110 in the aggregate per person) or two-thirds the employee's regular rate for leave for reasons 4, 5 and 6 listed below (capped at \$200 per day and \$2000 in the aggregate per person).

- **Reasons For Paid Sick Leave** – This portion of the new law would allow the employee to (1) comply with a requirement or recommendation to quarantine due to exposure to, or symptoms of, coronavirus; (2) self-isolate because the employee is diagnosed with coronavirus; (3) obtain a diagnosis or care because the employee is exhibiting symptoms; (4) to care for or assist an at-risk family member who is self-isolating due to a diagnosis who is exhibiting symptoms of

risk family member who is self-isolating due to a diagnosis, who is exhibiting symptoms of coronavirus and needs to obtain medical care, or who is adhering to requirement or recommendation to quarantine due to a exposure to, or symptoms of, coronavirus; (5) to take care of the employee's child if the child's school or place of care has been closed due to the COVID-19 coronavirus (including if the childcare provider is unavailable), or (6) the employee is experiencing "any other substantially similar condition" specified by Health and Human Services (catch-all provisions). Again, the U.S. Department of Labor has also issued guidance that suggests that if employers send home workers and stop paying them, these workers are not eligible for emergency paid sick leave. These reasons include because the employer has no work for the employee or has closed its business pursuant to a federal, state, or local directive.

- **Carryover** – This paid sick leave will not carry over to the following year and is in addition to any paid sick leave currently provided by employers.
- **Calculating Rate Of Pay** – Employees who work a part-time or irregular schedule are entitled to be paid based on the average number of hours the employee worked for the six months prior to taking paid sick leave. Employees who have worked for less than six months prior to leave are entitled to the average number of hours the employee would normally be scheduled to work. A business employing fewer than 500 employees is required, at the request of the employee, to pay the employee for 80 hours of mandated emergency paid leave instead of the initial 10 days of unpaid leave required by the Emergency Family and Medical Leave Expansion Act (summarized above).
- **Effective Date And Expiration** – This program will become effective on April 1, 2020 and remain in effect until December 31, 2020.

### ***Tax Credits For Emergency Paid Sick And Emergency Family And Medical Leave***

This section provides a series of refundable tax credits for employers who are required to provide the Emergency Paid Sick Leave and Emergency Paid Family and Medical Leave described above. These tax credits are allowed against the tax imposed by Internal Revenue Code Section 3111(a), which deals with the employer portion of Social Security taxes. While this limits application of the tax credit, employers will be reimbursed if their costs for qualified sick leave or qualified family leave wages exceed the taxes they would owe.

Specifically, employers are entitled to a refundable tax credit equal to 100% of the qualified sick leave wages paid by employers for each calendar quarter in adherence with the Emergency Paid Sick Leave Act.

Similarly, employers are entitled to a refundable tax credit equal to 100% of the qualified family leave wages paid by employers for each calendar quarter in accordance with the Emergency Family and Medical Leave Expansion Act.

### ***Coverage For Testing For COVID-19***

This section requires private health plans to provide coverage for COVID-19 diagnostic testing,

including the cost of a provider, urgent care center and emergency room visits in order to receive testing. Coverage must be provided at no cost to the employee and any others covered under the employee's health plan.

### **State, County, and City “Shelter-in-Place Orders**

While the federal government has elected not to issue significant restrictions on business operations, numerous states, cities, and counties have taken initiative to issue their own orders, requiring residents to stay at home. Most orders have directives for restaurants and bars including limiting restaurants to take-out and delivery services only. While the industry is quickly adjusting to those imitations, there are other implications for your employees who need to travel to and from work, and for your administrative staff who keep payroll, accounting, and other essential functions running.

It is essential that hospitality employers review their state and local orders to determine whether the business falls within the exceptions usually set forth for obtaining food, supplies, and operating essential parts of the business. Most of the orders encourages Essential Businesses to stay open, subject to proper social distancing, and the closure Non-Essential Businesses except for Minimum Basic Operations – such as securing inventory, maintaining payroll, and ensuring continued operations so employees can work from home. These orders generally establish civil and criminal sanctions for violations.

### **The Coronavirus Aid, Relief, and Economic Security (CARES) Act**

On March 27, 2020, President Trump signed the CARES Act into law. The most significant provision of the CARES Act for employers establishes new “paycheck protection” loans administered by the Small Business Administration (SBA) to help employers continue to cover payroll costs and other expenses during the COVID-19 crisis. The covered period for loans is February 15, 2020 through June 30, 2020.

Significantly, businesses with a NAICS Code 72 (hospitality industry) that employ not more than 500 employees “per physical location” are eligible for a loan. In other words, a franchisee with 2,000 employees, but no more than 500 at one location, could qualify for the loans.

The Small Business Administration has eligibility guidelines (“affiliation rules”) to determine whether a business qualifies as “small.” Presently, these affiliation rules have been waived for:

- the hospitality/restaurant industry with a NAICS Code 72 (hospitality industry) that employs not more than 500 employees;
- franchises (assigned a franchise identifier code); or
- those who receive financial assistance from a small venture investment company licensed under the Small Business Investment Act.

This is good news for the restaurant and hotel industry. You should contact your local banks to discuss options. Lenders will determine eligibility for the loans based on whether the business was

operational as of February 15, 2020, had employees on payroll, and paid wages and payroll taxes.

The loans may be used for payroll costs, healthcare, rent, utilities, and other debts incurred by the business. Notably, the definition of “payroll” costs excludes leave payments made pursuant to the new Families First Coronavirus Response Act (FFCRA). Reimbursement for those leave payments is made through the tax credit process enacted as part of that legislation. These “paycheck protection” loans are available for other payroll expenses and other costs.

Loan amounts will be available based on a formula. The amounts available will be the lesser of:

- Average monthly payroll costs during the prior year x 2.5; or
- \$10 million, whichever is less.

The federal government will forgive the loans in an amount equal to the amount of qualifying costs spent during an eight-week period after the origination of the loan. These qualifying costs include payroll costs (except of wages above \$100,000 per employee), interest on secured debt obligations, and rent and utilities in place prior to February 2020.

The amount of the forgiveness for the loans will be reduced if the employer:

- Reduces its workforce during the eight-week period compared to prior periods; or
- Reduces the salary or wages paid to an employee by more than 25% during the 8-week period (compared to the most recent quarter).

In addition, any reduction in the amount of loan forgiveness will be completely avoided if the employer re-hires all employees laid off (going back to February 15, 2020), or increases their previously reduced wages, no later than June 20, 2020. These provisions are designed to provide an incentive to employers to not lay off workers (or rehire them) and instead utilize the loan amounts to pay payroll and other expenses.

### **Unemployment Insurance Provisions**

The hospitality and restaurant industry has seen an unprecedented number of layoffs, furloughs, and terminations of staff. These employees are the lifeblood of the business. The CARES Act provides some much needed benefits for workers in the industry and expands unemployment assistance by creating a Pandemic Unemployment Assistance program through December 31, 2020.

For weeks of unemployment, partial unemployment, or inability to work caused by COVID-19 between January 27 and December 31, the Act provides covered individuals with unemployment benefit assistance when they are not entitled to any other unemployment compensation or waiting period credit. For this, the weekly benefit amount is generally the amount determined under state law plus an additional \$600 until July 31. Although the additional \$600 per week is only available for

the next four months, the maximum entitlement was expanded to 39 weeks rather than the 26 weeks typical of most states.

Covered individuals under this provision generally include those who provide self-certification the individual is otherwise able to work and available to work and is unemployed, partially unemployed, or unable to work for one of the following reasons:

- The individual is diagnosed with COVID-19 or experiencing COVID-19 symptoms and seeking medical diagnosis;
- A member of the individual's household was diagnosed with COVID-19;
- The individual is caring for a member of their family or household who was diagnosed with COVID-19;
- A child or person for which the individual has primary caregiving responsibility is unable to attend school or another facility that is closed as a direct result of the COVID-19 public health emergency and such school/facility is required for the individual to work;
- The individual is unable to reach the place of employment because of a quarantine imposed as a direct result of COVID-19 public health emergency;
- The individual is unable to reach the place of employment because a health care provider advised to self-quarantine due to COVID-19 related concerns;
- The individual was scheduled to commence employment and does not have a job or is unable to reach the job as a direct result of the COVID-19 public health emergency;
- The individual became the breadwinner or major support because the head of household died from COVID-19;
- The individual has to quit as a direct result of COVID-19;
- The individual's place of employment is closed as a direct result of COVID-19 public health emergency; or
- The individual meets additional criteria established by the Secretary of Labor.

The law also expands unemployment to also cover those who traditionally are not eligible to receive such benefits. Specifically, this provision also covers those who are self-employed (like independent contractors), who are seeking part-time employment, who do not have sufficient work history, or otherwise would not qualify for regular unemployment or extended benefits if they meet a qualifying reason above. However, the Act excludes those who would otherwise be a covered individual if they have the ability to telework with pay or if they receive paid sick leave or other paid leave benefits.

## **10 Ways Restaurant And Hospitality Employers Should Respond To The Pandemic**

### **1. Be Proactive About "Shelter-In-Place" Orders**

For hotel and restaurant businesses that remain open under a "shelter-in-place" order as an Essential Business, document why the business is critical to the flow of essential commerce or



Essential Business, document why the business is critical to the flow of essential commerce or the public interest, educate employees as to why the business should stay open, maximize social distancing, and issue official “travel” letters to employees that they can carry with them to present to law enforcement or local regulators.

## 2. **Communicate With Your Workforce**

In a crisis, silence leads to confusion and panic. You should get in front of the problem by communicating with your workforce about the common preventive measures they should take to stay safe. If you haven’t done so yet, the time is now to craft a message for your workers incorporating advice from the CDC and WHO.

Although the messages repeating CDC-issued advice is helpful – the more reminders you can get to wash your hands, the better – you would also be wise to craft your message to match the work your workforce is performing. Think of the kinds of things your workers do and personalize your content accordingly. Advise them not to shake hands with customers or guests. Or maybe they should carry disinfectant with them or offer wipes/sanitizing liquid to their customers. The more tailored to your business, the more effective your message will be.

## 3. **If Your Business is Closed, Communicate with your Customers and Guests**

For properties and business that are closed, use social media and traditional snail mail to communicate with your guests and customers. Tell them your plans to reopen even if tentative. Tell them what sanitation measures you are undertaking during the closure and your plans when you reopen. Loyal customers and guests want to hear from you.

## 4. **Implement Strict Sanitation Measures Immediately**

These include, but are not limited to:

- Increase cleaning measures for elevators, public spaces, door handles and other “touch points”;
- Require that housekeeping, laundry and most back-of-the-house positions wear gloves;
- Require scheduled and monitored hand-washing for employees;
- Place hand sanitizer strategically throughout the hotel and/or restaurant;
- Implement a no-touching policy (no handshakes, hugs, or other close contact);
- Limit housekeeping/laundry services;
- Stop all self-service food buffets – consider having trained servers serve food from the buffet; and
- Limit “help yourself” food items – peanuts, bar items, etc.

## 5. **Train Your Staff To Address Common Issues**

***How should an employer respond if an employee asks to where a face mask while working?***

Currently the CDC does not recommend that people who are well wear a facemask to protect

Currently the CDC does not recommend that people who are well wear a facemask to protect themselves from respiratory diseases, including COVID-19. If an employee requests to wear a facemask, employers should discuss the employee's specific circumstances as there may be a need to accommodate an underlying disability.

***Is it appropriate to ask a guest questions to determine if the guest has the coronavirus (COVID-19) or has traveled from an affected area?***

It would not be appropriate for an employee to ask a guest if they have the COVID-19 virus. Employees should not make any assumptions that the guest has COVID-19 or any other illness.

***Can a hotel refuse to accept a guest who exhibits symptoms of COVID-19 or who informs the hotel they may be sick with the virus or is staying at the property for a period of self-isolation?***

The hotel has two options: inform the guest that if they have any symptoms of illness or are checking in to self-isolate, they cannot check in and should immediately seek medical help; or allow the guest to check in and take precautionary measures including informing the guest that housekeeping and cleaning services will not be offered and that the guest is expected to stay confined to their guest room for their entire stay.

**6. If You Are Open, Communicate With Your Customers/Guests**

In order to keep your workers safe, you may also want to consider a message to those customers/guests interacting with your workforce reminding them of simple preventive measures and advising them to follow these steps when interacting with your workers. Ease their fears and let them know you have also advised your workers of these same steps. You may even consider a brief notification tied in with the delivery of your services asking customers if they have washed their hands or taken other simple steps that is sent each time an interaction is about to occur.

For hoteliers, consider sending a message to your incoming guests giving them a brief description of the preventive steps you are taking to keep employees and guests safe. Consider a communication that states the following with a brief overview of the measures you have implemented:

*The entire HOTEL team considers your safety a primary concern. The following are increased measures we are implementing to mitigate risk and reduce the spread of the virus at the hotel...*

**7. Be Prepared For An Upsurge In Work**

When the virus took hold in China, demand for food delivery skyrocketed as the public was advised to limit their everyday activities. Those workers carrying out the deliveries were hailed as heroes. We may end up seeing a similar dynamic in the U.S. if the virus continues to spread and daily routines are upended. Consider all of the cascading effects of quarantines or self-imposed limitations. If schools close, there will be an increase in demand for childcare services. If people



want to limit their time away from home, delivery services of all types will be taxed. Consider adjusting your business to adapt to what may be the new normal for some period of time.

#### **8. Be Prepared For A Worker Shortage**

At the same time, we may see a shortage of workers as the virus spreads. Those performing restaurant and hospitality work on the side to supplement their incomes may decide the risk of human interaction with customers is not worth it for the time being. They may self-quarantine, or find they might not have as much free time as they normally do if their family obligations shift with school closures. Whatever the reason, you may start to see your pool of available workers shrink. You might consider higher pay for performing certain work during critical times in order to induce new workers or to reward those who stick with it during these uncertain times and cross-training employees to perform multiple positions.

#### **9. Be Careful About Wage And Hour Issues Related To Changing Pay, Lowering Salaries And Managers Performing Non-Exempt Work**

If you are considering implementing salary cuts, changing “white collar” exempt employees to non-exempt employees, allowing managers to perform non-managerial duties, or cutting hours for exempt employees, you should be aware that the Federal Fair Labor Standards Act and many state laws will present some roadblocks. You can overcome many of these roadblocks, but it is important to consult legal counsel before making these decisions.

#### **10. Consider Short-term Modifications Of “Benefits Eligibility” Policies/Standards**

Many hotel and restaurant employers use strict “hours worked” measurements to determine whether employees maintain full time status for purposes of benefit eligibility, such as holidays, vacation, and PTO. Hotel and restaurant employers may want to consider relaxing (or suspending) those standards for this period of slow down so that normally classified full-time employees do not suffer a loss of benefits. This may not be permitted under certain plans, so check your insurance plan documents for limits on relaxing eligibility for insured plans.

#### **Other Issues Restaurant and Hospitality Employers Are Faced With During This Crisis**

Restaurant and Hospitality Employers are faced with a multitude of other issues during this crisis, such as FMLA treatment, workers’ compensation, and WARN layoffs. For further information, contact your Fisher Phillips attorney or review our [Comprehensive and Updated FAQs](#). 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.

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