

NECA Legal Webinar Q&A

What is the Coronavirus?

Coronavirus Disease 2019 (COVID-19) is a respiratory disease caused by the Severe Acute Respiratory Syndrome (SARS)-CoV-2 virus. The current mutation is a new strain of the SARS virus and no individual has any immunity prior to an exposure. The CDC has reported that testing has begun on a vaccine but for now, everyone should prepare and plan for possible impacts resulting from COVID-19. It has spread from China to many other countries around the world, including the United States.

1 Question: Are furlough forms considered a mandatory subject of bargaining?

We take the position that furlough and layoff forms drafted to address COVID-19 safety concerns fall within management rights and need not be bargained. It is best practice to notify the union and attempt to seek agreement. In the absence of agreement, implement and bargain effects. Also see the guidance provided in the NECA Legal Alert – COVID-19 and the Duty to Bargain.

2 Question: If employees refuse to work due to concerns of contracting COVID-19, can the employer replace them? Does the employer have to pay individuals who choose to not work?

This scenario, which is not sickness but FEAR of sickness, would be considered a voluntary quit due to “COVID-19 related concerns.” The employer can replace these individuals and has no requirement to pay them or provide the FFCRA pay. Under the NDERA, the employer would truthfully respond to any unemployment inquiry from the state.

3 Question: Do FFCRA benefits (EPSL & EFMLA) apply to bargained employees? How do benefits apply?

Yes. FFCRA benefits apply to full-time and part-time employees of employers with less than 500 employees regardless of the existence of a collective bargaining agreement.

On benefits, the FFCRA only speaks to the requirement to maintain healthcare and reimbursement for the same. We are still seeking guidance from the DOL and respective national trust funds to determine the calculation and payment of benefits. As we learn more, it will be communicated.

4 Question: If employees refuse to work due to concerns of contracting COVID-19, are they eligible for unemployment benefits (including the \$600 expanded unemployment benefit)? How does the employer respond to unemployment claims given the language in the NDERA about not contesting unemployment?

The FFCRA provides flexibility for states to amend their laws to allow for the payment of unemployment benefits for this scenario. Check with your state’s unemployment office to determine if the laws have been amended to accommodate leave related to COVID-19.

The CARES Act provides increased unemployment compensation to individuals no longer working or working reduced hours. The Act provides an additional \$600 of weekly unemployment compensation for up to four months for individuals already receiving state unemployment compensation. The Act also provides an additional 13 weeks of unemployment compensation to individuals who have exhausted their unemployment compensation through the state. In most states, this will provide a total of 39 weeks of unemployment compensation.

The CARES Act also creates the Pandemic Unemployment Assistance Program which makes unemployment compensation available to individuals who would not otherwise

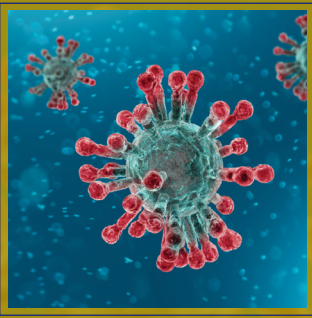


3 Bethesda Metro Center
Suite 1100

Bethesda, MD 20814

301-657-3110 • www.necanet.org

published 4/8/2020 updated 4/14/2020



qualify for state unemployment compensation such as independent contractors, self-employed individuals, and individuals without sufficient work history. In order to qualify for benefits under this provision of the Act, an individual must be unable to work due to particular COVID-19-related circumstances as described in the Act.

The NDERA was drafted to allow employers to recall employees if/when their jobsites are reopened following a COVID-19 closure or slowdown. It also assists employers in keeping their employees and jobsites safe during this pandemic. The language regarding not “contesting” unemployment does not mean that employers should not comply with the law. Employers should absolutely be accurate when responding to unemployment claims and realize that the state is the final arbiter of unemployment eligibility. If a state chooses to deny a benefit because of information provided by the employer, this is the state’s decision. That employer is complying with the NDERA.

5 Question: If employees refuse to work due to concerns of contracting COVID-19 and my state does not see this as a valid unemployment claim, is the contractor in violation of the NDERA?

See above. No. If an employee calls out consistent with the NDERA, we recommend that the contractor accurately comply with information requests from the state and inform the state that the separation was for “COVID-19 related concerns” or something to that effect – without actively contesting the claim. If the state asks if work is still available to the employee and the answer is yes, **then the answer is yes.**

6 Question: Will any provisions of the NDERA be changed/removed in future revisions of the Agreement?

The NDERA states that it will be evaluated every 30 days by the Parties, not that we need to wait that long. We are in constant discussions to address concerns received from the field and will advise immediately of any edits or adjustments.

7 Question: If an employee is feeling ill, is this an OSHA recordable event?

In almost all cases involving our contractors – No. OSHA deems illness as a recordable event if certain criteria are met. OSHA guidance provides:

COVID-19 can be a recordable illness if a worker is infected as a result of performing their work-related duties. However, employers are only responsible for recording cases of COVID-19 if all of the following are met:

1. The case is a confirmed case of COVID-19 (see CDC information on persons under investigation and presumptive positive and laboratory-confirmed cases of COVID-19);
2. The case is work-related, as defined by 29 CFR 1904.5; and
3. The case involves one or more of the general recording criteria set forth in 29 CFR 1904.7 (e.g. medical treatment beyond first-aid, days away from work).

OSHA has published guidance on when COVID-19 can be found here:
<https://www.osha.gov/SLTC/covid-19/standards.html>.

8 Question: How does an employer determine regular pay under the FFCRA?

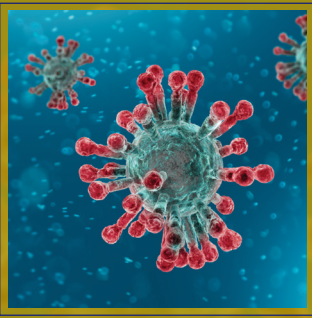
The DOL has set out guidance on this here:
<https://www.dol.gov/agencies/whd/pandemic/ffcra-questions>



3 Bethesda Metro Center
Suite 1100

Bethesda, MD 20814

301-657-3110 • www.necanet.org



The “regular rate of pay” is that which is determined using the FLSA calculation standard, explained here:

<https://www.dol.gov/agencies/whd/fact-sheets/56a-regular-rate>

9 Question: What qualifications must be met for a loan to be converted to a grant?

According to the SBA: Paycheck Protection Program loans will be fully forgiven to the extent the funds are used for payroll costs, interest on mortgages, rent, and utilities; so long as, at least 75% of the loan proceeds are used for payroll, and FTE headcount is the same or higher on June 30, 2020 as it was on February 15, 2020.

10 Question: Is the Small Business Association considering a small business as one with less than 500 employees in lieu of average annual sales less than \$16.5 million?

Yes. Please see the updated guidance and regulations from the SBA on the NECA Resource Center. NECA Government Affairs was instrumental in removing the revenue cap.

11 Question: What is the employer’s liability if the employee becomes ill on a job that remains open or remains open due to obtaining a waiver?

A contractor may be sued for anything at any time – and there will no doubt be plaintiff’s lawyers circling the waters to look for lawsuits during and after this crisis. But keep in mind that there must be some underlying fraud or wrongdoing to actually impose liability. Government “essential services” directives will go a long way to insulate claims that a contractor “made me go to work and I got sick.” By keeping jobs open in many jurisdictions, it will be difficult for liability to attach simply because a contractor staffs a job.

To deter liability, it is important to put in place a COVID-19 workplace safety and HR plan. NECA has developed significant guidance on our resource center such as:

- Follow essential industry, CDC and OSHA guidelines and have a COVID-19 safety plan;
- Work with your insurance company to make sure you understand coverages and address as necessary;
- Stay alert for government directives, travel restrictions and closures;
- Be sensitive to employee concerns, requests and needs.

Lastly, a word about workers’ compensation. Remember that workplace injuries – to the extent that a claim is based on the contention that an injury is an occupational injury – are diverted to the workers’ compensation process. There is a concept in workers’ compensation known as the “Workers’ compensation bar”, which means that workers’ compensation is normally the sole remedy for injuries that are deemed compensable and incident to the workplace. The application and interpretation of the bar varies from state to state, so contractors should make sure they are in contact with their carrier and/or third-party administrator as soon as a claim is made.

Also see the NECA Legal Alert – COVID-19 and Contractor Liability.

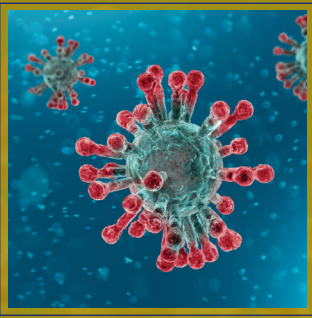
12 Question: Are furloughed employees eligible for emergency paid sick leave or extended FMLA benefits?



3 Bethesda Metro Center
Suite 1100

Bethesda, MD 20814

301-657-3110 • www.necanet.org



No. They are no longer employees. This is addressed in DOL FAQ Question #26: <https://www.dol.gov/agencies/whd/pandemic/ffcra-questions>

13 Question: Does NECA have a standard form for use by employers when employees request Sick Leave under the FFCRA?

No.

14 Question: How does the CARES Act work with the collective bargaining agreement regarding paid leave?

There is no distinction between bargained and non-bargained employees under the FFCRA or the CARES Act.

15 Question: Does the FFCRA apply to an employer with 15 or less employees?

Yes. The FFCRA applies to all employers with fewer than 500 employees.

16 Question: How long must an individual be employed for the payroll loan to become a grant?

For the loan forgiveness you will have to document and verify the number of full-time equivalent employees on payroll as well as the dollar amounts of payroll costs, covered mortgage interest payments, covered rent payments, and covered utilities for the eight-week period following this loan.

17 Question: Why do we as electrical contractors have to provide notices since the shutdowns have been initiated from the Customer, General Contractor, Government, etc.?

We believe it is best practice to provide your employees with all notices that impact their working conditions, safety and entitlements. Certain notices are mandated by law to be posted by each employer. Take care of your own employees.

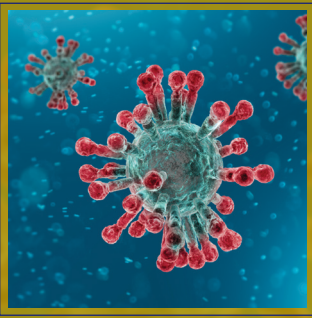
18 Question: If employees are afraid to be on a jobsite due to fear of exposure to COVID-19, can this be considered a force majeure claim?

Force majeure is a contractual provision, so first reference is to the language of the contract. If the contract provides potential relief (in the form of delays, termination, extensions, or financial forbearance) then a contractor may be able to use inability to staff a job due to COVID-19 to invoke force majeure, impossibility or other legal remedies. Case specific application.

19 Question: A general contractor told a member that it's business as usual in the construction industry. They expect us to complete the project on time per our contract despite the fact we may not be able to meet the schedule as 1/3 of our workforce has opted to take a furlough. It appears they want to play hardball.

We provided general guidance in the webinar and in other materials on the resource center on how to address construction contract issues such as delay, notice, force majeure, impossibility and other issues. Beyond that, each contractor will need competent local legal counsel to work through fact and contract specific scenarios.





20 Question: With regards to general conditions, such as providing hand washing stations or “adequate” restroom facilities, do you advise filing a claim if those are not being met?

It is not clear what is meant by “filing a claim.” If this means reporting a violation to a government agency, best practice may be to try to find a workplace solution before seeking government oversight. Must follow anti-retaliation whistleblower practices. If “filing a claim” means filing under a contract with a GC, you should follow your normal contracting practices and seek local legal advice to interpret contract and local obligations.

21 Question: The additional \$600.00 unemployment per week will mean that many of our employees will actually make more considering taxes than they would have made working a 40-hour week. I fear that the NDERA agreement’s use of “imminent fear” will cause many of them to take this route although they have not been directly affected when they ask for a furlough. Did NECA take this into account when they agreed to the NDERA?

The NDERA was drafted to allow employers to recall employees if/when their jobsites are reopened following a COVID-19 closure or slowdown. The NDERA also assists employers in keeping their employees and jobsites safe during this pandemic. The language of “imminent fear” comes directly from OSHA safety standards language and is designed to put some objectivity into an individual employee’s safety assessment. It is a difficult balance, particularly in this unprecedented environment.

The NDERA was also drafted before the CARES Act significantly sweetened the unemployment pot. The language regarding not “contesting” unemployment does not mean that employers should not comply with the law. Employers should absolutely be accurate when responding to unemployment claims and realize that the state is the final arbiter of unemployment eligibility. If a state chooses to deny a benefit because of information provided by the employer, this is the state’s decision. That employer is complying with the NDERA.

22 Question: Are sample notice letters available from NECA that would be applicable in most instances for the standard AIA contracts for issues like delay, impact, suspension, etc.?

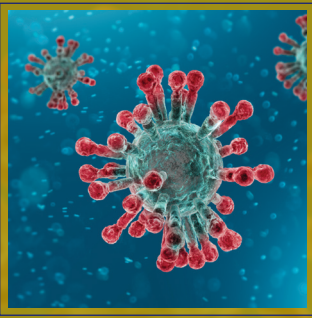
Yes, we have posted some templates on the NECA resource center.

23 Question: In the CARES Act, for the list of costs not eligible for payroll reimbursement in the small business debt relief program, I see information about \$100,000 compensation limits. Does that mean \$100,000 per month or per year? If the \$100,000 limit is then reached, does the loan not cover any of the compensation, or, is it that they compensate up to \$100,00 and then the owner is to cover the remainder?

The \$100,000 limit is used to calculate your payroll costs to determine how much loan eligibility you have. If you do not have employees that are paid over \$100,000/year then this won’t apply. If you do have employees paid over \$100,000/year you can only count \$100,000/year of each employee’s salary when calculating the amount of loan for which you qualify.

24 Question: Will a single notice cover employee that need to travel between states for essential work? Or will separate notices be needed?





Best practice would be to draft a notice that covers the exceptions in each relevant state and/or locality.

25 Question: If work is deemed essential and employees refuse to work due to belief of imminent danger from exposure to COVID-19, does the employer have to approve unemployment?

The NDERA was drafted to allow employers to recall employees if/when their jobsites are reopened due to a COVID-19 closure or slowdown. The NDERA also assists employers in keeping their employees and jobsites safe during this pandemic. The language of “imminent fear” comes directly from OSHA safety standards language and is designed to put some objectivity into an individual employee’s safety assessment. It is a difficult balance, particularly in this unprecedented environment.

The NDERA was also drafted before the CARES Act significantly sweetened the unemployment pot. The language regarding not “contesting” unemployment does not mean that employers should not comply with the law. Employers should absolutely be accurate when responding to unemployment claims and realize that the state is the final arbiter of unemployment eligibility. If a state chooses to deny a benefit because of information provided by the employer, this is the state’s decision. That employer is complying with the NDERA.

26 Question: Can you break down the FLSA regular rate of pay for FFCRA?

The DOL has set out guidance on this here:
<https://www.dol.gov/agencies/whd/pandemic/ffcra-questions>

The “regular rate of pay” is that which is determined using the FLSA calculation standard, explained here:
<https://www.dol.gov/agencies/whd/fact-sheets/56a-regular-rate>

27 Question: Regarding the Paycheck Protection Program, the forgiveness calculation is based in part on the employers’ ability to employ average full-time equivalents per month during the eight- or ten-week period after loan origination as compared to the average full-time equivalents during the 2 defined periods. What constitutes a full-time equivalent employee?

Although the CARES Act does not define Full Time Equivalent, it is a term of art in labor and employment; therefore, the standard definition should be used. Generally speaking, a full-time equivalent employee is a combination of employees, each of whom, individually, is not a full-time employee, but who collectively are equivalent to a full-time employee. So, for example, two employees who each work an average of 20 hours per week are equivalent to one full-time employee. However, for purposes of determining eligibility under the Paycheck Protection Program, all individuals employed on a full-time, part-time or other basis are used to calculate the number of employees.

28 Question: Do payroll taxes and fringe benefits count against the \$511/day cap?

No.

29 Question: If there is a suspected but unconfirmed COVID-19 infection and the employer asks an employee to quarantine, is the employee eligible for



FFCRA benefits?

No.

30 Question: Employee rights poster indicates 2/3 pay capped at \$2K is for reasons #4 and #6, not #5 childcare?

Employees are eligible for paid sick leave for Reason #5 (childcare) at 2/3 of their salary capped at \$200/day and \$2,000 over a two-week period. See Question #7 in the DOL FAQ. <https://www.dol.gov/agencies/whd/pandemic/ffcra-questions>

31 Question: Can you please address where a state such as Washington State has paid sick leave and a Paid Family Medical Leave, does Federal come first or State? Who dictates that employer/employee? Guidance would be appreciated.

FFCRA benefits are in addition to other paid leave benefits. See Question #46 in the DOL FAQ. <https://www.dol.gov/agencies/whd/pandemic/ffcra-questions>.

32 Question: Does extended FMLA apply to employers with less than 50 employees?

Yes.

33 Question: Is there an age limit for when employees request paid leave for the childcare provider reason? How do employers document?

Age limits are discussed in Question #66 of the DOL FAQ. Documentation is addressed in Question #15 of the FAQ. <https://www.dol.gov/agencies/whd/pandemic/ffcra-questions>

34 Question: If an employee tested positive for COVID-19 on March 30 and was placed in quarantine, will he be eligible for paid sick leave effective April 1 for the remainder of his quarantine? Or is he excluded from paid sick leave since he was quarantined prior to April 1?

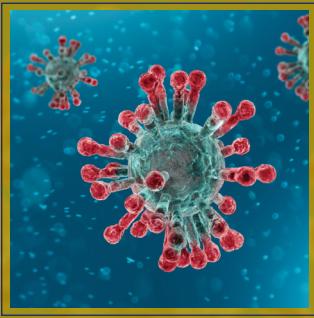
Eligible, but there is no retroactive pay required.

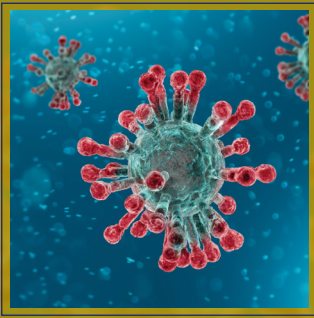
35 Question: What if your employee is on furlough (temp layoff) due to lack of work, and then on 4/1 they bring you a school closure note and state they are off work due to childcare issues? Would you have to pay them FFCRA benefits?

No. Furloughed individuals are not eligible for benefits. See Question #26 in the DOL FAQ <https://www.dol.gov/agencies/whd/pandemic/ffcra-questions>

36 Question: If they need to stay home to care for children not in school or daycare. What is the age limit requirement for the children? I.e. Kids are high school age 15 and 18. Do we need to pay?

Age limits are discussed in Question #66 of the DOL FAQ. In this scenario, if the employee has documentation to prove that childcare is unavailable and the schools are closed, the employee is eligible for FFCRA benefits. <https://www.dol.gov/agencies/whd/pandemic/ffcra-questions>





37 Question: Do healthcare premiums count toward the wage caps in the FFCRA?

No. They are in addition to these caps. The employer can claim these payments for a tax reimbursement as they would the wages.

38 Question: Is the apprenticeship contribution considered a fringe benefit?

Yes. We do not have guidance on if these are required payments when an individual is receiving FFCRA benefits.

39 Question: Has the DOL determined the procedure for claiming a hardship under the 50 employee or less rule in the FFCRA?

Procedure, No. Qualifications, Yes. It is limited. See DOL FAQs 58 and 59: <https://www.dol.gov/agencies/whd/pandemic/ffcra-questions>

(58) When does the small business exemption apply to exclude a small business from the provisions of the Emergency Paid Sick Leave Act and Emergency Family and Medical Leave Expansion Act?

An employer, including a religious or nonprofit organization, with fewer than 50 employees (small business) is exempt from providing (a) paid sick leave due to school or place of care closures or child-care provider unavailability for COVID-19 related reasons and (b) expanded family and medical leave due to school or place of care closures or child care provider unavailability for COVID-19 related reasons when doing so would jeopardize the viability of the small business as a going concern. A small business may claim this exemption if an authorized officer of the business has determined that:

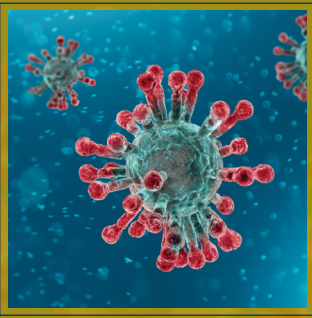
1. The provision of paid sick leave or expanded family and medical leave would result in the small business's expenses and financial obligations exceeding available business revenues and cause the small business to cease operating at a minimal capacity;
2. The absence of the employee or employees requesting paid sick leave or expanded family and medical leave would entail a substantial risk to the financial health or operational capabilities of the small 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 sick leave or expanded family and medical leave, and these labor or services are needed for the small business to operate at a minimal capacity.

(59) If I am a small business with fewer than 50 employees, am I exempt from the requirements to provide paid sick leave or expanded family and medical leave?

A small business is exempt from certain paid sick leave and expanded family and medical leave requirements if providing an employee such leave would jeopardize the viability of the business as a going concern. This means a small business is exempt from mandated paid sick leave or expanded family and medical leave requirements only if the:

- employer employs fewer than 50 employees;
- leave is requested because the child's school or place of care is closed, or child-care provider is unavailable, due to COVID-19 related reasons; and
- an authorized officer of the business has determined that at least one of the three conditions described in Question 58 is satisfied.





The Department encourages employers and employees to collaborate to reach the best solution for maintaining the business and ensuring employee safety.

40 Question: Are NECA National Service Charges owed on FFCRA payments?

NECA national has not made this determination. Local Chapters would have to make the decision on their local service charges.

41 Question: Are Payroll Protection Plan funds available to pay bargained for employees? If so, what is the basis for pay (40 hours?) and should fringes be paid on those hours?

Yes. The basis for pay is as defined by the FFCRA and calculation of the regular rate of pay as defined by the FFCRA in the DOL FAQ. The determination on how fringes should be made has yet to be made. This decision is pending guidance from the DOL and respective parties. <https://www.dol.gov/agencies/whd/pandemic/ffcra-questions>

42 Question: How is NEBF applicable to the FFCRA since the affected employee is not working?

NEBF is due on “gross labor payroll.” This term is broadly defined. The FFCRA are deemed wages under the legislation.

43 Question: Is NEBF contribution owed on FFCRA payments?

NEBF is due on “gross labor payroll.” This term is broadly defined. The FFCRA are deemed wages under the legislation.

44 Question: Do the IBEW working dues get deducted from PSL 80-hour wages?

The IBEW has not provided guidance on this.

45 Question: If none of my employees qualify for the additional 80 hours of sick pay how long do I have to make this available?

The FFCRA is effective until 12/31/2020.

46 Question: In Jef’s example, where an employer has paid \$4,000 in sick/family leave and \$9,000 in payroll taxes and assume an additional \$2,000 in H&W contributions on the \$4,000. Does the employer take a \$6,000 credit out of the \$9,000?

Yes.

47 Question: Relative to PPP, on the salary limitation of \$100,000, is this inclusive of benefits or wages only?

Supplemental response based on SBA Interim Guidance:

The exclusion of compensation in excess of \$100,000 annually applies only to cash compensation, not to non-cash benefits, including:

- employer contributions to defined-benefit or defined-contribution retirement plans;



- payment for the provision of employee benefits consisting of group health care coverage, including insurance premiums; and
- payment of state and local taxes assessed on compensation of employees.

48 Question: Would payment protection loans cover existing leases on equipment?

There is no specific mention of leases on equipment. However, loan forgiveness is available, and the amount of loan forgiveness can be up to the full principal amount of the loan and any accrued interest. In order to obtain loan forgiveness, the loan must be used for forgivable purposes described below and employee and compensation levels maintained.

The actual amount of loan forgiveness will depend, in part, on the total amount of payroll costs, payments of interest on mortgage obligations incurred before February 15, 2020, rent payments on leases dated before February 15, 2020, and utility payments under service agreements dated before February 15, 2020, over the eight-week period following the date of the loan. However, not more than 25 percent of the loan forgiveness amount may be attributable to nonpayroll costs. While the Act provides that borrowers are eligible for forgiveness in an amount equal to the sum of payroll costs and any payments of mortgage interest, rent, and utilities, the Administrator has determined that the non-payroll portion of the forgivable loan amount should be limited to effectuate the core purpose of the statute and ensure finite program resources are devoted primarily to payroll. The Administrator has determined in consultation with the Secretary that 75 percent is an appropriate percentage in light of the Act's overarching focus on keeping workers paid and employed. Further, the Administrator and the Secretary believe that applying this threshold to loan forgiveness is consistent with the structure of the Act, which provides a loan amount 75 percent of which is equivalent to eight weeks of payroll (8 weeks / 2.5 months = 56 days / 76 days = 74 percent rounded up to 75 percent). Limiting non-payroll costs to 25 percent of the forgiveness amount will align these elements of the program and will also help to ensure that the finite appropriations available for PPP loan forgiveness are directed toward payroll protection. SBA will issue additional guidance on loan forgiveness.

49 Question: PPP—what if employees quit during the forgiveness period? Employer wants to retain but the employees quit.

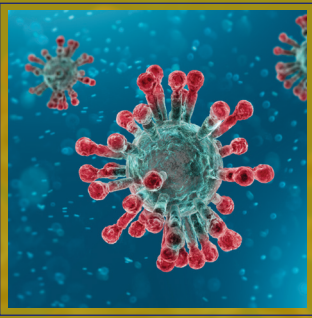
The Paycheck Protection Program does not require that you have the same employees, only the same number of employees. If someone quits, you may hire a replacement and still meet the standard.

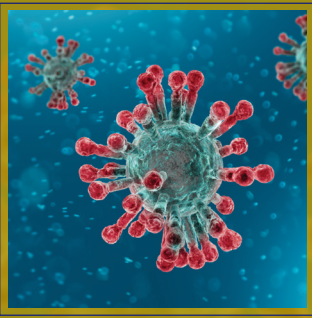
50 Question: PPP—are layoffs due to market conditions (oil and gas industry) counted in addition to layoffs due to COVID-19?

Yes, all furloughs due to the current state of the world are included.

51 Question: Will the Small Business Loans be turned into a grant?

Loan forgiveness is available, and the amount of loan forgiveness can be up to the full principal amount of the loan and any accrued interest. That is, the borrower will not be responsible for any loan payment if the borrower uses all of the loan proceeds for forgivable purposes described below and employee and compensation levels maintained. The actual amount of loan forgiveness will depend, in part, on the total amount of payroll costs, payments of interest on mortgage obligations incurred before February 15, 2020, rent payments on leases dated before February 15, 2020, and utility payments under service agreements dated before February 15, 2020, over the eight-week period following the date of the loan. However, not





more than 25 percent of the loan forgiveness amount may be attributable to nonpayroll costs. While the Act provides that borrowers are eligible for forgiveness in an amount equal to the sum of payroll costs and any payments of mortgage interest, rent, and utilities, the Administrator has determined that the non-payroll portion of the forgivable loan amount should be limited to effectuate the core purpose of the statute and ensure finite program resources are devoted primarily to payroll. The Administrator has determined in consultation with the Secretary that 75 percent is an appropriate percentage in light of the Act's overarching focus on keeping workers paid and employed. Further, the Administrator and the Secretary believe that applying this threshold to loan forgiveness is consistent with the structure of the Act, which provides a loan amount 75 percent of which is equivalent to eight weeks of payroll (8 weeks / 2.5 months = 56 days / 76 days = 74 percent rounded up to 75 percent). Limiting non-payroll costs to 25 percent of the forgiveness amount will align these elements of the program and will also help to ensure that the finite appropriations available for PPP loan forgiveness are directed toward payroll protection. SBA will issue additional guidance on loan forgiveness.

52 Question: For the loans, when is the 500-employee count done? How do you calculate it (for eligibility) if your company fluctuates between fewer than and more than 500?

Although there has not been a specific answer to this question, we believe a company will have a good faith reasoning to use FTEs. Primarily because, the SBA has already established that FTE will be the ultimate measure for maintaining headcount.

In addition, there has not been guidance for when you conduct the FTE calculation, as such, there is an argument to use any of the following: December 31, 2019, February 15, 2020, or the date you apply for the loan.

53 Question: Will bargained employees who have been furloughed count against the head count for loan purposes? Does loan forgiveness apply if only paying wages to office workers?

There has not been guidance for when you conduct the FTE calculation, so, as above, it depends on the date chosen for the count and when the employee is furloughed.

Yes, the loan forgiveness applies even if only paying office workers.

54 Question: Are the paid sick leave hours subject to workers comp cost? Is so, how do we get reimbursed?

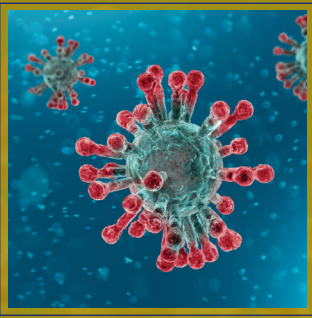
No, unless you want the illness to be considered an occupational disease and a recordable workplace hazard under OSHA.

55 Question: Regarding PPP—If your company experienced a downsize in 2019 not related to COVID-19 but has maintained the same average monthly payroll in 2020 are you still subject to the proportional reduction of loan forgiveness?

Although the SBA has not answered this specific question, at this time we believe, the measure of time is the number of employees on February 15, 2020 to the number of employees on June 30, 2020 headcount.

56 Question: Under the CARES Act, what constitutes a business for the 500 or less employee cap? Each business location of a company? Each individual NAICS code? Or each entity within a tax-controlled group?





The SBA has released additional guidance on affiliate companies. The test includes a consideration of ownership in excess of 50%, control and potential control, common management, and familial relationship.

57 Question: What liability and latitude does an employer have if an employee is willing to work, has no symptoms, but admits to being exposed to someone who has or has had COVID-19?

Under the NDERA and the law and CDC guidance, the employer can require this employee to obtain a doctor's release before returning to work. The liability to the employer could be great if this individual is in fact carrying the virus and infects others on the jobsite. Also see the NECA Legal Alert on COVID-19 and Contractor Liability.

58 Question: Will there be some type of flow chart on which federal program is best for employers to pursue? Time to publish?

Please see the new comparison chart on the NECA Resource Center.

59 Question: What ways can an employer push back on union information requests?

In general, an employer must comply with a request for information from the Union. If the request for information is not relevant or places an undue burden on the employer, the employer should communicate this to the Union and seek a way to comply. The employer should seek competent legal counsel when dealing with requests for information from the Union.

60 Question: Most released guidelines reference individuals (or close contacts) confirmed (or seeking medical confirmation) for COVID-19. There seems to be a gray area concerning people who MAY have COVID-19, but due to testing criteria, are unable to obtain a COVID-19 test.

The triggers for FFCRA sick leave are:

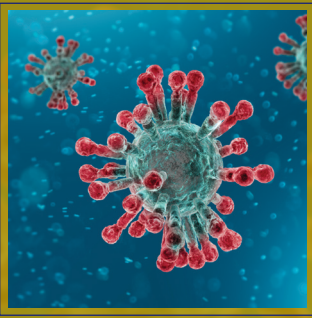
- Subject to a government quarantine or isolation order related to COVID-19;
- Have been advised by health provider to self-quarantine due to COVID-19;
- Experiencing symptoms of COVID-19 and seeking medical diagnosis;
- Caring for an individual subject to quarantine order or self-quarantine;
- Caring for children if schools are closed or their caregiver is unavailable because of a public health emergency; or
- Experiencing substantially similar conditions as specified by the Secretary of Health and Human Services.

61 Question: If an employee has taken leave due to, he/she (or close contact) exhibiting Covid-19 symptoms, how/when can the contractor allow the employee return to work in the absence of a currently unobtainable Covid-19 test?

If an employee has confirmed to have COVID-19 or has been in contact with someone with COVID-19, they are required to obtain a doctor's release before returning to work according to the NDERA and best guidance from CDC and OSHA.

62 Question: Is there any legal counsel on how an employee returns to work after being in contact with COVID-19?





This is a safety/medical issue. If an employee has confirmed to have COVID-19 or has been in contact with someone with COVID-19, they are required to obtain a doctor's release before returning to work according to the NDERA and best guidance from CDC and OSHA.

63 Question: Would the Management Rights Clause come into play if an employer implemented a new safety procedure or whatever not in the CBA?

The employer has the right to implement any policies or procedures that do not conflict with the collective bargaining agreement or a mandatory subject of bargaining. In this case, if the employer is implementing a safety procedure to protect the jobsite and the employees, they should notify the Union of such as this could restrict access to the jobsite for an employee.

64 Question: When is the determination of the 500-employee threshold determined?

This is addressed in Question #2 of the DOL FAQ.
<https://www.dol.gov/agencies/whd/pandemic/ffcra-questions>

65 Question: Regarding PPP and full-time equivalent employees, I need to understand what constitutes an FTE employ. This has the potential to impact our ability to meet the 25% guideline for forgiveness on the SBA loan.

The standard SBA language is: In determining a business' number of employees, SBA counts the average number of employees based upon numbers of employees for each of the pay periods for the preceding completed 12 calendar months. Part-time and temporary employees are counted the same as full-time employees. If a concern has not been in business for 12 months, the average number of employees is used for each of the pay periods during which it has been in business.

However, see above questions for additional details about FTEs and employee counts.

66 Question: Regarding PPP is the \$100,000 compensation limit inclusive of employee benefits or is the \$100,000 wages only?

Supplemental response based on SBA Interim Guidance:

The exclusion of compensation in excess of \$100,000 annually applies only to cash compensation, not to non-cash benefits, including:

- employer contributions to defined-benefit or defined-contribution retirement plans;
- payment for the provision of employee benefits consisting of group health care coverage, including insurance premiums; and
- payment of state and local taxes assessed on compensation of employees.

This material is for informational purposes only. The material is general and is not intended to be legal advice. It should not be relied upon or used without consulting a lawyer to consider your specific circumstances, possible changes to applicable laws, applicable CBAs, prime contracts, subcontracts, rules and regulations and other legal issues. Receipt of this material does not establish an attorney-client relationship.

