

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

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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 six-point plan you should review and consider adopting.

### Federal Response: House Passes COVID-19 Coronavirus Law: Prepare For Paid Sick Leave

In an effort to boost the government's response to the COVID-19 coronavirus outbreak, the U.S. House of Representatives passed the Families First Coronavirus Response Act on March 14, an economic stimulus plan aimed at addressing the impact of COVID-19 on Americans. 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. **Note, however, that this legislation has not been approved by the Senate or signed by the president, and there stands the chance that it could be revised before it is finalized.** Here are some of the highlights of the proposed law so you can begin to familiarize yourself with them.

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

There are three provisions relating to employees being forced to miss work because of the COVID-19 outbreak: an emergency expansion of the Family Medical Leave Act (FMLA), a new federal

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paid sick leave law, and expanded unemployment insurance benefits.

### *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 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 (1) comply with a requirement or recommendation to quarantine due to exposure to, or symptoms of, coronavirus; (2) to care for an at-risk family member who is adhering to requirement or recommendation to quarantine due to exposure to, or symptoms of, coronavirus; or to (3) 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.
- **Paid Leave** – The first 14 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 14-day unpaid period. After the 14-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. 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



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the list of those employees eligible for leave.

- **Effective Date And Expiration** – This program will become effective within 15 days of enactment 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 (or two-thirds the employee's regular rate to care for a child whose school or daycare has closed due to coronavirus, or to care for a family member who is self-isolating due to a coronavirus diagnosis, who is exhibiting symptoms and needs to obtain medical care, or who is complying with a requirement or recommendation to quarantine).

- **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 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; or (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).
- **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 14 days of mandated emergency paid leave instead of the initial 14 days of unpaid leave required by the Emergency Family and Medical Leave Expansion Act (summarized above).

An employer may not change its current paid leave policy after enactment to avoid the obligations of the additional leave mandated by the Emergency Paid Sick Leave Act. This program will be administered by the Social Security Administration over the next year until these requirements expire on December 31, 2020.



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### **Tax Credits For Paid Sick And Paid 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. The qualified sick leave wages are capped at \$511 per day (\$200 per day if the leave is for caring for a family member or child) for up to 10 days per employee in each calendar quarter.

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. The qualified family leave wages are capped at \$200 per day for each individual up to \$10,000 total per calendar quarter.

### **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.

### **Federal And Follow-Up State Laws**

As mentioned above, the Senate is expected to pass a version of this legislation soon, and the president is expected to sign it shortly thereafter. There may be changes made by the Senate before the legislation is finalized, and there may be follow-up "clean-up" legislation. In addition, many states are proposing similar emergency legislation to enact or expand their own paid sick leave or family and medical leave laws to cover coronavirus-related issues. Some of these state laws may be in addition to any new requirements at the federal level.

#### *State-Mandated Paid Sick Leave*

##### California



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California DLSE issued new guidance permitting employees to utilize the state-mandated Paid Sick Leave for preventative coronavirus measures. According to the DLSE, if the employee has paid sick leave available, the employer must provide such leave and compensate the employee under California paid sick leave laws.

Paid sick leave in California can be used for absences due to coronavirus-related illness, diagnosis, care, or treatment of an existing health condition or preventative care for the employee or the employee's family member.

The DLSE has stated that preventive care may include self-quarantine as a result of potential exposure to COVID-19 if quarantine is recommended by civil authorities. In addition, there may be other situations where an employee may exercise their right to take paid sick leave, or an employer may allow paid sick leave for preventative care. For example, where there has been exposure to COVID-19 or where the worker has traveled to a high-risk area.

### Colorado

Colorado has issued an emergency order regarding paid sick leave for employees in the state. Based on this temporary rule, employers must immediately provide up to four days of paid sick leave for an employee with flu-like symptoms who is being tested for COVID-19. If an employer already provides at least four days of sick pay, the employer does not have to provide more. However, if an employee has exhausted their sick leave, and then has flu-like symptoms and is being tested for COVID-19, they are entitled to the four days of paid sick leave.

Employers must pay these workers at their regular rate and for their regularly worked hours. If an employee's rate of pay or hours worked varies, employers must pay them their average daily pay for the preceding month.

The rule requests that employers and employees comply with the procedures of the federal Family and Medical Leave Act (FMLA) in pursuing leave. However, no employee can be terminated if they are unable to provide documentation during an illness that is due to the coronavirus.

This rule will remain in effect for 30 days or longer if the state of emergency continues.

### *Other State Limitations*

Some states are making various suggestions relating to the hospitality and restaurant industry.

- Illinois Governor J.B. Pritzker has ordered all restaurant and bar owners to close for two weeks. Delivery, carry out, and curbside service will still be allowed, but customers won't be allowed in dining rooms or bars from the end of business on March 16, 2020 through March



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- On March 15, 2020, Ohio Governor Mike DeWine ordered all bars and restaurants in the state to shut down all service beginning at 9:00 p.m. No end date for Ohio's moratorium was announced.
- On March 15, 2020, California's Governor Gavin Newsom strongly recommended that all bars, nightclubs, wineries, pubs, and breweries in the State of California close. California's governor has also suggested that all restaurants in the state reduce the number of customers they permit as their capacity by 50%. He also encouraged restaurants to offer curbside service and at-home deliveries as alternatives to dining in.
- Boston Mayor Marty Walsh has also ordered all bars, restaurants, and clubs to cut their capacities in half by removing tables and chairs for the purpose of social distancing. The city also relaxed rules regarding takeout food in the city. "We are basically allowing every single establishment that serves food in the city of Boston to serve takeout," Walsh said.
- New York City has also previously ordered all bars and restaurants to cut their capacities in half. While not closing establishments, Mayor de Blasio has stated authorities will now enforce penalties on establishments not following the half-capacity rule.

More cities and states will likely issue rules in the near future.

### Five Ways Restaurant And Hospitality Employers Should Respond To The Pandemic

#### 1. **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.

#### 2. **Tailor Your Message Based On Your Business**

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. Perhaps you will advise them not to shake hands with those they interact with. 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. **Implement Strict Sanitation Measures Immediately**

These include, but are not limited to:



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- 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.

#### 4. Train Your Staff to Address the Following Issues:

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

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 consider 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.

#### 5. Consider A Communication To 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



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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:*

### 1. **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.

### 2. **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.

### 3. **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. 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.





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### **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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