

New Virginia Executive Order, Federal Leave Law Responding to COVID-19 Raises New Issues for Employers

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In response to the coronavirus (COVID-19) pandemic, Virginia Governor Ralph Northam recently issued an [executive order](#) closing all K-12 schools through the end of the school year and temporarily closing or restricting public-access areas in non-essential businesses. The EO also limited daycare operations to groups no larger than 10 and encouraged daycare space to be prioritized for all essential personnel with daycare needs.

(For more information about the EO Order, see our article, [Virginia Governor Orders Temporary Restrictions on Certain Businesses, Closure of K-12 Schools.](#))

This announcement comes just as employers with fewer than 500 employees are gearing up to comply with the expanded protected leave under the Family and Medical Leave Act (FMLA), and new paid sick leave, under the Families First Coronavirus Response Act (FFCRA) that will take effect on April 1, 2020.

Families First Coronavirus Response Act

The FFCRA expands reasons for FMLA leave to include an employee who is unable to work or telework due to a need to care for the employee's child if the child's school or daycare has been closed (or the childcare provider is unavailable) due to a public health emergency with respect to COVID-19 declared by federal, state, or local authority.

The FFCRA also provides mandatory paid sick leave of up to 80 hours for, among other reasons, an employee who is caring for the employee's own child if the child's school or day care has been closed (or the childcare provider is unavailable) due to COVID-19 precautions.

For more information on the FFCRA and requirements for unpaid and paid leave, see our article, [The New Employer Obligations under the Slight Revised Families First Coronavirus Act \(H.R. 6201\)](#). Because regulations are still expected and Congress continues to debate whether other changes will be forthcoming, stay tuned.

What Employers Can Expect

- *Employee Requests for Leave under the FFCRA*– Due to K-12 school closings and restrictions on daycare facilities, employers in Virginia should expect affected employees to request leave under the FFCRA.
- *Fewer Employees May Be Needed Due to Closures/Restrictions*– Non-essential retail businesses may continue to operate, but must limit all in-person shopping to no more than 10 patrons. Many other businesses subject to the EO must close temporarily or, because of the restrictions on public access, may not be able to retain their workforce due to lack of work. Employers may need to make difficult decisions regarding reduced hours, reduced pay, furloughs, and layoffs.

Many employers will consider mandatory use of paid leave and furloughs, temporary shutdowns, or reduced hours plans as alternatives to layoffs. However, employers must take

care not to jeopardize the status of employees who are exempt from the minimum wage and overtime requirements of the Fair Labor Standards Act (FLSA), by inadvertently violating the salary basis requirement of the exemption. Furloughing or reducing the hours of non-exempt workers is typically straightforward. Absent a contract or collective bargaining agreement providing otherwise, hourly workers need be paid only for actual hours worked.

To meet the “salary basis” test under the FLSA and many state laws, an exempt employee must receive, for each pay period, a “predetermined amount” constituting all or part of the employee’s compensation. This amount is not subject to reduction because of variations in the quality or quantity of work performed. With few exceptions, an exempt employee must receive their full salary (no less than \$684 a week under the FLSA and in Virginia) for any week in which the employee performs any work, regardless of the number of days or hours worked in that week. Salary deductions cannot be made for a full- or partial-day’s absence due to lack of work as “occasioned by the employer or by the operating requirements of the business.”

Use of Paid Time Off (PTO)

Under the FLSA and Virginia law, employers may make mandatory deductions from an exempt employee’s accrued PTO for a full- or partial-day’s absence during a shutdown, furlough, or reduced hours plan, without affecting FLSA-exempt status, as long as the employee receives their full salary.

Employers should review their PTO policies, paying particular attention to whether they have reserved discretion to require or prohibit the use of leave based on business needs.

Shutdowns, Furloughs of a Full Week

If the shutdown or furlough will last for a whole workweek, then the employer need not pay affected exempt employees any salary. However, employers must ensure that these employees do not perform any work (including work that can be done from home, such as checking emails or calling clients or customers) during the workweek.

An exempt employee on furlough may be considered to have performed work if, for example, they check or respond to business email, correspond with other employees about work issues, or engage in administrative work. If this were to occur, the employee would have worked during the week and would be entitled to a full week of pay. Therefore, employers should give clear, written instructions that employees may not perform work during the furlough workweek.

Employers also may consider “impounding” work items, such as smartphones and laptops, or disabling company email and network access for the week to reduce the risk of violation. Finally, employers should ensure that all work responsibilities of a furloughed employee be covered by another employee at work for the week.

Shutdowns, Furloughs of Less Than a Full Week or Reduced Hours, Pay

If an exempt employee works any part of a workweek, employers may not reduce that employee’s salary due to a reduction of hours worked, because the reduced hours are “occasioned by the employer or by the operating requirements of the business.” However, employers generally can require the use of paid leave in such situations.

Reducing an exempt employee’s salary because of a “permanent change” in the employee’s

schedule due to economic conditions (*e.g.*, changing from 52 five-day workweeks to 40 five-day workweeks and 12 four-day workweeks over the course of a year) will not jeopardize an exempt employee's status, as long as the employee still receives at least \$684 per week. This salary threshold applies regardless of whether the employee is full-time or part-time. Employers must consider carefully the duration of the reduced schedule and avoid making frequent changes in schedule and corresponding salary.

Related Jackson Lewis Resources

Our Jackson Lewis [COVID-19 Task Force](#) materials:

- State-by state summaries on furlough/layoff information and issues including benefits, unemployment, and wage hour requirements. Please contact a Jackson Lewis attorney.
- For benefits issues in particular, see our article, [Employee Benefits Issues to Consider Before Deciding to Furlough or Terminate Employees During the COVID-19 Pandemic](#)

Jackson Lewis is committed to providing updates and clarifications to help employers make the best business decisions. Please contact a Jackson Lewis attorney if you have questions or need guidance handling issues pertaining to COVID-19.

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