



Kansas State Council of SHRM, Inc.
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KS SHRM COVID-19 WEBINAR DISCUSSION

April 24, 2020

Topic: Navigating the Intersection of FFCRA, FMLA & Unemployment

Guests:

- Shawn Yancy – Kansas Department of Labor
- Kyle Russell – Jackson Lewis P.C.

Questions answered on the call:

1. How will tax rates be affected by unemployment?

Likely the effect won't be noticeable until 2021 but there's potential to see rate increase.

2. Will businesses be charged for former employees?

Yes, there's a potential for a charge based on the base period for the employee.

3. If someone was already out on FMLA leave and not able to work, are they ineligible for unemployment benefits?

The COVID-19 FFCRA leave is more flexible, but if the leave is unrelated to COVID-19, then the more rigid UI rules apply. Regular FMLA still exists and the FFCRA paid benefit is only for employees that are unable to work or telework for a qualifying Covid reason. Pregnant employees are not automatically eligible; but are eligible under normal FMLA leave.

4. If an employee is deemed essential, are they exempted from the extended FMLA under FFCRA?

There is a provision in FFCRA that allows employers to exempt health care providers from the leave requirement but there is no exemption otherwise. The statute itself says the definition of a health care provider is very limited, consistent with FMLA, but a health care employer has discretion over the definition under the FFCRA.

5. Are there specific forms to use for the expanded FMLA?

There are no specific forms but the DOL has a good FAQ document that addresses information required and the documentation involved.



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- *Relaxing normal requirements for health care provider certification.*
- *Encouraging more flexibility than under normal FMLA.*

6. If a new mother can't find a babysitter during COVID-19, is she eligible for paid FMLA?

If an employee has an alternative means for providing childcare, then the employee is not prevented from working or teleworking and would not be eligible.

7. Do any of this change for notice or designation forms we offer back to the employee like we are required to do for FMLA?

There are no changes for regular FMLA notices. As for COVID-19, the DOL FAQ page notes information to obtain. They want to be flexible on documentation required and encourage you to err in favor of allowing employees to take leave. Just be sure to have the documentation together for back-up purposes.

8. If an employee's spouse has symptoms, is the employee eligible for sick pay?

Yes, if you're experiencing symptoms consistent with COVID-19, and you're not able to work or telework, you would qualify under the two-week paid leave. If it's someone in your household, and you would be advised to be under quarantine, the same would apply.

9. Is there any reporting that wouldn't be acceptable?

FFCRA has a posting requirement (there is a DOL poster you're required to post with the other employment law posters). If you have employees eligible for the leave, email or mail them a copy of the poster to ensure you are communicating their rights and complying with the posting requirements. Be sure to provide the documentation verbally, if not in writing, about their request.

10. If we are under 500 employees but are healthcare and exempt from FFCRA, do we still need to post the poster?

Yes, because you're a covered employer, but you may still choose to exempt employees.

11. Contacts for UI:

- For employers kdol.uitax@ks.gov
- For claimants with questions about claims: kdol.uicc@ks.gov

12. Is there a particular time to call in that's better?

Filing weekly claims online is best otherwise call during regular business hours.



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13. If you have an employee advised to self-quarantine, but the test comes back negative, are they still eligible for the paid sick leave?

Yes, if awaiting test results for whatever reason and advised to self-quarantine, then they are eligible under the FFCRA sick leave. Even if they're negative and have the flu, that's still a serious health condition and would be covered under regular FMLA.

14. Does the \$600 payment work in conjunction with the Shared Work Program?

Yes, if you're participating in the Shared Work Program, you are still eligible for the \$600 payment.

15. Are there best practices for applying leave for childcare activities?

Childcare activities are covered under the DOL FAQ. If an employee has a childcare/school issue and wants to use paid FMLA or sick leave, then the DOL is encouraging employers to be flexible with time increments. Allowing exempt employees to fill in gaps with paid sick leave or sick emergency FMLA in whatever increments agreed upon shouldn't mess up the exemption.

16. Is there any problem with paying the normal amount?

No, you can pay more but you won't get the tax credit for the extra money.

17. What is the time frame for the \$600 payment?

The \$600 payment goes from the week of March 29 through the week of July 25. KDOL just started paying that out yesterday and will be paid out for all future payments. If there is paid unemployment for prior weeks, those retroactive \$600 payments will be delayed just a bit.

18. Those employees who take the 2-weeks or the EFMLA for childcare intermittently have the 80 hours of sick leave to use however, as long as it is agreed upon with the employer, even if it is longer than a two-week period?

Yes, the 80 hours of sick leave can be used intermittently over longer than the 2-week period if both the employee and employer agree. It can stretch over a longer period but the availability of the tax credit expires December 31, 2020.

19. Do you get the tax credit if you've applied for PPP?

The tax credits are available under FFCRA to pay employees who are entitled to leave. This is different than the loan forgiveness under PPP but not as familiar with it because it's a federal program.



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20. Are you allowed sick leave even if you haven't been told to quarantine?

If someone calls in sick and hasn't been told to quarantine, they probably don't qualify for paid sick leave under FFCRA but they may be eligible for regular FMLA leave.

21. What guidance do you have concerning employees that fear coming into work?

Employees in unions are starting to file lawsuits against their employers for not providing safe workplaces, whether they're being investigated by OSHA or not. If you have an employee that is scared to come to work, it is not a qualifying reason for paid leave. Even though they may not be eligible under the statute or for a tax credit, revert back to pre-virus behaviors and find out why they have fear and do what you can to avoid a situation where the employee is fearful of coming into work because of potential exposure. Be sensitive, if you can (i.e. supermarkets employers providing plexiglass or face masks for their employees to try to resolve the fear). This situation is not necessarily disqualifying for unemployment and KDOL will weigh safety measures/risk status to determine whether the decision employee made was reasonable under the circumstances.

22. Do you have any additional guidance?

With all the new laws and guidance, employers' pre-virus obligations haven't changed (i.e. don't layoff older workers or ones with pre-existing conditions in violation of age discrimination laws or ADA). Voluntary furloughs or layoffs are fine but you can't impose them on older workers or disabled workers anymore than you did pre-virus.

23. Will nonprofits pay under the reimbursement method?

Nonprofits will receive a 50% offset of their quarterly reimbursement statements. The credit is available for the period beginning March 13.

24. If you transition from an hourly wage to commission but still work full time, is your unemployment eligibility impacted?

You are not eligible for UI if considered full time but KDOL will also look at income if you make less than the weekly benefit amount.

25. Any additional recommendations to help laid off workers?

File for benefits – they're out there and available for this purpose. The Shared Work Program is a good resource, as well.



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26. Is the KDOL still conducting UI Town Halls on Facebook?

No.

26. Will local governments be reimbursed for UI benefits?

Yes. If the government is a reimbursing employer they will receive the 50% CARES Act credit.