

The COVID-19 Apocalypse: Essential Labor and Bankruptcy Questions for Businesses of Less Than 500 Employees

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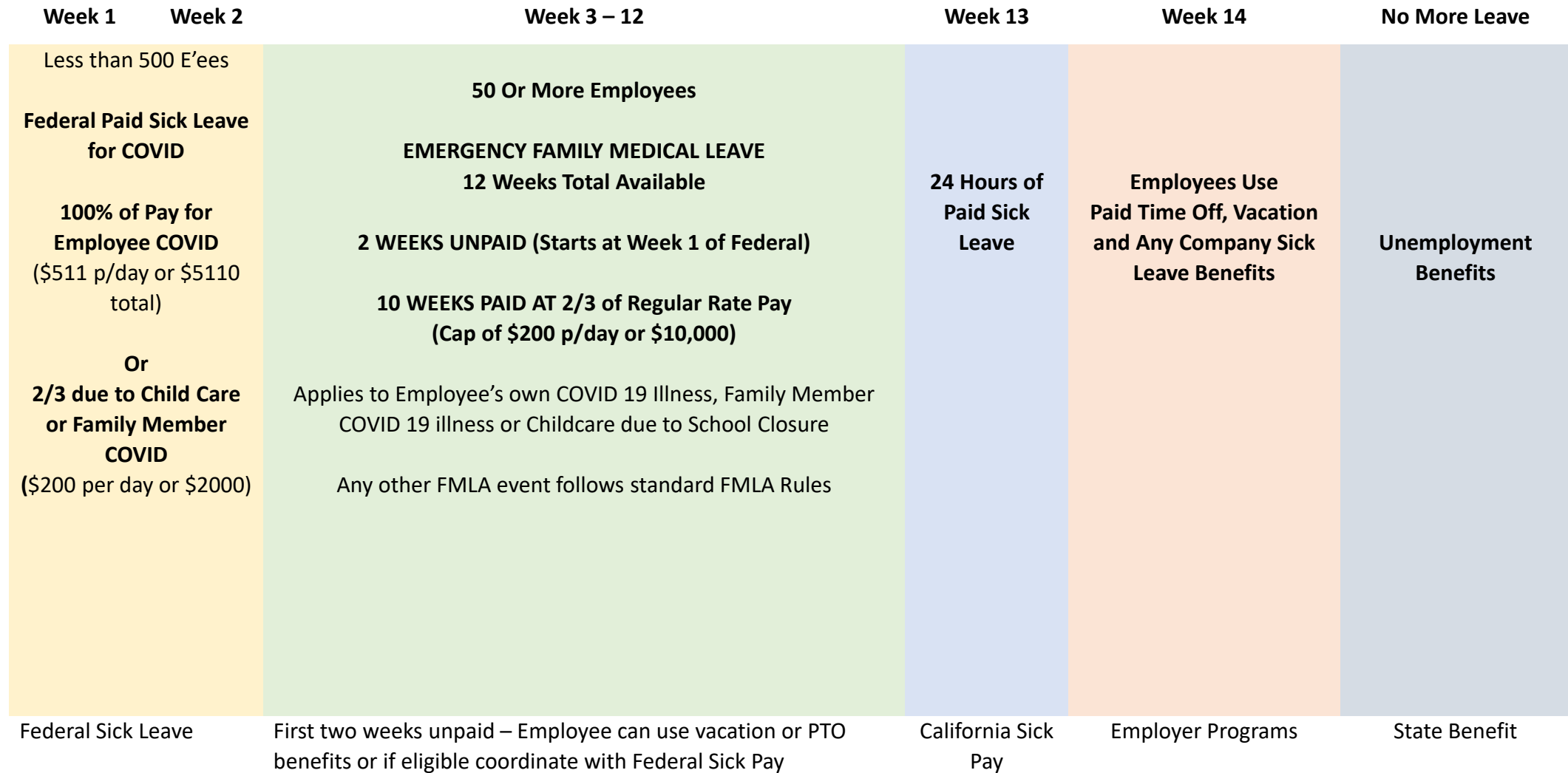
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How Federal and State Programs Interact



Frequently Asked Questions

I have less than 50 Employees – Can I Claim An Exemption?

- Yes. If you can show it “would jeopardize the viability of the business as a going concern” then you can claim the exemption.

What is the difference between furlough and lay off?

- Furlough is intended to be temporary and lay off is meant to be permanent.

What if I furloughed employees – do I still owe Paid Sick Leave?

- No. Unless the Employee had a qualifying an event *prior* to furlough or lay off.

Frequently Asked Questions - Continued

If Employee is Already Collecting Unemployment Do They Qualify?

- No. The DOL has said that if a business has ceased operations due to COVID-19 then employee must collect unemployment.

What if I converted employee to part time before law took effect, are they entitled to 80 hours or part time benefit?

- They would be entitled to the average of what they were paid over the past 60 months. If you had an employee who worked 5 months full time and converted to part time for a month then they would get 66 hours of leave instead of the 80 hours.

Penalty for Not Providing Federal Paid Sick Leave or EFMLA

Penalty is Treated as Failure to Pay Minimum Wage

- Owe two times minimum wage. For \$20 wage earner, this would be a \$3200 penalty.
- Personal liability on owner of company for failure to pay minimum wage
- Could owe interest and attorney fees

Benefits to Making Payment

Tax Credit

- It is up to \$511 per day for Paid Sick Leave and \$200 a day for EFMLA.
- An employer may choose to pay a greater amount of sick leave than required under FFCRA, but it will not be allowed a tax credit for the excess.
- An employer would not be entitled to a credit if it voluntarily pays amounts to its employees who do not satisfy any of the criteria listed above.

Loan Forgiveness for Small Business Loan

- There are very specific rules that have not been fully released, but if you believe you would like this loan you should evaluate for your business.
- There is a temporary cancellation of debt (COD) exclusion of small business loans forgiven

Essential Labor and Bankruptcy Questions

What's Happening in Your Business Today

- Closure of in-house food service
- Limited operations/take out/other creative options
- Shelter-in-place may continue until May 1
- Uncertainty about number of tables in-restaurant after that
- Rent is coming due on April 1
- Suppliers are demanding payment, withholding delivery
- Commercial lines of credit may be frozen
- Banks may be preparing to declare default
- Guarantors are reinforcing that you are personally liable

Essential Labor and Bankruptcy Questions

Your Options Depend on Your Goals

Continuing and/or Restarting vs. Minimizing Personal Liability

- **Continuing Operations:**
 - Reopening after shutdown?
 - Sale of location(s)?
 - Restructuring balance sheet?
 - Wait and see how long this lasts and what help you can get?

Essential Labor and Bankruptcy Questions

Your Options Depend on Your Goals

Continuing and/or Restarting vs. Minimizing Personal Liability

- Shutting down
 - Which debts are guaranteed?
 - Which debts are growing over time if not paid?
 - Will failing to pay some obligations be a violation of the law?

Essential Labor and Bankruptcy Questions

Homework

The Key Question – Will Bankruptcy of the Business Alleviate the problem

- Review leases and determine which clauses are in violation
- Review loan documents for defaults
- Review all commercial relationships for guaranties and co-signatures
- Do a complete assessment of personal liability that might pass through

Essential Labor and Bankruptcy Questions

Homework, Part 2

- Check regulatory notices relating to your business
- Check your insurance – is business interruption kicking into place?
- Check downstream and upstream suppliers and customers
- Understand and manage management of cash flow

Essential Labor and Bankruptcy Questions

FAQ - Who Do You Have to Pay?

- Wage claims, Employee Health Plans
- Taxes
- Landlord
- Utilities
- Suppliers
- Equipment lessors
- Your Bank

Essential Labor and Bankruptcy Questions

Your Taxes?

Extended Deadlines for Returns & Payments

- Per IRS and Treasury Department, Tax Day is extended from April 15, 2020 to July 15, 2020 to file and make payments without interest or penalties.
- California has also extended the filing and payment deadline for personal and business state tax returns, as well as sales tax, to July 15, 2020.
- Any required sales tax payments required during March 27- October 1, 2020 shall be due as one payment on October 1, 2020.
- Employers and self-employed taxpayers can delay payment of the employer portion of payroll taxes through the end of 2020. 50% of any payroll taxes deferred must be paid by 12/31/21 with the rest paid by 12/31/22.

Essential Labor and Bankruptcy Questions

Your Landlord?

Your lease is in breach possibly if:

- Failure to pay rent, minimum rent
- Failure to remain open
- CAM and utilities
- Rent holiday
- Partial deferral

Try negotiating

Essential Labor and Bankruptcy Questions

Your Landlord?

Warning signs re: your lease

- Notice of default
- Notice of termination under lease
- 3-Day Notice
- Commercial eviction and the court system – 7-county moratorium
- Loss of access to premises

Essential Labor and Bankruptcy Questions

Your Landlord?

What about voluntary surrender of premises?

- Turnover of keys
- Acceptance by landlord is not mandatory: Cal Civ. Code 1951.4
- Property remaining on premises/holdover tenancy
- Notifying equipment lessors
- Notifying secured parties
- Notifying owners of other assets

Essential Labor and Bankruptcy Questions

Your Utilities?

- Perishables on site - what's the removal plan
- Internet and telephone/computer access – preserving and maintaining records

Essential Labor and Bankruptcy Questions

Your Suppliers?

- Personal guaranty?
- Reclamation claims – deliveries within 20 days?
- PACA liens – where have the proceeds gone?

Essential Labor and Bankruptcy Questions

Get your house in order

- Contact critical vendors and customers
- Negotiate rent reduction or holiday with your lessor(s)
- Work with your bank toward forbearance, ensure credit lines are available if needed
- Plan for downstream bankruptcies of customers and upstream bankruptcies of suppliers and even corporate parents

Essential Labor and Bankruptcy Questions

Economic Injury Disaster Loan (EDIL)

Low interest loans-

3.75% for profit companies; 2.75% for nonprofit companies

30 year term, up to \$2 million in amount

Expect 3-4 weeks of processing delays

Economic Injury Disaster Loan (EDIL)

Contact for SBA— SBA Link <https://covid19relief.sba.gov/#/>

Key Requirements for SBA COVID19 Loan

Applicant is a business with not more than 500 employees.

Applicant is an individual who operates under a sole proprietorship, with or without employees, or as an independent contractor.

Applicant is a cooperative with not more than 500 employees.

Applicant is an Employee Stock Ownership Plan (ESOP) with not more than 500 e'ee.

Applicant is a tribal small business concern with not more than 500 employees.

Applicant is a business, including an agricultural cooperative, aquaculture enterprise, nursery, or producer cooperative, that is small under SBA Size Standards found at <https://www.sba.gov/size-standards>.

Applicant is a private non-profit organization that is a non-governmental agency or entity

Essential Labor and Bankruptcy Questions

Triggers to Some Kind of Filing

- Collection activity that cannot be avoided
- Turnover of possession rejected
- Statute of limitations ending / preferential transfer aging to 90 days
- 3-day notice or other default cure period is expiring

Essential Labor and Bankruptcy Questions

Insolvency Proceedings

- Bankruptcy
- Assignment for the benefit of creditors
- Workout or composition of creditors
- State law dissolution

Essential Labor and Bankruptcy Questions

Bankruptcy Options

- Liquidation vs. Reorganization
- Individual, Entity, or Both?
- Differences between Chapter 7, Chapter 9, Chapter 11, Chapter 12 and Chapter 13
- New Subchapter V

Essential Labor and Bankruptcy Questions

Tools Within the Bankruptcy Code

- The breathing spell: automatic stay of collection and litigation
- 120 days to assume, extendable to 180 days, more with lessor consent
- Prompt cure - up to 2 years to cure lease default?
- Sale of assets subject to lien, maximize value vs. Ch.7 auction
- Restructure secured and unsecured debt
 - Revise rate, term, stip off liens, pay at percentage on the dollar
- Corporate and individual discharge
- Complications of franchise in bankruptcy – consent needed

Essential Labor and Bankruptcy Questions

Tools Within the Bankruptcy Code

- “Reject” leases and other executory contracts
- Limitation on damages of 11 U.S.C. section 502(b)(6):
 - One year of rent under the lease
 - Or 15% of three years, whichever is greater
 - Plus accrued rent up to date landlord accepts possession
 - Applies to guarantors of commercial leases as well.

Essential Labor and Bankruptcy Questions

Small Business Reorganization Act of 2019

- Origin of the SBRA
- CARES Act increases debt limit to \$7.5 million non-contingent and liquidated for one year
- All the benefits of Chapter 11; lower expense, faster approval
- No impaired accepting class is needed
- No absolute priority rule; just pay disposable net income for 3-5 years
- Allows for controlled liquidation as well, waiver of discharge

Essential Labor and Bankruptcy Questions

Small Business Reorganization Act of 2019

Timeline for a Subchapter V case

- Petition
- The Subchapter V trustee – who they are and what they do
- IDI and 341 meeting
- 60-day Status Conference with the court
- 90-day plan filing deadline
- Confirmation of a plan and the effective date
- Case closing – consensual vs. non-consensual

Essential Labor and Bankruptcy Questions

AUDIENCE QUESTIONS

Via WebEx Chat



Essential Labor and Bankruptcy Questions

MORE QUESTIONS?

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Speaker Biographies

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Ms. Long maintains a diverse litigation practice in employment, hospitality, business litigation and real estate. Ms. Long is the Chair of the Employment Law Practice Group and Hospitality Practice Group. Ms. Long's employment and hospitality litigation practice includes handling wage and hour claims and lawsuits, claims of employment discrimination, ADA compliance, wrongful termination, and breach of employment contract cases. She has experience with class action litigation including taking matters through trial, as well as handling FLSA and EEOC investigations and ADA Compliance. In addition to her litigation practice, Ms. Long counsels clients on all aspects of employment, including complaints made to and investigations initiated by the Department of Fair Employment and Housing, Labor Commissioner, and the EEOC on matters relating to employment including compensation issues, mandatory leaves of absence, reasonable accommodations, and reductions-in-force for individuals, companies and local government. Ms. Long regularly speaks to individuals in the hospitality, automotive, agricultural, technology and manufacturing industries on all matters relating to their business operations including partnership disagreements and dissolutions, partition actions, commercial landlord/tenant suits, easement and boundary claims, and development agreements.

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Speaker Biographies

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Mr. Harris is a partner in the Silicon Valley bankruptcy boutique, Binder & Malter LLP. Mr. Harris frequently lectures and writes on bankruptcy topics and has authored numerous articles, case updates, and other materials, including three affirmative legislative proposals that became California law and has presented three programs on the Small Business Reorganization Act of 2019. Mr. Harris has also contributed to a book on the topic of small business bankruptcy and has twice testified before the California State Senate as an expert in the field of bankruptcy and insolvency. Mr. Harris's accomplishments, publications and speaking engagements are detailed at <https://www.bindermalter.com/robert-g-harris.html>.

Mr. Harris' practice focuses on representing large and small businesses and individuals in Chapter 11, both as debtors and creditors, bankruptcy litigation, state court ABCs, receiverships, execution sales and various other bankruptcy and collection matters. Mr. Harris's experience includes real estate restructurings, sales and reorganizations of high tech and general manufacturing companies, dealing with intellectual property rights in bankruptcy, and handling alleged securities laws and Federal Trade Act violations.