

## Publications

### 3PL Employment Issues to Consider in the Wake of COVID-19

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#### ***Employee compensation, teleworking, and employee health and benefits***

As 3PLs adapt to the impact that COVID-19 continues to have on their business and as employers and employees adjust to teleworking, there are myriad employment issues and new laws that must be considered. Among them are wage-hour laws under the Fair Labor Standards Act relating to employee compensation and teleworking and changes brought about by the Families First Coronavirus Response Act (FFCRA) relating to employee health and benefits.

#### **Employee Compensation**

In light of concerns expressed by employers, the U.S. Department of Labor (DOL) recently issued guidance, [which is available here](#). Below are key considerations.

##### ***Payment to Non-Exempt 3PL Employees***

Non-exempt employees must be paid at least the minimum wage for all hours worked and are to be paid only for the hours they actually do work. Employers can reduce non-exempt employees' schedules and do not have to pay them for hours they would have otherwise worked. Note, however, that some states (such as California and New York) have minimum shift requirements. Also, non-exempt employees must be paid overtime at time-and-a-half for all hours worked over 40 in a workweek. Some states have different daily and/or weekly overtime requirements, and if an employer extends non-exempt employees' shifts to meet increased demands, some states may require additional pay.

##### ***Payment to Exempt 3PL Employees***

Exempt employees generally must receive their full salary for any week in which they perform any work, subject to certain very limited exceptions. An employee will not be considered paid "on a salary basis" if deductions from the employee's predetermined compensation are

made for absences occasioned by an office closure during a week in which the employee performs any work. Exempt employees are not required to be paid their salary for weeks they do not work.

Also, employer-provided vacation time is not required. When an employer offers a bona fide benefits plan or vacation time to its employees, an employer may require that such accrued leave or vacation time be taken on a specific day(s). This will not affect the exempt employee's salary basis as long as the employee still receives in payment an amount equal to the employee's guaranteed salary. An employer may also direct exempt employees to take vacation or debit their leave bank account in the case of an office closure, whether for a full or partial day, provided the employees receive in payment an amount equal to their guaranteed salary. However, an exempt employee who has no accrued benefits in the leave bank account, or has limited accrued leave and the reduction would result in a negative balance in the leave bank account, must still receive the employee's guaranteed salary for any absence(s) resulting from an office closure in order to remain exempt.

### ***Teleworking***

Employers are still required to maintain an accurate record of hours worked for all employees, regardless if employees are teleworking or are working under other flexible work arrangements. Likewise, employers must still be paid no less than the minimum wage for all hours worked and must be paid at least one and one-half times the employee's regular rate of pay for all hours worked over 40 for non-exempt employees. Further, exempt employees still must perform primarily exempt duties when teleworking. This is especially important in states like California that take a quantitative approach to determining exempt status and require that at least 51% of an employee's time be spent on exempt duties. Employers should take steps to ensure that employees who telework accurately record their actual hours worked (including any breaks required by state law).

### ***Reimbursement of Expenses for Teleworking Employees***

The FLSA prohibits employers from requiring employees to incur business expenses on the employer's behalf if doing so reduces the employee's earnings below the required minimum wage or overtime pay. Non-exempt employees must receive the required minimum wage and overtime pay "free and clear." This means that when a covered employee is required to provide the tools and equipment (e.g., computer, internet connection, etc.) needed for telework, the cost of providing the tools and equipment may not reduce the employee's pay below that required by the FLSA. Additionally, some states, such as California and Illinois, also require that employee-incurred business expenses be reimbursed.

## **Employee Health and Benefits**

Several provisions of the recently-enacted FFCRA impact employers' obligations with respect to employees' health and benefits. Key portions of FFCRA are below.

### ***Expanded Leave Under the FMLA (for employers with under 500 employees)***

The FFCRA amends the Family Medical Leave Act (FMLA) to provide for a new type of family leave related to the COVID-19 pandemic. It provides for 12 weeks of FMLA leave to care for a minor child if the child's school or place of care has been closed or the child's care provider is unavailable due to an emergency.

declared by a federal, state, or local authority related to COVID-19. Employees are eligible for this leave after only 30 days of service—as opposed the 12 months for most FMLA leave. This portion of FFCRA applies to private sector employers with less than 500 employees and to all public sector employers. The coronavirus FMLA leave is 2 weeks of unpaid leave with the potential for 10 subsequent weeks of leave paid at two-thirds of the employees regular pay (capped at \$200/day). During the unpaid portion of the leave, employees are permitted to substitute available paid vacation, personal, medical, or sick leave for the unpaid leave. Employers will be given tax credits for FMLA leave wages paid under this new provision.

Notably, the DOL has the authority to issue regulations to exclude, among others, businesses with fewer than 50 employees from the requirements of this law when compliance with the law would jeopardize the viability of the business as a going concern. Importantly, the rest of the FMLA rules remain intact. For example, a person who has been employed between 30 days and 1 year is not eligible for unpaid FMLA leave for any other reason.

***New Required Emergency Paid Sick Leave (All employers except private employers with over 499 employees)***

FFCRA also requires employers to provide two weeks of paid sick time to employees for certain reasons related to the COVID-19 pandemic. Like the FMLA expansion, it applies to private employers with fewer than 500 employees and to all public employers. Unlike the new type of FMLA leave, there is no length of service requirement. Rather, employees are eligible for paid sick leave immediately upon hire. Full-time employees are entitled to 80 hours of paid sick time. Part-time employees are entitled to paid sick time in an amount equal to the average number of hours they work in a two-week period.

Under the law, paid sick time must be provided when an employee is unable to work (or telework) due to a need for leave because the employee:

1. Is subject to a federal, state, or local quarantine or isolation order related to COVID-19;
2. Has been advised by a health care provider to self-quarantine due to concerns related to COVID-19;
3. Is experiencing symptoms of COVID-19 and is seeking a medical diagnosis;
4. Is caring for an “individual” who is subject to an order or advisement as described in numbers 1 and 2 (Note: There is no definition of “individual,” so this individual could be any person and is not limited to family members);
5. Is caring for a son or daughter (as defined by the FMLA) if, due to COVID-19 precautions, the child’s school or place of care has been closed or the child care provider of such child is unavailable; or
6. Is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services.

Under the new law, the amount that the employee must be paid varies depending on the reason for the leave: Reason 1-3 Paid 100% of their regular rate of pay times the number of hours of paid sick leave, capped at \$511 per day and \$5,110 in total Reason 4-6 Paid 2/3 of their regular rate of pay times the number of hours of paid sick leave, capped at \$200 per day and \$2,000 in total

The DOL is expected to issue additional guidelines regarding the calculation of paid sick time under this law by April 2, 2020.

Employers are required to post a notice regarding these new paid sick time requirements in a conspicuous place in the workplace. Just like with the new FMLA leave, the DOL has the authority to issue regulations to exclude, among others, businesses with fewer than 50 employees from the requirements of this law when compliance with the law would jeopardize the viability of the business as a going concern. Both the FMLA amendment and new paid sick time requirements will take effect on April 1, 2020. These provisions are temporary and will expire on December 31, 2020.

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### **VORYS COVID-19 TASK FORCE**

Vorys attorneys and professionals are counseling our clients in the myriad issues related to the coronavirus (COVID-19) outbreak. We have also established a comprehensive COVID-19 Task Force, which includes attorneys with deep experience in the niche disciplines that we have been and expect to continue receiving questions regarding coronavirus. Learn more and see the latest updates from the task force at [vorys.com/coronavirus](https://www.vorys.com/coronavirus).