



COVID-19 and HR-Related Issues

December 9, 2020



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Panel

- Attorney John Martin, Pillar+Aught
- Tricia Richardson, Senior Consultant, RKL's Human Capital Management Practice
- Julie Mele, Human Resources Project Specialist, OneDigital
- Christina Mihalik, SVP, Government Relations, CrossState
- Chris Abeel, VP, Government Relations, CrossState
- Nicola Foggie, Chief Regulatory Officer, CrossState
- Ann Renfrew, Compliance & Regulatory Affairs Officer, CrossState
- Erin Ensminger, Compliance & Operations Officer, CrossState
- Cindy Russell, Director of Member Engagement, CrossState

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58. **When does the small business exemption apply to exclude a small business from the provisions of the Emergency Paid Sick Leave Act and Emergency Family and Medical Leave Expansion Act?**

An employer, including a religious or nonprofit organization, with fewer than 50 employees (small business) is exempt from providing (a) paid sick leave due to school or place of care closures or child care provider unavailability for COVID-19 related reasons and (b) expanded family and medical leave due to school or place of care closures or child care provider unavailability for COVID-19 related reasons when doing so would jeopardize the viability of the small business as a going concern. A small business may claim this exemption if an authorized officer of the business has determined that:

1. The provision of paid sick leave or expanded family and medical leave would result in the small business's expenses and financial obligations exceeding available business revenues and cause the small business to cease operating at a minimal capacity;
2. The absence of the employee or employees requesting paid sick leave or expanded family and medical leave would entail a substantial risk to the financial health or operational capabilities of the small business because of their specialized skills, knowledge of the business, or responsibilities; or
3. There are not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services provided by the employee or employees requesting paid sick leave or expanded family and medical leave, and these labor or services are needed for the small business to operate at a minimal capacity.

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FFCRA & Interplay with State "Orders"...

Subject to a Quarantine or Isolation Order.

For the purposes of the EPSLA, a quarantine or isolation order includes quarantine, isolation, containment, shelter-in-place, or stay-at-home orders issued by any Federal, State, or local government authority that cause the Employee to be unable to work even though his or her Employer has work that the Employee could perform but for the order. This also includes when a Federal, State, or local government authority has advised categories of citizens (e.g., of certain age ranges or of certain medical conditions) to shelter in place, stay at home, isolate, or quarantine, causing those categories of Employees to be unable to work even though their Employers have work for them.

29 C.F.R. § 826.10 (emphasis added).



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FFCRA & Interplay with State "Orders"...

• [Current Pennsylvania Order](#) (excerpt):

iv. **Employee Isolation or Quarantine:**

- a. *If an employee becomes sick during the workday, the individual must be sent home immediately. An employee who has symptoms of COVID-19 before reporting to work should notify the employee's supervisor and remain home.*
- b. *An employee who is a close contact of a person who is diagnosed with or tests positive for COVID-19, as defined by the Pennsylvania Department of Health or local health department in accordance with CDC guidance, may not continue to work at an in-person business, and must quarantine in accordance with the direction of the Pennsylvania Department of Health or the local health department.*
- c. *If an employee is diagnosed with or tests positive for COVID-19, the employee may no longer work at an in-person business, even if asymptomatic, and must isolate in accordance with the direction of the Pennsylvania Department of Health or a local health department.*

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OSHA Record-Keeping Requirements

- [May 19, 2020 Enforcement Memo:](#)
 - Under OSHA's recordkeeping requirements, COVID-19 is a recordable illness, and thus employers are responsible for recording cases of COVID-19, if:
 - The case is a confirmed case of COVID-19;
 - The case is "work-related"; and
 - The case involves one or more of the general recording criteria (e.g., death, days away from work, restricted work or transfer to another job, medical treatment beyond first aid, loss of consciousness, and/or a significant injury or illness diagnosed by a physician or other licensed health care professional).



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OSHA Record-Keeping Requirements

Because of the difficulty with determining work-relatedness, OSHA is exercising enforcement discretion to assess employees' efforts in making work-related determinations.

In determining whether an employer has complied with this obligation and made a reasonable determination of work-relatedness, CSOs should apply the following considerations:

- The reasonableness of the employer's investigation into work-relatedness. Employers, especially small employers, should not be expected to undertake extensive medical inquiries, given employee privacy concerns and most employees' lack of expertise in this area. It is sufficient in most circumstances for the employer, when it learns of an employee's COVID-19 illness, (1) to ask the employee how he believes he contracted the COVID-19 illness, (2) while respecting employee privacy, discuss with the employee his work and out-of-work activities that may have led to the COVID-19 illness, and (3) review the employer's work environment for potential SARS-CoV-2 exposure. The review in (3) should be informed by any other instances of workers in that environment contracting COVID-19 illness.
- The evidence available to the employer. The evidence that a COVID-19 illness was work-related should be considered based on the information reasonably available to the employer at the time it made its work-relatedness determination. If the employer later learns more information related to an employee's COVID-19 illness, then that information should be taken into account as well in determining whether an employer made a reasonable work-relatedness determination.
- The evidence that a COVID-19 illness was contracted at work. CSOs should take into account all reasonably available evidence, in the manner described above, to determine whether an employer has complied with its recording obligation. This cannot be reduced to a ready formula, but certain types of evidence may weigh in favor of or against work-relatedness. For instance:
 - COVID-19 illnesses are likely work-related when several cases develop among workers who work closely together and there is no alternative explanation.
 - An employee's COVID-19 illness is likely work-related if it is contracted shortly after lengthy, close exposure to a particular customer or coworker who has a confirmed case of COVID-19 and there is no alternative explanation.
 - An employee's COVID-19 illness is likely work-related if his job duties include having frequent, close exposure to the general public in a locality with ongoing community transmission and there is no alternative explanation.
 - An employee's COVID-19 illness is likely not work-related if she is the only worker to contract COVID-19 in her vicinity and her job duties do not include having frequent contact with the general public, regardless of the rate of community spread.
 - An employee's COVID-19 illness is likely not work-related if he, outside the workplace, closely and frequently associates with someone (e.g., a family member, significant other, or close friend) who (1) has COVID-19 (2) is not a coworker, and (3) exposes the employee during the period in which the individual is likely infectious.

CSOs should give due weight to any evidence of causation, pertaining to the employee illness, at issue provided by medical providers, public health authorities, or the employee herself.

If, after the reasonable and good faith inquiry described above, the employer cannot determine whether it is more likely than not that exposure in the workplace played a causal role with respect to a particular case of COVID-19, the employer does not need to record that COVID-19 illness. In all events, it is important as a matter of worker health and safety, as well as public health, for an employer to examine COVID-19 cases among workers and respond appropriately to protect workers, regardless of whether a case is ultimately determined to be work-related.



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Vaccines!!



- *"Can I require employees to receive the COVID-19 vaccine as a condition of employment?"*
 - At present, no law, regulation, or other guidance directly addresses whether employers may require their employees to get a COVID-19 vaccination.
 - However, the concept of mandatory vaccination programs in employment is not an entirely novel issue.
 - Many healthcare workers are currently required to receive certain vaccinations as a condition of their employment.
 - The EEOC and OSHA have both addressed the issue of mandatory flu vaccination policies in the past.



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FFCRA > What is Paid

Effective April 1st – December 31st

Reason for Leave	Pay Information
1. I am subject to a federal, state or local quarantine or isolation order related to COVID-19	Days 1 to 10: 100% of Regular Pay Rate Not to exceed: \$511/day or \$5,110 in total FT = 2 weeks or 80 hours PT = typical # hours worked in 2 week period
2. I have been advised by a health care provider to self-quarantine related to COVID-19	
3. I am experiencing COVID-19 symptoms and am seeking a medical diagnosis	
4. I am caring for an individual subject to a self-quarantine order	Days 1 to 10: 67% of Regular Pay Rate Not to exceed: \$200/day or \$2,000 in total FT = 2 weeks or 80 hours PT = typical # hours worked in 2 week period

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FFCRA > What is Paid

Reason for Leave	Pay Information
5. I am caring for a child whose school or place of care is closed (or child care provider is unavailable) for reasons related to COVID-19	Days 1 to 10: 67% of Regular Pay Rate Not to exceed: \$200/day or \$2,000 in total FT = 2 weeks or 80 hours PT = typical # hours worked in 2 week period Weeks 3 to 12 (50 days): Employee becomes eligible after 30 days of employment 67% of Regular Pay Rate Not to exceed: \$200/day or \$2,000 in total FT = 2 weeks or 80 hours PT = typical # hours worked

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FFCRA > What is Paid

Reason for Leave	Pay Information
6. I am experiencing other substantially-similar condition specified by the Secretary of Health and Human Services, in consultation with the Secretaries of Labor and Treasury	Days 1 to 10: 67% of Regular Pay Rate Not to exceed: \$200/day or \$2,000 in total FT = 2 weeks or 80 hours PT = typical # hours worked in 2 week period

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FFCRA > Credits Available

Employers MUST USE the correct payroll code for FFCRA wages

Calculated automatically through payroll processing:

- Already exempt from Employer Social Security
- Credits applied toward 941 payments or requested on Form 7200
- Gross EPSL wages paid
- Employer Medicare (1.45%)

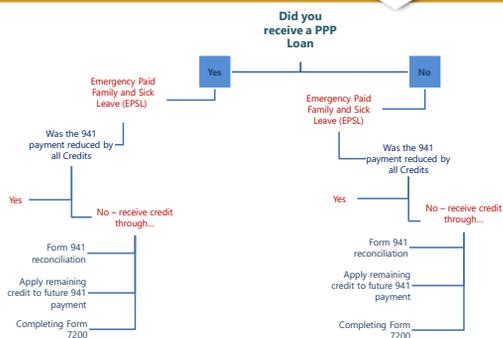
Must add this information (or provide to the payroll provider):

Qualified health plan expenses



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FFCRA > Receiving the Credits



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ERTC > Eligibility

Eligible if:

- No PPP Loan
- Not a State or Local government or instrumentality
 - *An instrumentality is an organization created by or pursuant to state statute and operated for public purposes. Generally, an instrumentality performs governmental functions, but does not have the full powers of a government, such as police authority, taxation and eminent domain.*
- Experienced a full or partial suspension of the operation of their trade or business during any calendar quarter because of governmental orders limiting commerce, travel, or group meetings due to COVID-19
- Experienced a significant decline in gross receipts
 - A significant decline in gross receipts is calculated by determining the first calendar quarter in 2020 in which an Employer's gross receipts are less than 50% of its gross receipts for the same calendar quarter in 2019.

<https://www.irs.gov/coronavirus/employee-retention-credit>

<https://www.irs.gov/government-entities/federal-state-local-governments/government-entities-and-their-federal-tax-obligations>

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ERTC > Eligibility

Per the National Association of Federally-Insured Credit Unions (NAFCU)

"While the Federal Credit Union Act does not specifically explain why credit unions receive a tax exemption, various government actions and documents have provided commentary on the subject. A 1979 Internal Revenue Service (IRS) document explains that IRC 501(c)(14) exempts credit unions that are operating on a not-for-profit basis, organized without capital stock, and operating for mutual purposes. Furthermore, federally chartered credit unions are considered to be instrumentalities of the United States and are exempt under 501(c)(1). The IRS document suggests that credit unions merit a tax exemption as they have certain features that clearly distinguish them from other financial institutions and have not deviated from their original purpose. For example, credit unions still have a common bond among members and serve as a source of credit for low- and moderate-income people."

<https://www.nafcu.org/cutaxexemption/background>

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ERTC > Eligibility

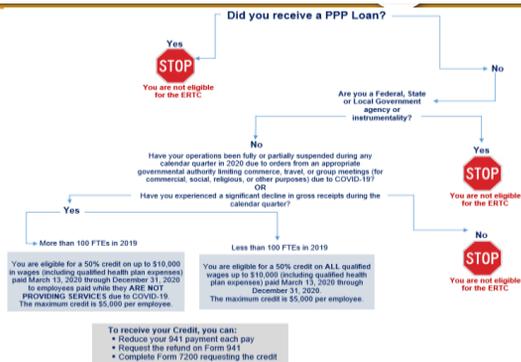
Per the 1979 Internal Revenue Service IRC 501(c)(14)

"State chartered credit unions without capital stock, organized and operated for mutual purposes and without profit are exempt from Federal income tax under IRC 501(c)(14)(A). Federal credit unions are considered to be instrumentalities of the United States, exempt from Federal income tax under the provisions of the Federal Credit Union Act, 12 U.S.C. 5176b, thus qualifying for exemption under IRC 501(c)(1)."

<https://www.irs.gov/pub/irs-tege/eotopicm79.pdf>

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ERTC > Eligibility



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ERTC > Credits Available

Wages paid between March 13th and December 31st

Credit of 50% for up to \$10,000 in qualified wages (to include qualified health plan expenses) – total Credit per Employee = \$5,000

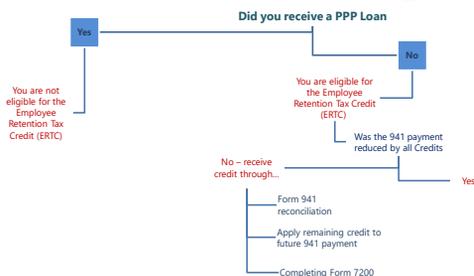
- > Employer averaged more than 100 full-time Employees during 2019 qualified wages paid to Employees who did not work
- > Employer averaged 100 or fewer full-time Employees during 2019 all qualified wages paid

Must add this information (or provide to the payroll provider)



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ERTC > Receiving the Credits



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Allocable Qualified Health Plan Expenses Calculation >

Use any Section 125 Benefit Plans (pre-tax) – could include health, vision and dental & the amount of contributions made on behalf of the Employee to an HRA (excluding QSEHRAs) or FSA

1. Invoice Cost (ER and EE) for all Plans (based on the Employee or using an average; Self-Insured use the COBRA rate) x 12 = Annual Cost
2. Annual Cost / 260 (based on full-time 5 days a week x 52 weeks) = Daily Rate
3. Daily Rate x Days related to the credit = Health Insurance Credit for that Employee

\$1,000 x 12 = \$12,000
 \$12,000 / 260 = \$46.15
 \$46.15 x 10 days paid = **\$461.50**

← Usually neglected or under-valued



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Get the Help You Need, When You Need It, *We're in it Together.*

HR. Solved.SM is a unique program designed to provide certified HR expertise on demand - without all the costly overhead.



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What Can HR. SOLVED.SM Do for You?

Whether a large HR department or a team of one, HR. Solved.SM provides expert support and access to experienced and highly certified strategists so you can shift from being reactive to strategic. Get the help you need, when you need it. **Our valuable suite of resources and solutions are each engineered to enable you to power your people and drive continued growth for your business.**



Get on-demand HR support at a moment's notice, via phone or email.



Access critical resources that have been tested and approved by HR experts.



Create customized documents necessary to run your organization.



Protect your organization from expensive mistakes.



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30-Day Free Trial for CrossState Members

- CrossState members can sign up for a 30-Day free trial and get on-demand access (via phone and email) to our Team of HR Experts.
- Members will have the option to continue with the full suite of HR. Solved.SM tools and resources after the trial period concludes.



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HR. Solved.SM Service Tiers

Subscription Service Features	Platinum \$400	Gold \$250	Silver 90-Day Free Trial For CrossState Members \$150
Monthly Subscription Fee	\$400	\$250	\$150
OneDigital HR Consultant Support – Phone and Email	✓	✓	✓
Legislative Alerts – Online and Email	✓	✓	✓
Comprehensive, Online Compliance Assessment with Reports and Consultative Strategic Support Upon Completion	✓	✓	✓
Multi-State Handbook Builder with Update Notifications	✓	✓	✓
Document Library – Forms, Checklists, Templates, etc.	✓	✓	✓
Compliance Checklists	Coming Soon!	Coming Soon!	✓
User Webinars with SHRM, HRCI credits	✓	✓	✓
Multi-State Law References	Coming Soon!	Coming Soon!	✓
On Demand Webinar Playback Access	✓	✓	✓
Other Buy-Up HR Services: Recruiting, Payroll, Compensation, Onsite/Professional HR Support, Customer Training, User of Absence Administration Management (additional fees may apply)	✓	✓	✓



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CrossState Advocacy Update

- Legislative/Regulatory Update
- Advocacy Comment Letters
- COVID-19 Resources
- Member Engagement

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CrossState’s COVID-19 Resources

- www.crossstate.org
 - [COVID-19 Resources](#)
 - [SBA/PPP Resources](#)
 - [Reopening Resources](#)
- [InfoSight](#)
 - [COVID-19 – Coronavirus](#)
- [CU PolicyPro](#)



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Resources

- [State of New Jersey Department of Health](#)
- [State of Pennsylvania Department of Health](#)
- [World Health Organization](#)
- [Center for Disease Control and Prevention](#)
- [Occupational Safety & Health Administration \(OSHA\)](#)
- [NCUA](#)
- [PA Department of Banking and Securities](#)
- [NJ Department of Banking & Insurance](#)
- [NASCUS COVID-19 Resources & Guidance](#)



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Q&A Session





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Thank You!

For further questions, contact
compliance@crossstate.org



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