



Practical Advice for Employers Facing Paid Leave and Compensation Issues During the COVID-19 Pandemic

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Littler[®]

Presented by



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Agenda



- **FFCRA**

- What You Need to Know Right Now About FFCRA
- Overview of Key Provisions of the FFCRA
- Significant Threshold Issues/ Questions



- **Compensating Employees During the Pandemic**



- **Reducing Work Hours During the Pandemic**



- **Unemployment Compensation**



Employers Chasing COVID-19 Compliance

- Taking temperatures, sending people home, paid and unpaid time off
- Fast and furious
 - FFCRA enacted on March 18, 2020—took effect yesterday, **APRIL 1, 2020**
 - DOL issued Q&A three times in a matter of days last week to provide clarity
 - CARES Act—signed into law Friday, March 27 (\$2T measure, historic levels of emergency aid across the economy, including to households, businesses, cities and states—including expanded UIB)
 - DOL issued the final rule on the afternoon of April 1 (124 pages, less than 24 hours ago)!

What You Need to Know Right Now

- FFCRA is not retroactive—you did not have to comply until April 1, and what you did before April 1 does not count
- If you're covered by FFCRA, you have to post the poster (even if you might claim an exemption with regard to one or more employees)
 - https://www.dol.gov/sites/dolgov/files/WHD/posters/FFCRA_Poster_WH1422_Non-Federal.pdf
 - <https://www.dol.gov/agencies/whd/pandemic/ffcra-poster-questions>
- Where to find the DOL's FFCRA resources
 - <https://www.dol.gov/agencies/whd/pandemic>



More Resources You Need Right Now

- Where to find the DOL's FFCRA Q&A
 - <https://www.dol.gov/agencies/whd/pandemic/ffcra-questions>
- Where to find the new **DOL's Final Rule** (current regulations—preparing for publication in Federal Register) on FFCRA that issued April 1
 - <https://www.dol.gov/sites/dolgov/files/WHD/Pandemic/FFCRA.pdf>
- Treasury also issued updated guidance/Q&A earlier this week on how to get the FFCRA tax credits
 - [https://www.irs.gov/newsroom/covid-19-related-tax-credits-for-required-paid-leave-provided-by-small-and-midsize-businesses-faqs#how to claim](https://www.irs.gov/newsroom/covid-19-related-tax-credits-for-required-paid-leave-provided-by-small-and-midsize-businesses-faqs#how%20to%20claim)



DOL's "No-Enforcement" Announcement*

*"The Department will not bring enforcement actions against any public or private employer for violations of the Act occurring within 30 days of the enactment of the FFCRA, i.e. March 18 through April 17, 2020, provided that the employer has made reasonable, good faith efforts to comply with the Act. For purposes of this non-enforcement position, an employer who is found to have violated the FFCRA acts "reasonably" and "in good faith" when all of the following facts are present: (1) The employer remedies any violations, including by making all affected employees whole as soon as practicable. As explained in a Joint Statement by the Department, the Treasury Department and the Internal Revenue Service (IRS) issued on March 20, 2020, this program is designed to ensure that all covered employers have access to sufficient resources to pay required sick leave and family leave wages; (2) The violations of the Act were not "willful" based on the criteria set forth in *McLaughlin v. Richland Shoe*, 486 U.S. 128, 133 (1988) (the employer "either knew or showed reckless disregard for the matter of whether its conduct was prohibited..."); and (3) The Department receives a written commitment from the employer to comply with the Act in the future."*

<https://www.dol.gov/agencies/whd/field-assistance-bulletins/2020-1>

****This doesn't prevent private litigation—which we expect***

Overview of FFCRA Paid Leave Provisions

NOTE: FFCRA Leave is When there is Work Available to be Performed, But the Employee is Unable to Work for Certain, Specified COVID-19-Related Reasons

- **Emergency Paid Sick Leave (“EPSL”)**

- No eligibility requirements—immediately upon hire
- Up to 80 hours (~ first 10 days)
- 6 different reasons
- Full pay or 2/3 pay (depending on reason)—subject to monetary caps

- **Emergency Paid FMLA (“FMLA+”)**

- Must be employed 30 calendar days (no year of service, no 1,250 hours, no 50-in-a-75-mile-radius)
- Up to 12 weeks (~ days 11-60)
- 1 reason only—school closure/childcare unavailability
- Weeks 1 -2 unpaid by this provision
- Weeks 3 – 12: 2/3 pay—subject to monetary caps

There are Six Very Specific Reasons for EPSL

29 CFR § 826.20(a). Where the employee is unable to work (or telework) due to a need for leave because...

1. employee is subject to a federal, state or local quarantine/isolation order related to COVID-19;
2. employee advised by a health care provider to self-quarantine because of COVID-19;
3. employee is experiencing symptoms of COVID-19 and is seeking medical diagnosis;
4. employee is caring for an individual subject or advised to quarantine or isolation;
5. employee is caring for son or daughter whose school or place of care, or childcare provider, is unavailable due to COVID-19 precautions and/or;
6. employee is experiencing substantially similar conditions as specified by HHS.

*****There are COVID-19-related reasons employees take time off of work that are NOT on this list—and if they are not on this list, there is no paid leave under FFCRA (FMLA+ is already EPSL #5).***

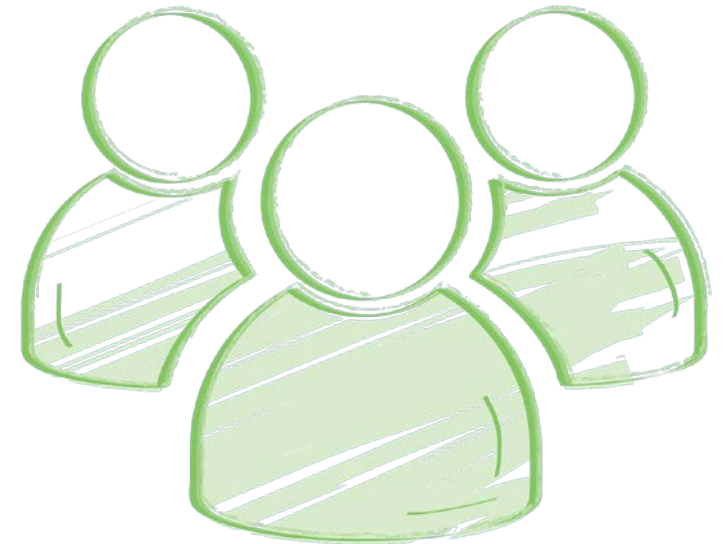
The Confusion Over Shelter-in-Place Orders

- 29 CFR §§ 826.10(a); 826.20(a)(2): “Any Employee Subject to a Quarantine or Isolation Order may take Paid Sick Leave for [EPSL reason #1] only if, but for being subject to the order, he or she would be able to perform work that is otherwise allowed or permitted by his or her Employer, either at the Employee’s normal workplace or by Telework. **An Employee Subject to a Quarantine or Isolation Order may not take Paid Sick Leave where the Employer does not have work for the Employee as a result of the order or other circumstances.**”
- Preamble (p. 14 of PDF in link provided): “For example, if a coffee shop closes temporarily or indefinitely due to a downturn in business related to COVID-19, it would no longer have any work for its employees. A cashier previously employed at the coffee shop who is subject to a stay-at-home order would not be able to work even if he were not required to stay at home. As such, he may not take paid sick leave ...That said, he may be eligible for state unemployment insurance...”
 - DOL further clarifies in a footnote that this is true even if the closure of the coffee shop was substantially caused by the shelter-in-place order—whether it is because customers are staying at home and not going there so there is not enough work, or whether the order forced the coffee shop to close.

Critical Questions and Issues Applicable to Both Types of Leave

Is Your Organization Covered by FFCRA?

- 29 CFR § 826.40(a)
- Private employers with **fewer than 500 employees** (so 499 and below), and public entities of any size (some differences for federal government employees)
- All employees of joint employers and integrated employers count
- Employers should also count full-time, part-time, those on leave, temps (including those from an agency)



So When and How Do I Count to 500?

- This is a live count “dependent on the number of employees at the time an employee would take leave.” - DOL Preamble to the Rule
- Practical effect: if you’re close to 500, whether or not you are a covered employer could change from day to day
- Combine entities? Be mindful of taking a position here in the short-term that doesn’t align with your business realities, or other positions you’ve taken before (or might need to take later)



But Wait, I Heard Somewhere Employers Under 50 Are Off the Hook?

- This is an exemption to be affirmatively claimed and proven, not an overall opt-out for small employers, and not all aspects of FFCRA are off the table
- 29 CFR § 826.40(b). Employers (including religious organizations and nonprofits), with fewer than 50 employees are exempt from providing EPSL and FMLA+ 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 (*i.e.*, you still have to provide EPSL for reasons #1, 2, 3, 4 and 6)
- This exemption appears to be one that has to be elected by an employer with regard to particular employees—from the DOL’s Preamble: “...the employer may deny paid sick leave or expanded family and medical leave only to those otherwise eligible employees whose absence would cause” the employer to meet the criteria in the Rule

More on Relief for Small Business (Under 50 Employees)

- An authorized officer of the business has to be able to document that the employer meets the Rule's criteria for the exemption with regard to a particular employee to whom leave is being denied (and retain records of that to support the denial—but don't send to DOL now)
- You **still have to post the poster**, even if you plan to claim this exemption as to some
- 29 CFR § 826.151(b): Private litigation cover for claims under FMLA+ for small employers not otherwise subject to “classic” FMLA (doesn't bar DOL action)

So, Did I Read that Health Care Providers are Exempt from FFCRA?

- **Employers may deny providing paid FFCRA leave to employees who are “health care providers” or “emergency responders”**
 - 29 CFR § 826.30(c). Health care provider = “anyone employed at any doctor’s office, hospital, health care center, clinic, post-secondary educational institution offering health care instruction, medical school, local health department or agency, nursing facility, retirement facility, nursing home, home health care provider, any facility that performs laboratory or medical testing, pharmacy, or any similar institution, Employer, or entity. This includes any permanent or temporary institution, facility, location, or site where medical services are provided that are similar to such institutions.”
 - Also includes those who contract, provide supplies or services, etc., and emergency responder definition similarly broad
 - **If you are in these industries, read the Rule carefully**—DOL also says to be judicious about the goal of minimizing the spread of COVID-19 (*i.e.*, don’t over use this)
 - If you don’t elect to exempt an individual from this type of leave, all other rules and tax credit guidelines apply
- **Note: the definition of “health care provider” for signing a medical certification to keep an employee off of work is still the same as it is under “classic” FMLA**

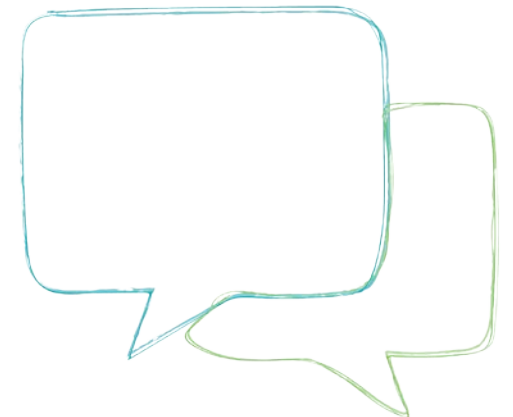
What if We Already Provide Generous Time Off Benefits?

- EPSL and FMLA+ are **on top of** whatever you are already doing, or what state or local law already requires you to offer, or what you did prior to April 1
- As of April 1, employers were no longer permitted to require employees to use their existing, Company-provided paid time off banks *prior to* using paid FFCRA time (if they are eligible for FFCRA time)
- Allowing employees at 2/3 pay to “top off” to 100%? No tax credit for the top off



Requiring Documentation of the Need for FFCRA Leave

- 29 CFR § 826.100: Employee is required to provide name, dates leave is requested, qualifying reason for the leave, oral or written statement that employee is unable to work or telework because of the reason for leave
- *Dorothy, we aren't in Kansas anymore*—this is not “classic” FMLA
 - DOL’s Final Rule requires information, but not much documentation (e.g., “name of the health care provider who advised the employee to self-quarantine due to concerns related to COVID-19...”)
 - Remember to watch Treasury website and regulations to see if any other documentation will be required for the tax credits



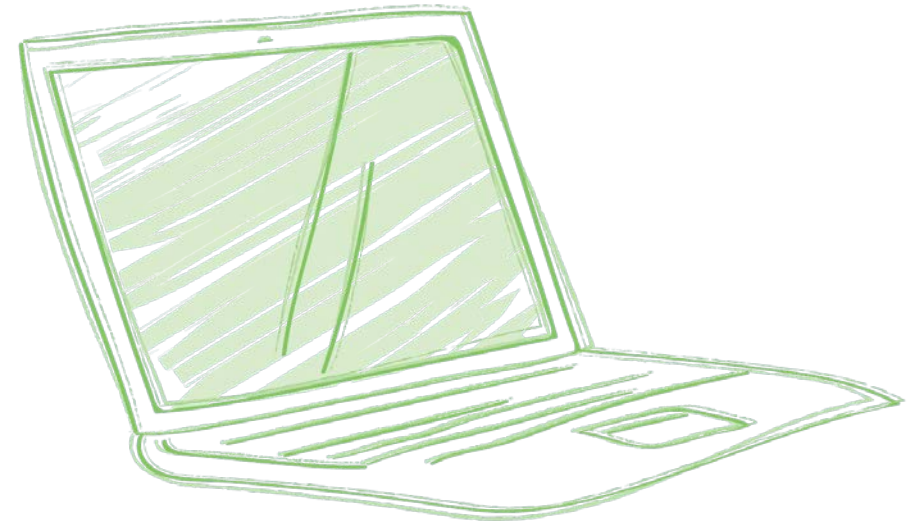
Making Necessary Organizational Changes

- FFCRA does not take away an employer’s right to make lawful organizational changes (and employees who are laid off, terminated or furloughed are not entitled to FFCRA paid leave if no work is available for them to do). *See, e.g.,* 29 CFR § 825.160(d)
- Absent justifiable organizational changes, job restoration rights of “classic” FMLA apply to both EPSL and FMLA+ (and of course employers cannot take adverse employment action to avoid obligations under FFCRA)—special rules for employers with fewer than 25 employees
- Organizational changes must still be defensible under traditional non-discrimination and non-retaliation principles—cannot be to avoid the consequences of FFCRA

Compensating Employees During a Pandemic

Nonexempt Employees Working from Home – The Basics

- Nonexempt employees are compensated for time actually worked
 - No requirement to pay for time not actually worked
 - EXCEPT “on call” time
 - EVEN if it’s the employer’s decision
 - ALL hours actually worked
 - Employees cannot volunteer to work without pay



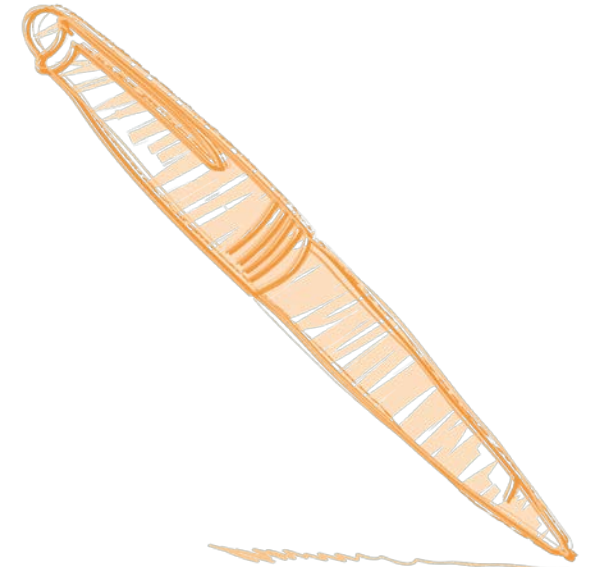
Nonexempt Employees Working from Home – Compliance Strategies

- Ensure time is accurately recorded
 - Establish policy for recording time worked at home
 - Establish work hours
 - Pay attention to communications outside established work hours



Nonexempt Employees Working from Home – Compliance Strategies

- Ensure time is accurately recorded
 - Unpaid lunch breaks must be uninterrupted
 - Require written certification of time records
 - Require written certification of uninterrupted lunch breaks



Nonexempt Employees Working from Home – Compliance Strategies

- Ensure continued compliance with Company policies
 - Timekeeping
 - Overtime approval
 - Breaks



Nonexempt Employees Working from Home – Compliance Strategies

- Consider implementing a **TEMPORARY** telework policy
 - Must be available via telephone and/or email during established hours
 - Expected to attend mandatory meetings
 - Telecommuting expenses
 - Use of company equipment
 - Information Security
 - Workplace injuries



Hours Reduction – Nonexempt Employees

- Notice requirements – many states require advanced notice of changes to pay
 - typical time frame is a pay period in advance.
- Predictive scheduling –
 - Is the employee subject to predictive scheduling?
 - Is there an exception that applies in these circumstances?
 - Has the law has been suspended for the pandemic?

Nonexempt Employees - Additional Wage/Hour Issues

- **WAGE AND HOUR OBLIGATIONS STILL APPLY**
 - Hazard pay (among other types of incentive compensation) must be included in the regular rate for purposes of calculating overtime
 - Commute/travel time rules still apply
 - Meeting time is compensable
 - Training time is compensable
 - Unapproved overtime is compensable



Hours/Pay Reduction – Exempt Employees

- Salary basis test requires minimum pay regardless of hours worked
 - Federal/Texas - \$684
 - Some states over \$1k per week.
- Several states require advance notice of pay reductions
- Salary also must be “bona fide” – cannot be tied to quality or quantity of work.



Hours/Pay Reduction – Exempt Employees

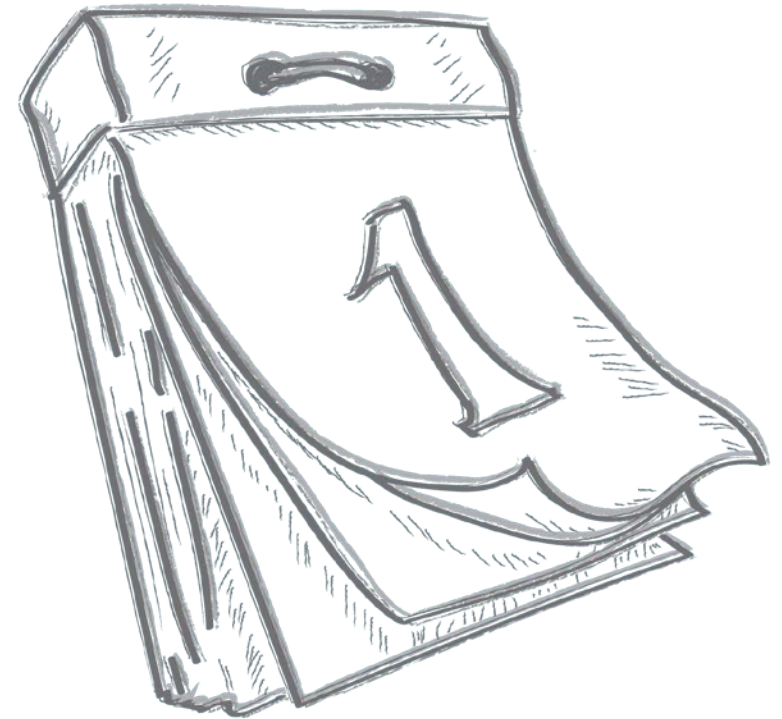
- Employers can dock exempt employees' salaries for a full-day absence, without affecting salary status, *only* for voluntary absences
- When an employer **shuts down** its operations for **less than a full workweek, exempt employees must be paid their full salary.**

Hours/Pay Reduction – Exempt Employees

- If exempt employees **work only part of a day, you cannot dock an exempt employees' pay.**
- They may be required to use accrued leave or vacation time for their absences (but depends on what your policy says). If they don't have it, or you can't require them to use it, exempt employees are guaranteed salary if they work part of the day.

Reclassifying Exempt Employees

- All the compliance issues apply
 - time keeping, minimum-wage compliance, overtime payments calculated on all wages (including bonuses and other incentive pay), and breaks.
- Consider maintaining non-exempt status when things return to normal.

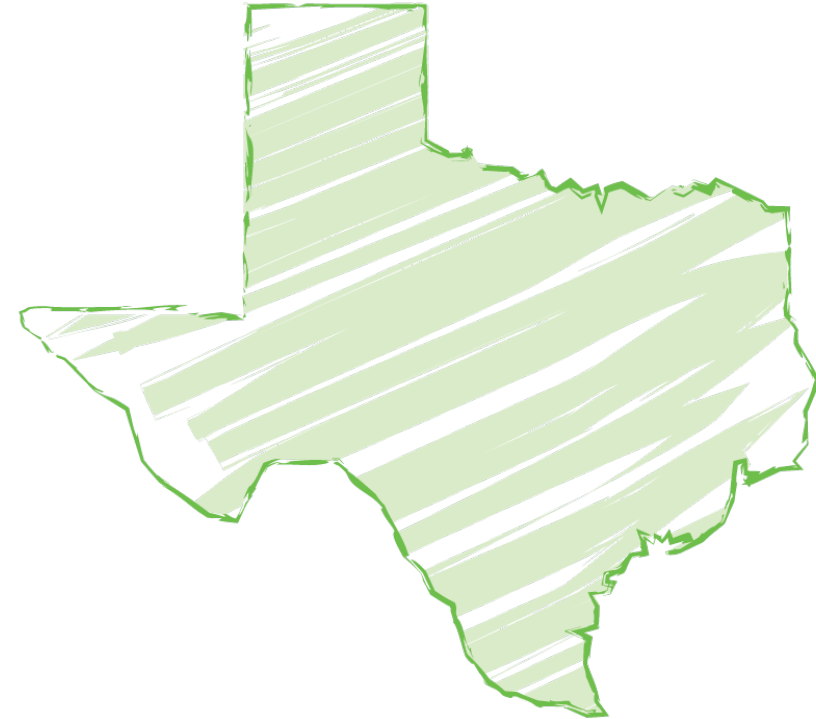


Texas Unemployment Compensation

Shared Work Plans and Mass Claims

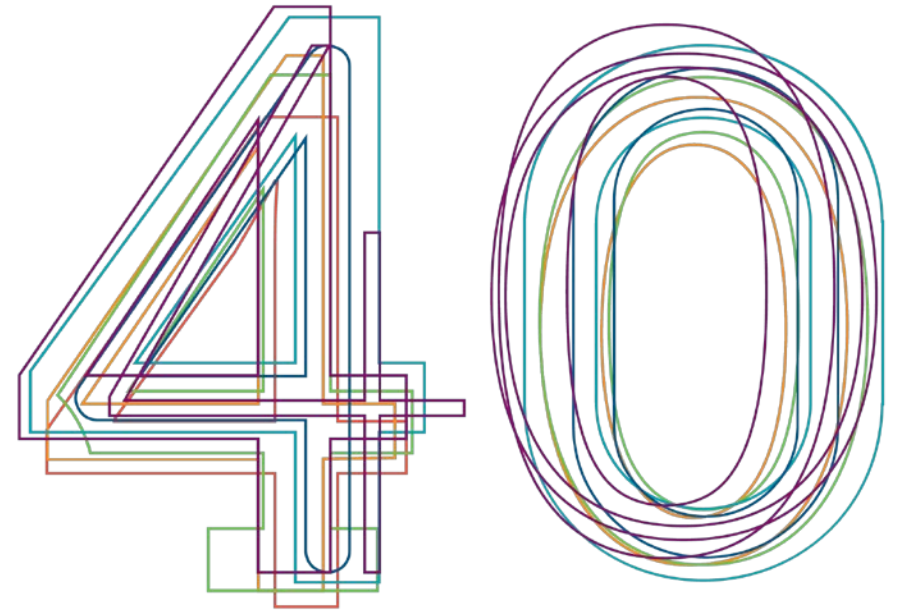
Texas Unemployment – Shared Work Plan - What Is It?

- Designed to incentivize reduction in hours instead of lay offs
- Provides greater unemployment benefit for eligible employees
- Does not require a one-week waiting period for benefit payment
- Employee does not need to search for work.
 - search exemption similar to that of employees on temporary layoff who have a definite date to return to work.



Texas Unemployment – Shared Work Plan - Comparison

- On a Shared Work Plan, the percentage reduction in the employee's work hours determines the amount of unemployment benefits a worker receives each week.
- If the employee's hours are reduced by 40 percent, the employee will receive 40 percent of the weekly benefit amount.



Texas Unemployment – Shared Work Plan - How It Works

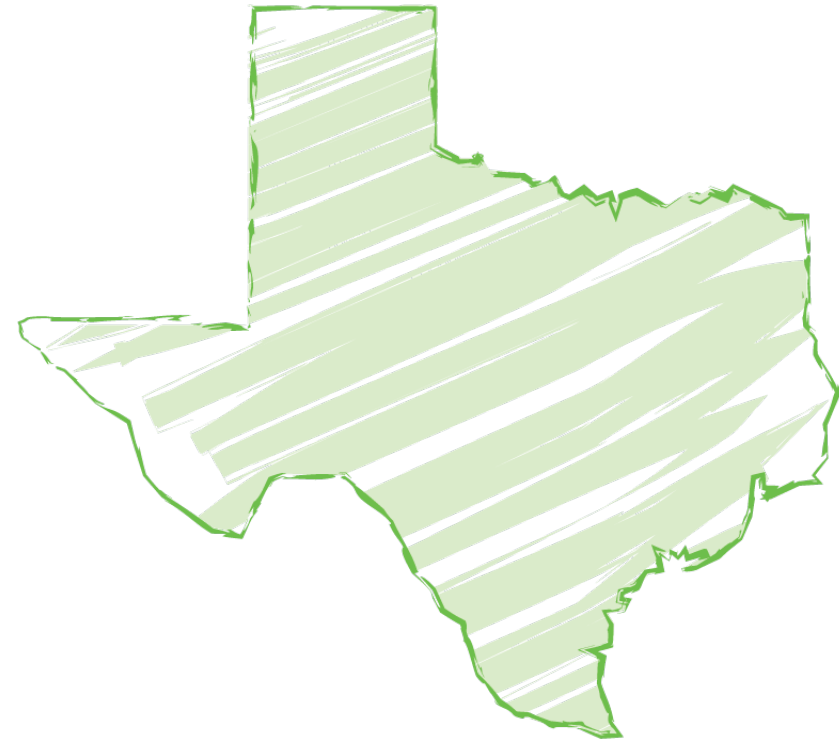
Example:

An employee would be qualified to receive \$400 in regular unemployment benefits.

- Employer cuts hours from 40 per week to 32 per week — a 20 percent reduction.
- Shared Work Plan benefit = \$400 (the regular benefit amount) by .20 (percent reduction in hours), which equals \$80.
- Employee receives \$80 in Shared Work benefits each week in addition to regular wages for the 32 hours worked.

Texas Unemployment – Shared Work Plan - Comparison

- Unemployment benefits are based on the highest wages in a quarter over the current and previous year.
- For an employee who worked 40 hours a week at the rate of \$10 per hour, quarterly wages would be approximately \$4,800.
- To determine the weekly benefit amount we divide the quarterly pay by 25 and round to the nearest dollar.
- The weekly benefit amount for the employee is therefore \$192.



Texas Unemployment – Shared Work Plan - Comparison

- Employee can still get unemployment benefits while working reduced hours, but only if the wages do not exceed 125% of the weekly benefit amount (\$240).
- Assuming employee's hours are reduced to 24 hours a week, the employee's weekly wages would be \$240.
- Employee would not be entitled to unemployment benefits.
- Employee's weekly compensation would be \$240.

Texas Unemployment – Shared Work Plan - Comparison

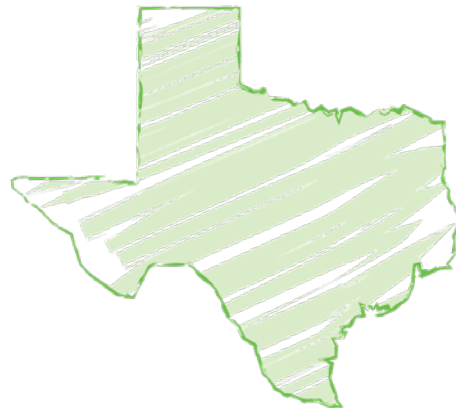
- Example for our employee
 - Employee's regular weekly unemployment benefit = \$192
 - Employee's hours reduced to 24 hours per week
 - To determine Shared Work Plan benefits, multiply \$192 (the regular benefit amount) by .40 (percent reduction in hours)
 - \$64.80
 - EE would receive \$65 in Shared Work benefits each week in addition to regular wages for the 24 hours worked, for a total of \$305 per week.

Texas Unemployment – Shared Work Plan Eligibility

- Employee hours reduced between 10 and 40%
 - For 40 hour regular workweek, this means reducing hours to 24-36 hours a week
- Percentage of reduced hours can be different for different individuals
- Employers can have multiple plans within the organization if each plan covers **two or more** employees.
- Reduction in hours must apply to at least 10 percent of the employees in an affected unit).

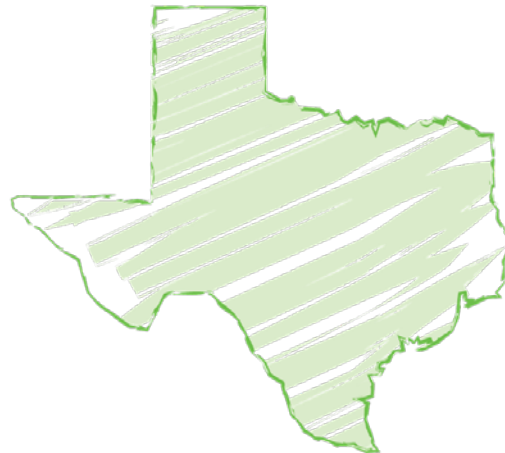
Texas Unemployment – Shared Work Plan

- A shared work plan must describe how the employees will be notified in advance of the plan, *if possible*.
- A shared work plan must be an alternative to layoffs and you must provide an estimate of the number of employees who would be laid off if you do not participate in a shared work plan.



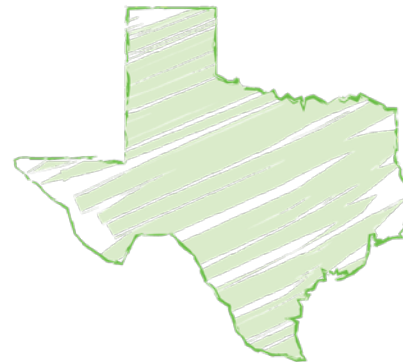
Texas Unemployment – Shared Work Plan

- If you currently provide fringe benefits, you must continue to provide these benefits for the employees in the shared work plan.
- Employees participating in a shared work plan may participate in training, such as employer-sponsored training or Commission-approved training, to enhance their job skills.



Texas Unemployment – Shared Work Plan

- You can renew the shared work plan after it expires.
 - TWC will notify you and request a new application.
- You may return individuals or groups to work full time for a week or two and then continue the plan. You have the flexibility to stop or continue as needed.

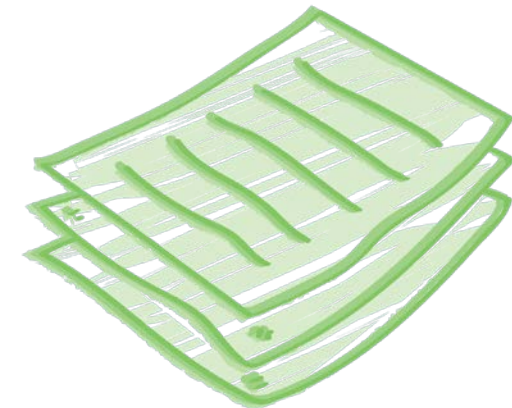


Texas Unemployment – Shared Work Plan

- You may lay off some workers who were originally in the plan and keep the remainder in the plan, as long as they continue to meet requirements for an approved plan.
- You may modify the original plan after reporting any changes in writing to TWC. Substantial changes will be reevaluated for approval.
 - PARTNER WITH THE TWC

Texas Unemployment – Shared Work Plan

- To complete your Shared Work Plan application, you will need:
 - Company name, address, telephone number, fax number, and the contact information for an authorized representative with signature authority
 - ***Your TWC Tax Account Number***
 - The union name, local union number, and the union official's name for any union affected by the plan
 - The names and Social Security numbers of all participating employees you want to enroll in the plan



Texas Unemployment – Shared Work Plan



TEXAS WORKFORCE COMMISSION SHARED WORK PLAN APPLICATION

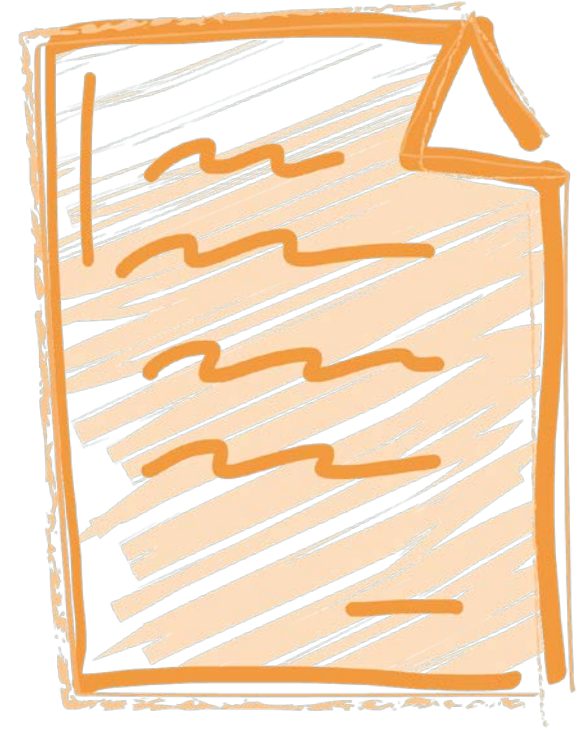
Please complete all the items below.

1. TWC Tax Account Number		
Employer Information		
2. Organization Name	3. Additional Name	
4. Mailing Address		
5. City	6. State	7. Zip Code
8. Country	9. Foreign Zip Code	
10. Telephone Number ()	11. FAX Number ()	
12. Contact Person Name & Email Address		
Plan Information		
13. Is this Shared Work Plan a replacement for a previous plan? <input type="checkbox"/> Yes (complete 14) <input type="checkbox"/> No	14. What is the number of the plan being replaced?	
15. Plan Description: Which is affected by the work reduction? <input type="checkbox"/> Unit <input type="checkbox"/> Entire Organization	16. Total Number of Employees in the Unit or Organization	
17. Total Number of Employees in the Unit or Organization Affected by Work Reduction	18. Will work hours be reduced by 10% - 40% (percent)? <input type="checkbox"/> Yes <input type="checkbox"/> No	
19. Is your request for a Shared Work Plan an alternative to a layoff? <input type="checkbox"/> Yes <input type="checkbox"/> No	20. Is the work of the affected unit/organization seasonal? <input type="checkbox"/> Yes <input type="checkbox"/> No	
21. Are any of the following fringe benefits affected? Health insurance, retirement benefits, vacation, holiday or sick pay, other employee benefit provided by the employer. <input type="checkbox"/> Yes <input type="checkbox"/> No If yes, describe how: If yes, which is affected by the change to employee benefits? <input type="checkbox"/> Unit <input type="checkbox"/> Entire Organization		
22. Are any unions involved in the work reduction? <input type="checkbox"/> Yes (complete questions 29-46) <input type="checkbox"/> No	23. Does the affected unit/organization normally work full time? <input type="checkbox"/> Yes <input type="checkbox"/> No	
24. What are the affected unit/organization's normal work hours? /week	25. Is at least 10% (percent) of the unit/organization affected? <input type="checkbox"/> Yes <input type="checkbox"/> No	
26. Will affected employees be notified of the Shared Work Plan in advance? <input type="checkbox"/> Yes <input type="checkbox"/> No If yes, explain how:		
27. What is the estimated number of employees who would be laid off if you do not participate in a Shared Work Plan		
28. What is the estimated begin date for work reduction? (format as MM/DD/YY)		
29. I certify the implementation of this Shared Work Plan and the resulting reduction in work hours is instead of layoffs that would affect at least 10% (percent) of the affected unit(s).		
Employer Representative Signature		Date

Texas Unemployment – Shared Work Plan

After Shared Work Plan is approved, shared work employees must:

- Submit their unemployment claims
- Be eligible for regular unemployment benefits
- Accept all work offered by the participating employer
- Be able and available for work with the employer



Texas Unemployment – Shared Work Plan - Tips

- Average approval time is 7 days
- Employees can file for reduced hours on their own
- Rejection rate
- Make sure employee is paid under the correct account number
- Exempt employees
- Deciding percentage of hours
- Public employers

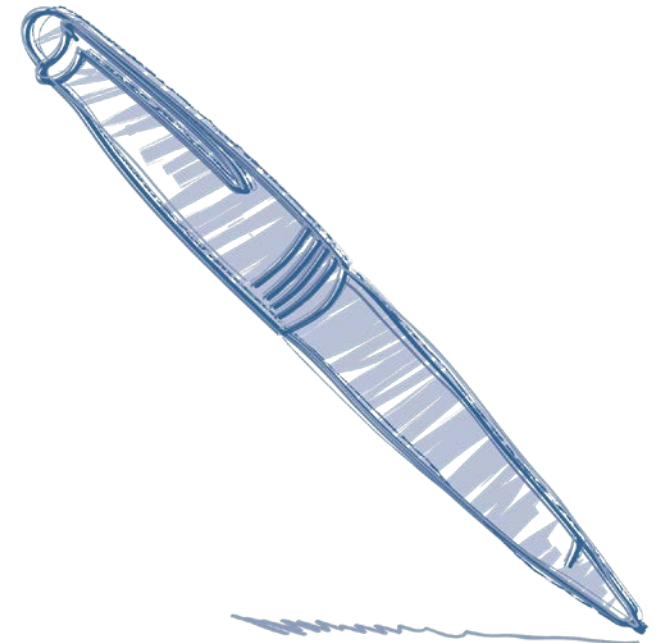
Texas Unemployment – Mass Claims

The Mass Claims program allows employers to submit basic worker information on behalf of their employees to initiate claims for unemployment benefits.



Texas Unemployment – Mass Claims - Advantages

- Can submit the layoff information before the layoff, which ensures a smooth transition for both employer and worker
- Can establish claims more efficiently than workers who submit their own unemployment benefits claims
- Can submit the worker's final week of earnings, helping to ensure proper payment

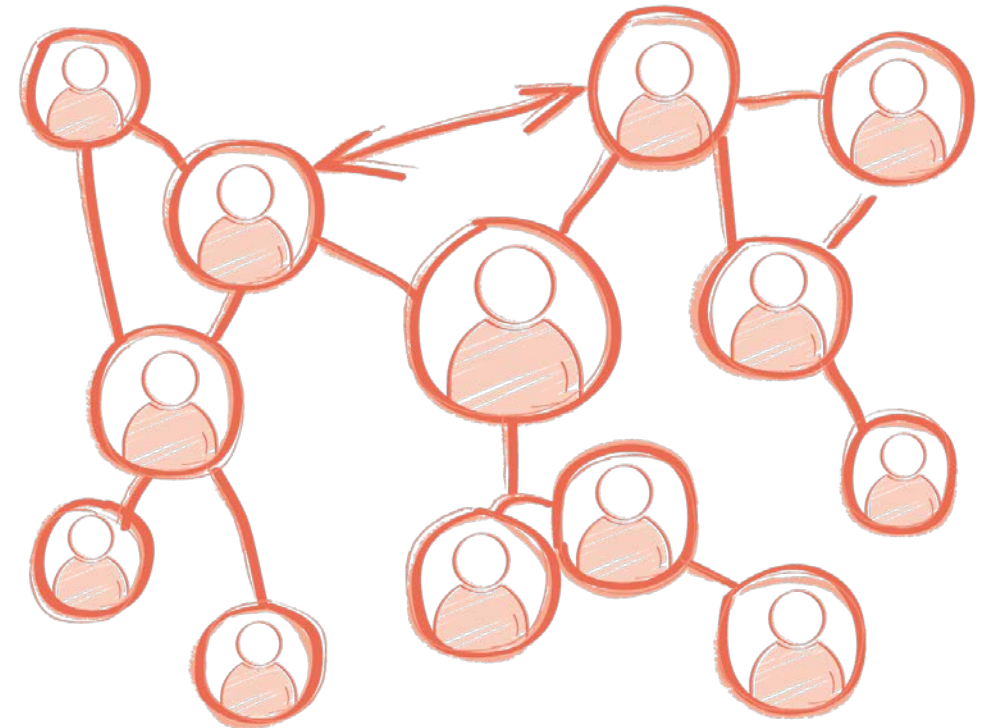


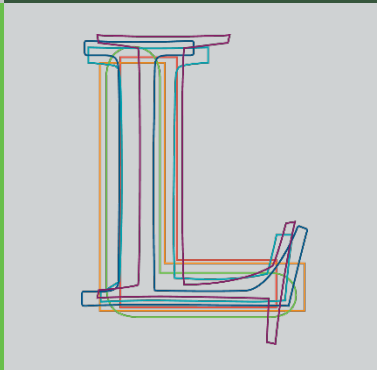
Texas Unemployment – Mass Claims - Advantages

- Can submit information on severance pay or wages in lieu of notice of layoff, reducing subsequent contact by TWC
- Are not inundated with a written notice of application for each individual who applies for unemployment benefits
- Automatically become a party of interest to each claim filed

How to Navigate All of This

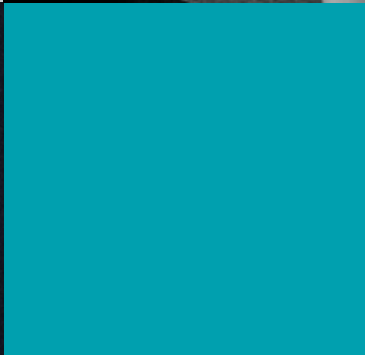
- Stay connected with your Littler attorneys
- Visit our website for COVID-19 employer resources, available at: <https://www.littler.com/coronavirus>
- Watch dol.gov and irs.gov for updates

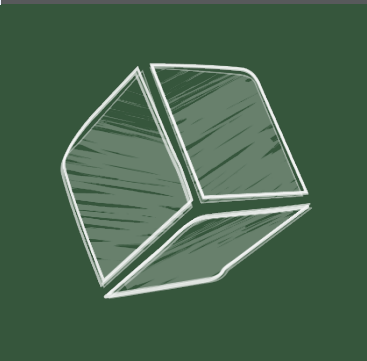
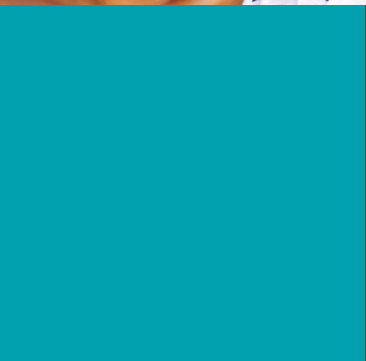




Questions?

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