

# FFCRA and CARES ACT for Employers

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# Federal Responses to COVID-19

- DOL Guidance
  - Unemployment rules began to change
- Families First Coronavirus Response Act (FFCRA)
  - SBA Loan #1
  - Small businesses less than 500 employees:
    - Sick leave
    - Expanded Paid FMLA
- CARES Act
  - SBA Loan #2
  - Unemployment expansion
  - Tax credits
  - And on and on ...



# **DOL Guidance**

# DOL Guidance

- March 12, 2020
- Amendments to unemployment
  - Waiver of waiting weeks
  - Expansion of coverage
  - Removal of job search criteria
  - Exceptions for quarantine, shelter in place orders
- States began to make changes

Including South Carolina



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# **Families First Coronavirus Response Act (FFCRA)**

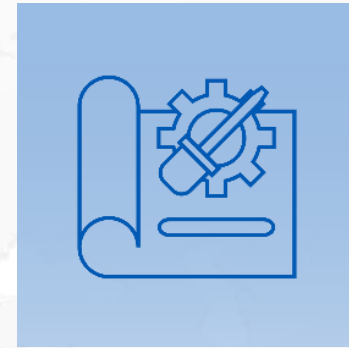
# An Economic Stimulus Package -- Families First Coronavirus Response Act (FFCRA)



Expanded FMLA  
“EFMLA”



Created New  
Paid Sick Leave  
“EPSL”



Benefit  
Mandates and  
Tax Credits

# FFCRA – two benefits to employers



Incentivized states to loosen unemployment compensation, and not have benefits affect tax rating



Created Tax Credits for employers who provide E-FMLA and EPSL


# Before we get to the FFCRA, DON'T FORGET!!!!



- Other leaves are still out there
  - Leaves under policies
    - Follow your normal policies
    - Or feel free to amend them if they are not appropriately responding
- Continue to monitor state and local leaves (including paid leave laws)
  - States are active too amending and creating leave laws to respond to COVID-19 scenarios
- And....

# FMLA and ADA

- “Old School” FMLA
  - Own Serious Health Condition
  - Family Serious Health Condition
- ADAA
  - Could be a Disability under the ADAA
  - Leave Can Be a Reasonable Accommodation

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# **FAMILIES FIRST CORONAVIRUS RESPONSE ACT**

# FFCRA

Effective April 1, 2020 (according to DOL) – December 31, 2020



NOTE – THERE IS ALSO A SUNRISE -- ANY LEAVE GIVEN PRIOR TO APRIL 1 FOR THE REASONS WE ARE ABOUT TO DISCUSS GETS NO CREDIT UNDER THE NEW REQUIREMENTS

# FFCRA

- Applies to schools, governmental employers of any size, and **private employers with less than 500 employees**
  - How do you count? For either E-FMLA or EPSL
    - Start with the W-2 employer
      - Add to that # any temporary employees, leased employees, or other “shared” employees
      - That’s your number

# FFCRA

- What about **employers under 50**. Aren't they exempt?
  - **NO! Not unless the DOL lets you out**
  - Act requires DOL to pass regs that will develop the criterion for an employer with <50 to prove that providing the paid leave **for school closures** in accordance with the act would **jeopardize the businesses ability to continue as a going concern**
  - DOL intends to pass regulations on it

# FFCRA

- **Notice Posting—Already issued**

- Maintain, in a ***conspicuous location***, where notices to employees are customarily posted, in ***all work locations***
- ***Email or direct mailing*** to employees
- Posting via ***intranet or external website***

**[https://www.dol.gov/sites/dolgov/files/WHD/posters/FFCRA\\_Poster\\_WHI422\\_Non-Federal.pdf](https://www.dol.gov/sites/dolgov/files/WHD/posters/FFCRA_Poster_WHI422_Non-Federal.pdf)**

- **DOL has already issued guidance on over 30 hot topics**
- And more are expected today, over the weekend, and into next week....

# FFCRA

- Damages and **penalties** as under the FLSA for unpaid EPSL, including:
  - ***Unpaid wages***
  - An additional equal amount as ***liquidated damages***
  - ***Attorneys' fees and costs***
- Injunctive relief under the FLSA for unlawful discharge, discipline, or discrimination, including:
  - ***Reinstatement***



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# **EMERGENCY FAMILY AND MEDICAL LEAVE EXPANSION ACT**

# Expanded FMLA or Emergency FMLA (E-FMLA)

## – Key Points

- It is just another form of FMLA (so 12 weeks; same FMLA year as usual)
  - Normal FMLA rules apply – e.g., benefit protection, etc.
  - If leave is granted, and you are already an FMLA Covered Employer, any leave taken will count against the normal 12 week period for other types of FMLA
  - Other than pulling out of the same 12 week bank, this law is different enough that it should not alter how you normally go about processing FMLAs for traditional reasons, and you should not try to modify your forms – just build new ones for this.
- It provides leave for **ONLY ONE** type of **COVID-19** situation
  - If the employee has a minor child
  - The child's school or daycare closes because of **COVID-19** concerns or if the child's normal, paid care provider is unavailable because of COVID-19
  - As a result, the employee cannot work or telework
  - Because they need to care for the child

# Expanded FMLA or Emergency FMLA (E-FMLA)

## – Key Points

- Changed the definition of employer (SOLELY FOR E-FMLA)

- Private employers <500
- Schools
- Public agencies (governmental employees)

The OLD definition of employer still applies for all other forms of FMLA

- Employers with 50 or more employees in 20 or more workweeks this year or last

- Changed the definition of eligible employee (SOLELY FOR E-FMLA)

- Any employee who has been on payroll for more than 30 calendar days (whether working or not)
- If not eligible when requested, but they become eligible because they are still on payroll, then they get it when they hit 30 days

# Expanded FMLA or Emergency FMLA (E-FMLA)

## – Key Points

- **Unpaid for first two weeks**
  - But could be paid by EPSL; or employer's other paid leaves (at employee's option)
- **Provides for pay to employees for weeks 3-12**
  - At **2/3rds regular rate of pay** (over past 6 months) (subject to applicable minimum wage)
    - Regular rate of pay is same definition as FLSA (includes all non-discretionary bonuses)
  - **Capped at \$200 per day**
- Employer cannot require employees to supplement with other paid leaves, and employee cannot demand. Must be by agreement.



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# **EMERGENCY PAID SICK LEAVE ACT**

# Employee Eligibility

- **All employees** are eligible for EPSL.
  - Length of employment does not matter.
  - Unlike E-FMLA provisions, there is ***no calendar days, hours of service, or geographic proximity requirements.***
- *No waiting period.*
- All covered employers have the same obligation.

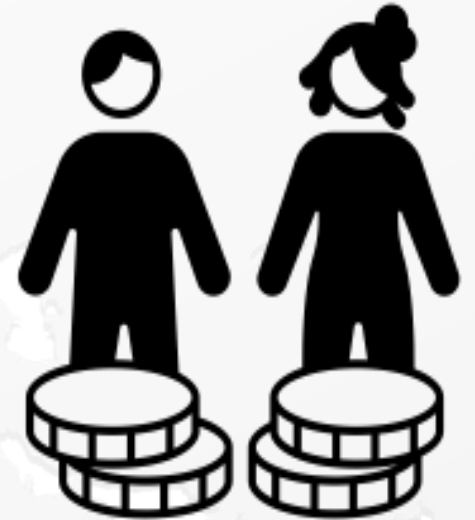


# When can ESL be Used?

- State or local **quarantine or isolation order** related to COVID-19
- **Self-quarantine** at health care provider's advice related to COVID-19
- Experiencing **COVID-19 symptoms** and seeking a medical diagnosis
- **Caring for an “individual”** (undefined) subject to a quarantine/isolation order or self-quarantine related to COVID-19
- **Caring for a son or daughter whose school or place of care has been closed**, or whose child care provider is unavailable, due to COVID-19
- When experiencing a “**substantially similar condition**” as specified by the Secretary of Health and Human Services in consultation with the Secretary of the Treasury and the Secretary of Labor.

# EPSL Pay

- Unlike E-FMLA, ***all EPSL is paid.***
- ***Pay is calculate*** at the ***higher*** of:
  - Regular rate, federal minimum wage, or local minimum wage
  - Inclusive of commissions, tips, or piece rates
- However, EPSL is ***capped***:
  - \$511 per day
  - \$5,110 in the aggregate
- ***But***, employees absent for “**Care for Others,**” “School/Childcare Closure,” and “Similar Conditions” receive **two-thirds (2/3) of their regular rate, capped at \$200 per day (\$2,000 in the aggregate).**



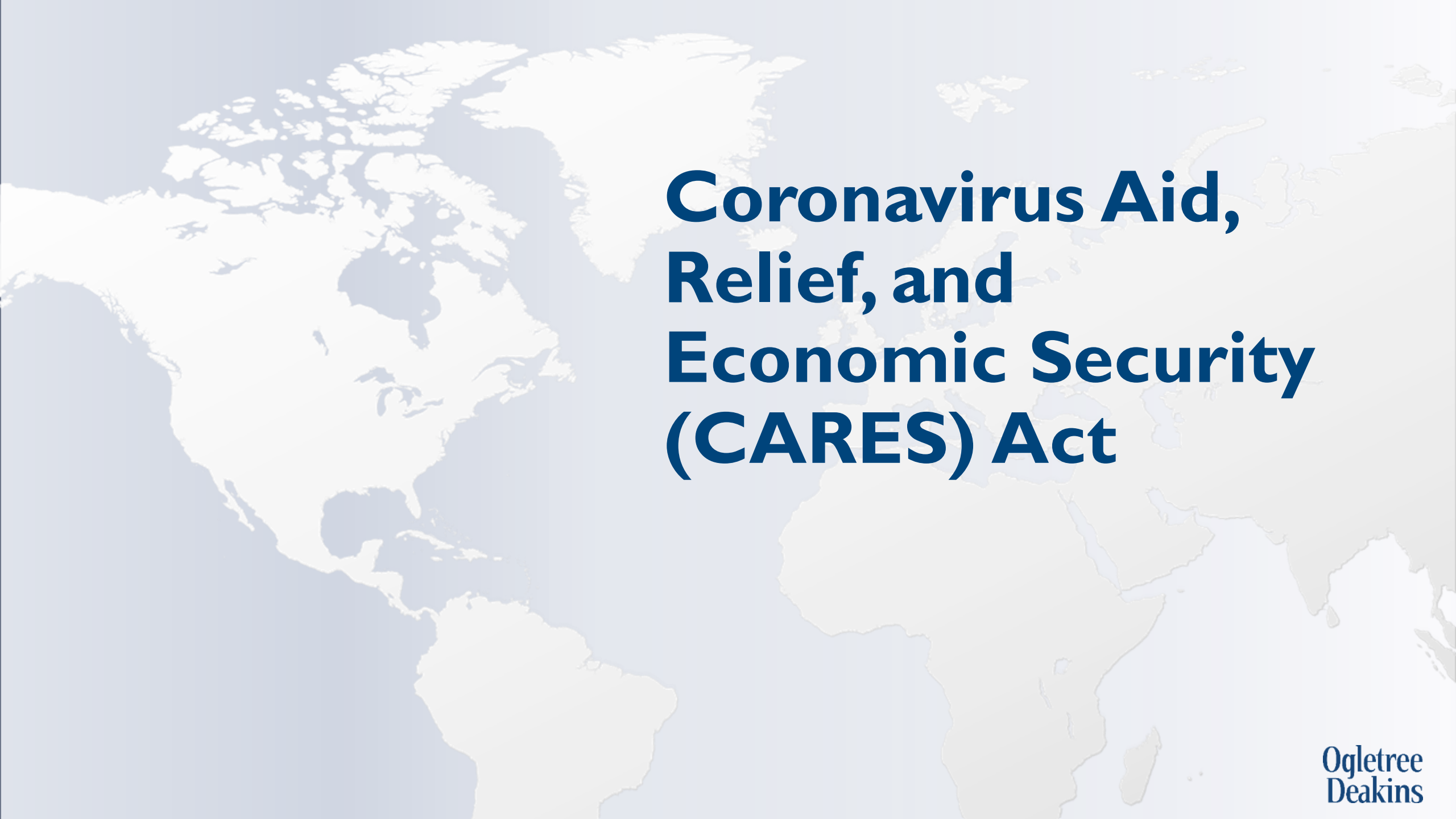
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# **BENEFIT MANDATES AND TAX CREDITS**

# Tax Credits for Wages

- Employers with fewer than 500 employees are eligible for:
  - tax credits on amounts paid to employees who go out on qualified EPSL or E-FMLA
  - costs to maintain health insurance coverage for employees during period of leave for EPSL or E-FMLA



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# **Coronavirus Aid, Relief, and Economic Security (CARES) Act**

# Coronavirus Aid, Relief, and Economic Security (CARES) Act

- Business Loans
- Expansion of Unemployment
- Tax Credits
- Money to Individuals
- Help for Certain Distresses Industries
- Greater ability to access Retirement and Pension
- Additional tax relieve
- Help for non-profits
- List goes on and on



# Loans for Employers/Businesses

- *Payroll Protection Loans for Small Businesses and Nonprofits*
  - To help small businesses avoid layoffs
  - Expected to provide 8 weeks of cash-flow assistance
  - If used for payroll and payroll related expenses will be forgiven.
  - Proposal would be retroactive to February 15, 2020
  - To help small business with payment of unexpected sick leave and family medical leave
  - Any small business, 501(c)(3) nonprofit, a 501(C)(19) veteran's organization or tribal business with not more than 500 employees
  - Businesses with more than one physical location that employ more than 500 employees per physical location in certain industries and circumstances

# SBA Loans

Either/Or -- Not eligible for both SBA loans



# Tax Credits

## *Employee Retention Credits*

- Section 2301 of the Act
  - A refundable payroll tax credit for 50% of wages (up to \$10,000 per employee)
  - Available to business whose operations were fully or partially suspended during the COVID-19 crisis or
  - If receipts declined by more than 50% when compared to the same quarter in 2019.
  - Cannot exceed the applicable employment taxes in any one quarter.
- Not eligible for retention credit and SBA payroll relief loan

# Payroll Tax Delay

Delay through end of year  
If less than 500 employees;  
multi-year catch-up



# Unemployment – Five Key Changes

## *1. Help for Nonprofits & Government Agencies*



# Unemployment – Five Key Changes

## 2 – **Waiting Week Waiver**

- To help encourage the 7 states who have not yet waived the waiting week requirement
- CARES Act provides funding to states for the coverage of this initial week of unemployment
- Expect all states to waive waiting weeks
  - **Why do you care?**
  - **Who pays for the additional week?**

# Unemployment – Five Key Changes

## 3. New Unemployment Benefits

- An **increase of \$600 per week** on top of state unemployment
- Pandemic unemployment insurance (CARES PUI)
  - **Covers more people**
  - **Extends UI benefit length**



# Unemployment – Five Key Changes

## *More People Now Eligible...*

Includes business owners, self-employed individuals, independent contractors, GIG workers, those with a limited work history and history of wages earned and individuals covered under state UI after state UI exhausted.



- Apply with the state agency where they live and self certify they are otherwise able to work/available for work except that the individual is unemployed, partially unemployed or unable or unavailable to work for one of the following reasons:

- Diagnosed with COVID-19;
- Symptoms of COVID-19 and seeking a medical diagnosis;
- Household member has COVID-19;
- Providing care to household member with COVID-19;
- Child or other person in the household for which the individual is the primary caregiver is unable to attend school or daycare due to COVID-19;
- Unable to reach work due to quarantine;
- Unable to attend work because advised by a healthcare professional to self-quarantine;
- Individual scheduled to commence employment and does not have a job or is unable to reach the job as a direct result of COVID-19;
- Individual has become breadwinner due to death of head of household as a result of COVID-19;
- Individual had to *quit job as a result of COVID-19*;
- Place of employment closed due to COVID-19;
- Individual is self-employed, is seeking part-time employment, does not have sufficient work history, or otherwise would not qualify for unemployment under another state unemployment program.

Individuals who are able to telework with pay or who are receiving sick leave or other paid leave benefits are **not** eligible.

# Unemployment – Five Key Changes

## *Expanded Coverage for up to 39 Weeks*

- State unemployment benefits will be extended 13 weeks for a total of potential unemployment coverage of up to 39 weeks.



# Unemployment – Five Key Changes

## *Additional Monetary Relief for the Unemployed*

- Entitled to an **additional \$600 per week** for up to a total of 16 weeks/four months (or until July 31, 2020)
- An exponential increase in the amount of unemployment assistance an individual can receive





## Questions?

How does it work?

Who does it apply to?

Who is going to pay for the additional UI benefit?




# FAQs

# When will the additional benefits be available?

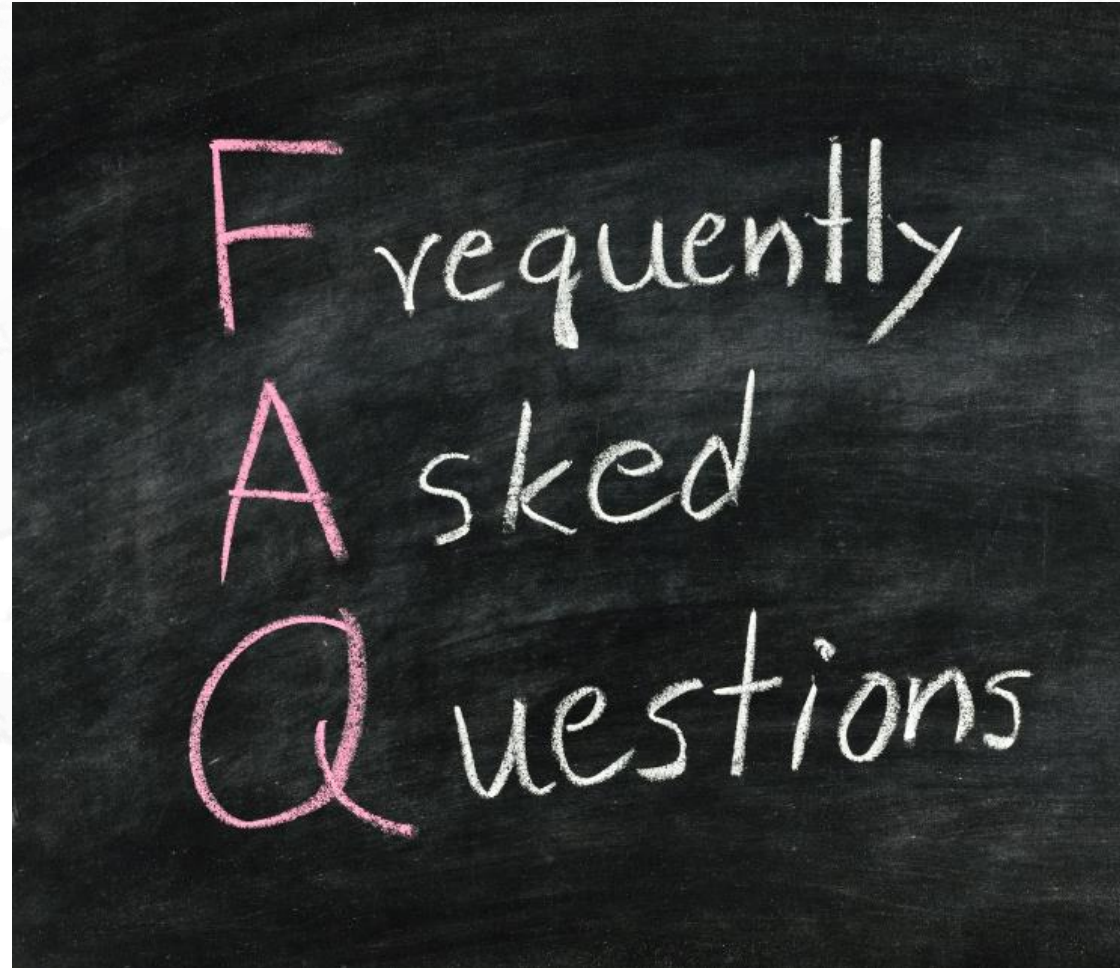


- Each state must enter into a written agreement with the DOL.
- **South Carolina expected in a few days**
- The \$600 payments will begin to supplement state unemployment and CARES PUI immediately after each state enters into their individual agreements
- **Money in pocket ... at least 3 weeks**
- Additional PUI coverage available to those individuals who exhaust their state benefits do not begin until the underlying state benefit has been exhausted.

# How has South Carolina Changed Rules?

- Quarterly unemployment payments delayed. Amounts normally due April 30, 2020  June 1, 2020
- Wage Report filing still due April 30, 2020
- Benefits paid as a result of COVID-19 will not be charged to a contributory employer's account for UI benefits.
  - Benefits paid will still be charged to a reimbursable employer's account
    - CARES may change this charge
- Auto designation of claims as COVID-19 related if filed between March 15, 2020 and April 18, 2020

# SEE SCDEW for FAQs on Eligibility



# How long will state unemployment last?

- Each state is different
- South Carolina is **20 weeks**
- CARES now extends total unemployment benefits 13 weeks up to a total 39 weeks
- South Carolina **33 weeks**
- States benefits are exhausted first
- Then, the impacted individual becomes eligible for additional benefits for the remaining time period

# How much will state unemployment pay?

- Each state is different. Minimum and maximum weekly unemployment benefits, as well as how calculations are made vary by state.

Average in South Carolina **\$236** per week; maximum is **\$326**

Example: in South Carolina maximum state UI is \$326 for 20 weeks...

**\$326 + \$600 = \$926 for 16 weeks (or until July 31)**

**After the 16 weeks, back to \$326 for 33 weeks (not 39 weeks without change to state UI benefit)**

# Does that mean it is possible for an employee to receive more money if they are unemployed than if they kept their job?

- **Yes.** Every person on unemployment will receive state unemployment (or CARES PUI) + \$600 (\$15/hour) for up to 16 weeks or July 31, 2020.

If you are eligible for \$1.00 in unemployment you get additional \$600 per week.



# Can an employee quit to collect unemployment?

Probably not.

- Quitting employment *normally* bars unemployment.
- Under CARES, however, there is a provision that allows an employee to become eligible for CARES PUI if they “quit due to COVID-19”.
- Also possible an employee could argue they were “*scared*” to go to work due to COVID-19.
  - “reasonable good faith belief”
    - Underlying condition
    - Age
    - Hot spot at work
    - OSHA guidance



# What Do I Do If Employee Does Quit?

- **Offers of Work**

- Individuals who have turned down offers of suitable work are **not eligible** for UI benefits during that week. If you have offered an individual a job and they refused, it is important for you to report the incident to DEW through your Employer Self Service Portal.

Or you can submit an Offer of Work Form (UCB-261) to the address below.

This process ensures that only eligible individuals receive UI benefits and helps minimize tax rates for all businesses.

- S.C. Department of Employment and Workforce  
Benefits Section  
P.O. Box 995  
Columbia, SC 29202

# If I reduce the hours of my employees, are they eligible for unemployment?

- Yes
- Reduced hours employees are “**partially unemployed**”
- The question is not one of qualification for unemployment but rather one of **offset** from unemployment.
- Each state calculates differently
- If an employee is making any money from any source, weekly unemployment benefits will be offset.



# Partial Unemployment Calculations

Each state calculates differently...

Example: in South Carolina claimants can receive  $\frac{1}{4}$  of their weekly benefit amount in wages before their weekly benefit amount is reduced dollar for dollar. However, claimant will not receive any UI benefit amount because they earned more wages than their weekly benefit amount. They are not considered to be “unemployed”

Assume \$300 weekly benefit

25% of \$300.00= \$75.00	Example 1	Example 2	Example 3
UI Weekly Benefit Amount	\$300.00	\$300.00	\$300.00
Earnings for the week	\$75.00	\$100.00	\$325.00
Earnings Deduction from payment	\$0.00	\$25.00	\$300.00
Amount of UI Payment	\$300.00	\$275.00	\$0.00

# Short –Time Compensation/Workshare

STC is a way to spread the reduction of hours to a group of employees and still allow the group to receive unemployment (and \$600 CARES benefit)

AZ, AR, CA, CO, CT, FL, IA, KS, ME, MD, MA, MI, MN, MO, NE, NH, NJ, NY,  
OH, OR, PA, RI, TX, VT, WA, WI

Watch to see if South Carolina adds this program

**Other States:** possibly. CARES Act provides states money to start programs

**WARNING:** may not work for exempt employees

# Can I supplement employee wages while they are on unemployment?

- No state allows “pay continuation” for a layoff and collection of unemployment at the same time. It will offset or delay unemployment eligibility
- Some states do allow an employer to pay supplement income to employees in various forms (earned PTO, bonus or severance).

South Carolina will offset all additional funds in week in which payment received.



# What else do I need to consider if hours are reduced for my employees or if I lay people off?

- Wage and hour issue
- Are benefits impacted - COBRA
- Is WARN or Mini-WARN triggered (**S.C. no mini-warn**)
- State notice requirements of change in hour pay to employees
- Predictive scheduling (**not in S.C.**)
- PTO/leave pay out (**S.C. policy determines**)
- Notice to unemployment



# Must I give notice to my employees regarding unemployment?

Yes



**IMPORTANT NOTICE**

[https://dew.sc.gov/docs/default-source/default-document-library/edited-employer-filed-claims-flyer.pdf?sfvrsn=8556ada1\\_0](https://dew.sc.gov/docs/default-source/default-document-library/edited-employer-filed-claims-flyer.pdf?sfvrsn=8556ada1_0)

# Can/must an employer file an unemployment claim on behalf of its employees?

- Georgia is the only state requiring employers file
  - Only applicable to partial claims
  - Violation will require reimbursement to GDOL
  - On-going weekly filing requirement
- Other states **request** employers file
  - Will allow claims to be processed faster
  - Employer won't have to certify claims
  - Helps streamline the process



# South Carolina Allows Employer Filing

- Employer Filed Claims process is **efficient** and **convenient** for businesses and their employees. It also helps protect the security of the unemployment insurance process and claimants by reducing opportunities for **UI fraud**.
- Visit [dew.sc.gov](http://dew.sc.gov) and under the **Employers tab**, click on **Employers Bridge to Benefits**.
- Wait until the end of the week of the layoff.
  - Like payroll, SCDEW pays in arrears.
- Must file within 14 days of that claim-week

**NOTE:** If the business submits an employer filed claim on behalf of their employees, they should notify their employees. The worker will still need to create an account and certify the claim each week.

# Timing

- **Average 7-10 days**
- There are many variables that affect this question. Such as:
  - When the employer files the claim.
  - How quickly the worker certifies the claim.
  - Eligibility status.
  - When an employer responds to separation information.
  - And more.

## **LET'S LOOK AT A BEST CASE SCENARIO!**

- An employer lays off part of his workforce on a Monday. They do not work for that week, and the employer immediately files on behalf of his employees the following Sunday.
- The workers could check their account and certify the claim the Monday after the employer files on Sunday.
- **2-3** business days later the workers would receive a debit card or direct deposit

# QUESTIONS



# Additional Resources

- Ogletree Deakins Coronavirus Resource Page
- <https://ogletree.com/solutions/coronavirus-covid-19-resource-center/>
  - FAQs
  - Blogs
  - Webinars (free)
- US Chamber Small Business Center
  - Great information on SBA loans
- State unemployment website FAQs
  - Regular and Covid-19

# Thank you!

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