

## Fisher Phillips Dealership Practice Group FAQs On COVID-19 For Automobile Dealerships

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The “Families First Coronavirus Response Act” will take effect on April 1, 2020, ushering in an emergency expansion of the federal Family and Medical Leave Act and federal paid sick, among other things. The Fisher Phillips Automotive Dealership Practice Group has collected the most frequently asked questions from dealerships across the country and assembled our best guidance in one source.

For an in-depth discussion of many of these topics, you can access our firm’s Comprehensive and Updated FAQ for Employers on the Covid-19 Coronavirus. Please note that this FAQ for Dealerships is of general applicability and state laws may also apply. Call your Fisher Phillips attorney if you need clarification on any topic discussed in this FAQ or to discuss specific state laws that may apply.

### FEDERAL EMERGENCY FMLA AND PAID SICK LEAVE

#### Who is a “covered employer” subject to the federal emergency law?

All private employers with “fewer than 500 employees” are subject to the law. For most dealerships and dealership groups that have a combined total of fewer than 500 employees, this is an easy analysis. For dealership groups with multiple stores with an aggregate employee count in excess of 499 employees, whether they are a covered employer depends on many factors under what are referred to as the “integrated” and “joint employer” tests. Consult with your Fisher Phillips attorney if you need to discuss whether you are a covered employer under the emergency law.

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### **What does the emergency law require me to do with respect to employees?**

The primary impact upon dealerships are the two different requirements to pay *eligible* employees for absences occasioned by the emergency. One provision is “emergency paid sick leave” up to 80 hours at the employee’s regular rate or weekly salary. The other provision requires employers to provide up to 12 weeks of “emergency family and medical leave” to eligible employees.

### **How does an employee qualify for emergency paid sick leave?**

Any employee, regardless of the amount of time they have worked for the dealership, qualifies for the emergency paid sick leave if one or more of the following conditions are met: 1) the employee is subject to a federal, state or local quarantine or isolation order; 2) the employee has been advised by a health care provider to self-quarantine; 3) the employee is experiencing symptoms of the virus and is seeking a medical diagnosis; 4) the employee is caring for an individual who is subject to an order of self-quarantine or who has been advised by a health care provider to self-quarantine; 5) the employee is caring for a son or daughter if school or child care is closed or unavailable; 6) the employee is experiencing “any other substantially similar condition” specified by the Department of Health and Human Services.

### **What is the rate of pay for the emergency paid sick leave?**

For reasons 1-3 above, the rate of pay is 100% of the higher of the employee’s regular rate of pay, the federal minimum wage, or the local minimum wage. For reasons 4-6 above, the rate of pay is 2/3 of the higher of the employee’s regular rate of pay, the federal minimum wage, or local minimum wage.

### **Are there caps on the amount of emergency paid sick leave for each employee?**

Yes. For reasons 1-3 above, the cap is \$511 per day and \$5,110 in the aggregate per employee. For reasons 4-6, the cap is \$200 per day or \$2,000 in the aggregate per employee.

### **Are all employees eligible for the full 80 hours of emergency paid sick leave assuming they qualify?**

No. Full-time employees who qualify are paid for 80 hours. Part-time or “irregularly” scheduled employees should be paid based on the average number of hours the employee worked during the last six months. If the part-time or irregularly scheduled employee has worked less than six months, the number of hours of paid sick leave is the reasonable expectation of the number of hours for which the employee was hired to work.



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### **How does emergency paid sick leave interact with other paid sick leave I provide to employees?**

The emergency paid sick leave is in addition to other paid sick leave you provide. However, emergency paid sick leave will not carry over to 2021. Employers cannot require employees to take employer provided leave in lieu the emergency paid leave.

### **Does the emergency family and medical leave law supplant the traditional Family and Medical Leave Act (FMLA)?**

No. The emergency family and medical leave is in addition to your obligations under the traditional Family and Medical Leave Act (FMLA). In most situations, the traditional FMLA rules and requirements apply to emergency family and medical leave.

### **Which employees will be eligible for emergency family and medical leave?**

This leave applies to employees who have been employed for at least 30 days.

### **Which employees will qualify for emergency family and medical leave?**

An eligible employee is entitled to 12 weeks of job protected leave only if the employee is unable to work (or telework) due to the need for leave to care for a son or daughter under 18 years of age if the school or place of care has been closed, or the child care provider is unavailable, due to the public health emergency as declared by a federal, state, or local authority.

### **Are there limits or a cap on emergency family and medical leave?**

Yes. The first 10 days of emergency family and medical leave is unpaid. However, an employee may elect (but cannot be required) to substitute any accrued paid leave such as vacation or other sick leave to cover some or all of the 10-day unpaid period. After the first 10 days, an employee is compensated at 2/3 of their regular rate of pay. The total cap is \$200 per day or \$10,000 in the aggregate per employee.

### **Do I have to restore an employee to their position after the emergency family and medical leave?**

Generally, yes. For employers with 25 or more employees, you have the same obligation as under traditional FMLA to return any employee who has taken emergency FMLA to the same or equivalent position upon returning to work. Employers with fewer than 25 employees may be excluded from this requirement if the employee's position no longer exists due to an economic downturn or other circumstances caused by the public health emergency.



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This exclusion is subject to the employer making reasonable attempts to return the employee to an equivalent position and requires an employer to make efforts to return the employee to work for up to a year following the employee's leave.

### **Can I apply for an exemption under this emergency law so I do not have to pay employees for either emergency paid sick leave or emergency family and medical leave?**

Yes, but only if you have fewer than 50 employees. An exemption will have to be requested from the Secretary of Labor of the U.S. Department of Labor. At this time, there is no official guidance as to what documents or information you will need to present in order to request an exemption.

### **How do I determine the "regular rate" for an employee who is eligible for paid leave?**

Dealerships should continue to pay employees on their regularly set pay dates. At this time, we are not aware of any laws providing for delayed payments. Dealerships should continue to follow employee pay plans. Where a pay plan provides for a guarantee, bonus, or commission, it should be paid unless the plan provides otherwise. Salaried, exempt employees have a salary/guarantee requirement that must be met each week to maintain the exemption such that if any work is performed in the workweek, the dealership must pay the salary and can only dock it (without supplementing from PTO, vacation, sick, etc.) in limited circumstances.

All other employees are generally paid only for work performed and/or produced. For example, an hourly employee must only be paid for hours worked and a commissioned employee must only be paid on commissions generated. However, employees subject to minimum wage (and, if applicable, overtime requirements) must still be compensated properly for all hours worked. If employees are placed on furlough or terminated, state law may require payment as early as the last day worked. Any changes to pay plans should only be made prospectively and in writing signed by the employee.

### **How do I know if an employee needs to take leave?**

Employees should make a specific request to take emergency paid leave. If the need for leave is foreseeable, the employee should provide notice to you as is practical under the circumstances.

### **Do I have to post notices in the workplace about the emergency paid leave?**

Yes. The U.S. Department of Labor will issue model notices to be posted in the workplace.

### **Can an employee refuse to report to work even if the employee is not eligible for paid leave under the emergency law?**



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Generally, no. As long as the dealership remains open, you have the right to expect that employees who do not need to take emergency leave or who are ineligible to take emergency leave will continue to report to work. However, please note that Occupational Safety and Health Administration (OSHA) and National Labor Relations Act (NLRA) considerations may apply in this scenario – check our Comprehensive FAQs for a more detailed discussion.

### **How do I get reimbursed for this paid leave from the federal government?**

Employers are entitled to a refundable tax credit against the employer portion of Social Security taxes equal to 100% of the qualified sick leave wages paid for each calendar quarter. Only employers with fewer than 500 employees are eligible for this tax credit.

### **If an employee does not need to take paid leave, can I offer an incentive for an employee to come to work so I can stay open?**

Probably yes. But, if an employee qualifies for the paid emergency sick leave or emergency family and medical leave, we do not advise offering an incentive for the employee to remain working in lieu of taking the paid leave that the employee is entitled to take. This could be viewed as coercion or interference with an employee's legal rights.

## **REMOTE WORK**

### **Can I allow employees to work from home?**

Yes, where this is practical. If hourly paid employees are allowed to work from home, the employees must accurately record their work time. All employees who are allowed to work remotely should be informed that regular workplace policies apply to them. If an employee's job duties are such that they cannot work from home and perform their duties, you are under no obligation to allow the employee to work from home. Call your Fisher Phillips attorney to determine whether you should have employees who work from home sign a "Emergency Remote Work" policy.

### **Am I required to allow employees to work from home?**

This law imposes no such requirement but you may have consider doing so as an accommodation under the Americans with Disabilities Act (ADA).

## **WORKPLACE SAFETY**

### **Do I have to allow an employee to wear a mask or gloves while at work?**



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No, generally this is not required. As a practical matter, employers should consider allowing these types of personal protective equipment if it will not unduly interfere with your business operations.

### **What should I do if an employee informs me that they are sick but they are not sure if they have the virus?**

First, you should instruct the employee to stay home, consult with a healthcare professional when they can do so, and stay in communication with the dealership. Second, to the extent the employee routinely works in close proximity to other employees, you can inform the other employees that someone (without specifically identifying the employee) is at home sick and the other employees may take off from work if they feel the need to do so.

### **Can I take the temperature of an employee prior to allowing the employee to work at the facility?**

Generally, yes, at least for now. We advise that employees should be presented with a notification form that contains a waiver. Contact your Fisher Phillips attorney if you want to take the temperature of employees.

### **What should I do if an employee reports that they have the virus or if they suspect they have the virus and is under a quarantine order?**

This scenario elevates the notification requirements for other employees in the workplace. For other employees who routinely work in close proximity with the quarantined employee or who came into close contact with the employee during the previous 14 days, those employees should be informed, and they should be instructed to stay at home for at least 14 days and consult with a healthcare provider when they can. For other employees who did not work in close proximity with the sick employee, those employees should likewise be informed but there is no requirement that those employees stay home unless they too are feeling sick. The sick employee's workspace should be shut down and disinfected, preferably with the use of an outside service.

### **What can I request of customers who visit the dealership?**

Hopefully, customers who are sick or exhibiting symptoms of the virus will not visit your dealership. Under some circumstances, you can inform the customer that you want to take their temperature before coming into a facility. Customers should also be informed that employees have been instructed to practice social distancing with customers. You may consider temporarily halting test drives for a few weeks so that an employee and a customer are not in close proximity in a car during a test drive.



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### WORK REDUCTIONS AND LAY-OFFS

#### What is the difference between a “furlough” and a “lay-off”?

A furlough means that an employee or employees will be instructed to work fewer hours during the workweek or take a certain amount of unpaid time off from work, such as two days a week. The thought is that all employees share the burden of an economic downturn. A lay-off is a temporary but complete separation from work with the expectation that the employee may return to work at a later time. A temporary lay-off can turn into a permanent lay-off based on business conditions.

#### Can I furlough employees during this public health emergency?

Generally, yes. However, the emergency paid sick leave and emergency family and medical leave will still apply to these employees. Also, other laws will apply, such as Title VII and the Fair Labor Standards Act (FLSA). Before you engage in a furlough of employees, we recommend that you first consult with your Fisher Phillips attorney.

#### Can I lay off employees during this public health emergency?

Generally, yes. However, the emergency paid sick leave and emergency family and medical leave may still apply to these employees, particularly if an employee requested emergency paid leave prior to the announcement of the lay-off. Also, other laws will apply, such as Title VII of the Civil Rights Act. Before you engage in a lay-off of employees, we recommend that you first consult with your Fisher Phillips attorney.

#### If our employees are no longer working, are they still entitled to group health plan coverage?

First, you must determine what type of employment action is taken. If an employee is being told that a layoff or furlough is temporary and that they may return after a short period, such as two to four weeks, then it is not likely a termination, but rather, a temporary period where the employee is being asked to not work. If a layoff or furlough is being communicated in such a way that the employee may or may not be called back to work, then it is likely a termination. Each situation should be analyzed carefully, and it is possible that an employer will treat different groups of employees differently.

Second, the employer must apply the terms of the group health plan based upon the type of employment action being taken. If a termination is taking place, then COBRA should be offered pursuant to the terms of the group health plan. If an employee is not being terminated, then you must check your group health plan document (or certificate of coverage if your plan is fully insured) to determine how long employees who are not actively working may remain covered by your group health plan. Once this period expires, active employee coverage must be terminated (unless the



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insurance carrier or self-funded plan sponsor otherwise agrees to temporarily waive applicable eligibility provisions), and a COBRA notice must be sent.

If you would like to waive applicable plan eligibility provisions, you should first make sure that any insurance carriers or stop-loss coverage insurance carriers agree to cover claims relating to participants who would otherwise be ineligible for coverage.

### **What happens to group health plan coverage if employees are not working and unable to pay their share of premiums?**

In the normal course of events, group health plan coverage will cease when an employee's share of premiums is not timely paid. However, several actions might be taken that could allow coverage to continue. The insurance carrier providing the health coverage may voluntarily continue the coverage while the emergency is sorted out and until an employer reopens its doors. More likely, the employer may arrange with the insurance carrier providing health coverage to pay the employees' share of premiums to keep coverage in place (at least temporarily) and possibly until the employer can reopen its doors. Each situation will be different, depending upon the insurance carrier and the relationship between the employer and the insurance carrier. Therefore, each factual situation will need to be individually assessed.

### **If an employee is laid off, can the employee apply for unemployment compensation?**

Yes. Unemployment compensation is governed by state law and administered by state agencies. Under this emergency law, it is likely that states will relax certain rules and regulations so that affected workers will be eligible for unemployment benefits.

### **Do I have WARN notice obligations if I have a mass lay off or business closure?**

It depends. The federal WARN law contains exceptions for unforeseeable business circumstances. However, because the length of the shutdown or lay-off will be unknown, you should consult with your Fisher Phillips attorney to determine whether the federal WARN law applies and whether a state WARN law applies.

### **If I am ordered by a state authority to close my dealership, do I have to pay my employees for any length of time?**

Unknown at this time. The new law does not address this specific scenario. A government mandated closure of a business is not currently listed as a specific qualifying reason for the emergency paid sick leave or the emergency family and medical leave. We are monitoring this issue and will supplement this response if clarification is issued or the law is amended.





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### **If I have to close, will my business disruption insurance apply to protect me?**

The answer to this question depends on the specific language of your insurance policy or policies. You should direct this question to your insurance broker. Our collective experience is that most business disruption insurance policies contain exclusions for public health emergencies.

### **MISCELLANEOUS**

#### **Can I modify pay plans for employees during the emergency?**

Generally, yes. However, if the pay plan is designated as a contract of employment, you will have to continue to abide by its terms. This is one area where state laws may have a significant impact on what you can do. Any changes to pay plans should only be made prospectively and in writing signed by the employee. Please consult your Fisher Phillips attorney if you are considering making changes to pay plans.

### **CONCLUSION**

We will continue to monitor this rapidly developing situation and provide updates as appropriate. Make sure you are subscribed to Fisher Phillips' alert system to gather the most up-to-date information. If you have any questions about this situation or how it may affect your school, please contact any member of our Dealership Practice Group or your Fisher Phillips attorney. You can also review our nationwide Comprehensive and Updated FAQs for Employers on the COVID-19 Coronavirus and our FP Resource Center For Employers, maintained by our Taskforce.

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*This Legal Alert provides an overview of a specific developing situation. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.*

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