

# US

## Company

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### Tax measures (deferrals, reductions)

- The Families First Coronavirus Response Act (the “Response Act”), which came into force on 18 March 2020, includes, among other things, an offsetting employer-side payroll tax credit (to be administered by the IRS) against an employer’s portion of Social Security tax obligations, as follows:
  - a payroll tax credit for employers equal to 100% of qualified paid family leave (“PFL”) wages required to be paid, as described in the “Sick pay” section below; and
  - a payroll tax credit for employers equal to 100% of qualified paid sick leave (“PSL”) wages required to be paid, as described in the “Sick pay” section below.

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### Social Security measures (deferrals, reductions)

- The Coronavirus Aid, Relief, and Economic Security Act (the “CARES Act”) provides for a deferral of the payment of the employer’s portion of Social Security taxes due between the date of enactment and 1 January 2021.
- 50% of such taxes will become due on 31 December 2021. The remaining amounts of applicable employer payroll taxes will become due on 31 December 2022.
- The CARES Act also provides that businesses which, for any calendar quarter, are fully or partially suspended under Government orders due to the COVID-19 pandemic or which experience a significant decline in gross receipts compared to the prior year may be eligible for a credit which may be set against applicable employment taxes for each calendar quarter in an amount equal to 50% of qualified wages (up to US\$10,000 resulting in a maximum credit of US\$5,000 per employee) for each employee for such calendar quarter, reduced by any payroll tax credits under the Response Act. If the credit exceeds the applicable employment taxes, the excess will be refunded to the business. For employers whose average number of full-time employees in 2019 was more than 100, qualified wages eligible for the credit are wages that are paid to employees who are *not* providing services due to a suspension of business or drop in gross receipts, plus qualified health care expenses. For employers who have up to 100 employees, qualified wages are wages paid to *any employee* during a suspension of business / drop on gross receipts (i.e. without regard to whether the employee is providing services).
- Certain companies may be eligible under the CARES Act for small business loans of up to US\$10 million to be used for certain expenses, including payroll costs (which would include paid sick and paid medical leave), mortgage interest payments or rent and utilities. Companies taking advantage of such loan arrangements under the CARES Act (a portion of which may be forgivable) are disqualified from taking advantage of the employee retention tax credits. Further guidance and information from the U.S. Small Business Administration regarding such loans can be found [here](#).

# US

## Employer

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### **Sick pay (eligibility, obligations to pay, recovery from Government)**

- Under the Response Act, from 2 April 2020 to 31 December 2020, the following will apply to employers with fewer than 500 employees:
  - PSL for up to two weeks where, due to COVID-19, employees are in quarantine (on healthcare advice), experiencing symptoms, or caring for such an individual or child. PSL is paid at 100% (capped per employee at US\$511 per day or US\$5,110 aggregate) or 67% where employees are caring for others (capped per employee at US\$200 per day or US\$2,000 aggregate). Part-time workers will be paid by average hours worked;
  - PFL: up to 12 weeks of job-protected leave to care for a child if the school or place of childcare or the childcare provider is unavailable due to the COVID-19 pandemic. The first 10 days of PFL is unpaid (but an employee may use paid time-off or PSL for the first 10 days). PFL is paid at 67% of the employee's regular rate (capped per employee at US\$200 per day and US\$10,000 in aggregate); and
  - an offsetting employer-side payroll tax credit to be administered by the IRS (described in the "Tax measures (deferrals, reductions)" section above).
- Additional guidance from the U.S. Department of Labor can be found [here](#).

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### **Enforced leave / use of holiday (paid vs unpaid)**

- Employers may require employees who are exempt under the U.S. Fair Labor Standards Act ("FLSA") to use vacation or paid time off in the case of a workplace closure due to the COVID-19 pandemic, provided that the exempt employee receives his or her full guaranteed weekly salary. If an exempt employee does not have sufficient vacation time or paid time off available, the employee generally must still receive their salary for any week in which they perform any work.

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### **Temporary layoffs**

- Temporary layoffs of less than six months do not trigger WARN Act notification requirements (see "Terminations" section below).

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### **Reduction in pay and/or hours**

- Employees who are exempt under the FLSA must generally be paid their full salary for any work week in which they perform any work. Employers should track the type of work performed, as the exempt status of employees may change if they work remotely for a long period.
- Employees who are non-exempt under the FLSA are only required to be compensated for hours worked (including while in self-quarantine). In certain states, payment obligations during self-quarantine may be triggered where the employer has required that employees self-quarantine and not work.
- Hours worked in self-quarantine or at home may be difficult to track and can increase the risk of off-the-clock and overtime claims. In order to mitigate these risks, employers should implement and communicate a policy that clarifies that employees should work only their regularly scheduled hours (and consider

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including a policy prohibiting unauthorised overtime) and to record all hours worked and breaks taken.

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## **Terminations**

- The federal Worker Adjustment and Retraining Notification (“WARN”) Act prohibits applicable employers (with 100 or more employees (excluding part-time employees) or 100 or more employees who work at least 4,000 aggregate hours per week (excluding overtime)), from ordering “plant closings” or “mass layoffs” without 60-days’ written notice that, in each case, results in an “employment loss” (which includes a layoff exceeding six months or reduction in hours of more than 50% each month for six months). Failure to provide requisite notice or full pay and benefits in lieu can result in the employer being liable to each employee for back pay up to 60 days and benefits. A liable employer may also be subject to civil penalties of up to US\$500 per day of violation.
  - The WARN Act contains exceptions to providing full notice for certain faltering companies, unforeseeable business circumstances and natural disasters.
  - The employer must show that the requisite conditions have been satisfied but with respect to “unforeseeable business circumstances,” deference is generally given to the employer’s business judgment.
  - An employer must ensure it complies with applicable state and local laws.
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# US

## Workforce

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### Teleworking

- Since employees may be required to work remotely to comply with new policies aimed at compliance with recent guidelines from the U.S. Occupational Safety and Health Administration (“OSHA”), employers should take steps to prepare employees to work from home where possible.
- Employers should review local laws regarding at-home requirements and restrictions on the operation of non-essential businesses, a summary of which can be found [here](#).
- New policies may be required for in-person meetings versus conference calls and for continued attendance at industry conferences.
- Current guidance for businesses and employers by the Centers for Disease Control and Prevention can be found [here](#).
- Where working from home is not possible, and employees are absent due to sickness, quarantine, or childcare needs, the employers will need to determine whether and for how long absent individuals will continue to be paid.

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### Travel (business and personal)

- It is permissible (and recommended) for employers to implement policies that restrict business travel to high risk destinations and require employees returning from such destinations to self-quarantine for the maximum period it takes for symptoms to appear (currently considered to be 14 days).
- Employees who contract the virus as a result of business travel may be entitled to benefit under workers’ compensation insurance (but note, employees generally would not be entitled to claim under workers’ compensation policies as a result of contracting an infectious disease from a colleague in the office).
- While employers cannot generally restrict personal travel, it is permissible to implement a policy requiring that an employee provide advance notice of any personal travel and requiring that employees self-quarantine upon their return from destinations where there are known cases of COVID-19. Employers should be diligent in applying the policy impartially and consistently to help avoid claims of discrimination based on the protected class of impacted employees. Proper documentation of decisions made and consistent application will be key to defend against such claims.

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### Preventive actions (reception policy, public interactions, management of infected employees)

- In light of OSHA and guidance from the Centers for Disease Control and Prevention, employers should require employees with symptoms of a contagious disease to stay at home and should not require a health care provider’s note to validate their illness or return to work.
  - Employers should determine how best to communicate the message that an employee has tested positive for COVID-19. Employers do have a general duty to inform the workforce if an employee tests positive or is a probable COVID-19 case. However, the confidentiality and privacy requirements of the
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Americans with Disabilities Act and the Health Insurance Portability and Accountability Act, and other applicable local laws, mean that steps should be taken to preserve the privacy of the impacted employee and not share their identity with the workforce.

- Employers returning to the workplace should ensure that they are in compliance with all required employment laws, regulations and guidance issued by public health authorities and other regulators.

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**Employees with children or older dependants**

- For employees who are off work and are not being paid, employers should consider the impact of the Family and Medical Leave Act, as well as applicable state and local laws which may permit periods of paid or unpaid time off to care for sick family members.
  - As discussed above, the Response Act requires that certain employers provide eligible employees with paid family leave under the Emergency Family Medical Leave Expansion Act.
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