

EMPLOYMENT LAW FAQ FOR VERMONT FARMERS AND FARM WORKERS RELATED TO COVID-19

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Disclaimer: This document was last updated April 3, 2020. The situation and the law are rapidly evolving and we are doing our best to keep this information up-to-date. This document is for educational purposes only. It is not legal advice. Each enterprise is unique, and there may be nuances of your situation that this document does not address. For legal advice, please consult with an attorney licensed in your state.

If you are in New England, we recommend that you reach out to the [Legal Food Hub](#) to be matched with an attorney licensed in your state. The Vermont Legal Food Hub operates out of Vermont Law School's Center for Agriculture and Food Systems and we can be reached via the link above or at LegalHub@vermontlaw.edu.

Does federal or state law require that farm employers provide their employees with paid sick leave?

State Law: Under existing, pre-pandemic VT law, all employers must provide earned sick time for all employees that work at least 18 hours a week and more than 20 weeks per year.[1] While the employer's sick time policies may vary, they must provide at least the statutory minimum of one hour earned per 52 hours worked, equal to roughly 40 hours per year for a full-time employee.[2]

Federal: In general, there is no federal requirement that any employers (farm employers or otherwise) provide paid sick leave to their employees.

However, under the recently enacted Families First Coronavirus Response Act (FFCRA), the federal government has created temporary requirements that employers provide up to two weeks paid sick leave to workers impacted by COVID-19, effective April 1–December 31, 2020.[3] The employer must:

- 1) Provide up to 80 hours at full pay if the employee is subject to a quarantine or isolation order; has been advised by a health professional to self-quarantine; or is experiencing COVID-19 symptoms and seeking medical diagnosis[4], OR
- 2) Provide up to 80 hours at two-thirds pay if the employee cannot work because they must care for another person experiencing reasons similar to those listed in (1) above,

or to care for a child whose school or daycare is closed due to COVID-19.[5]

- Part-time workers are also eligible for paid sick leave equal to the average number of hours worked in a two-week period.

FFCRA also expands family and medical leave to provide compensation for workers that must stop working to care for their children whose schools or daycares are closed as a result of emergency orders for up to an additional 10 weeks (in combination with the paid sick leave explained above).[6] The worker must have been employed for at least 30 calendar days, and pay is available at two-thirds the employee's regular wage rate.

How does it work?

Starting April 1, the federal government is reimbursing employers for qualifying wages paid out under the FFCRA in the form of a tax credit when employers file payroll taxes.

Do these temporary requirements apply to all employers?

The paid sick leave and expanded family and medical leave requirements apply to all private employers with fewer than 500 employees. However, an exemption from providing paid sick leave or expanded family/medical leave for childcare-related reasons is available to small businesses (defined as having fewer than 50 employees) where doing so would “jeopardize the viability” of the business.

[1] 21 V.S.A. 481(5); see also VT Department of Labor [FAQ](#).

[2] 21 V.S.A. 482(a).

[3] See U.S. Department of Labor [COVID-19 website](#); see also this [DOL FFCRA FAQ](#) (explaining the situations that qualify for paid sick leave). Questions 15 and 16 explain the records employers should retain and workers should provide to employers; see also 29 C.F.R. 826.100 (Documentation of need for leave) and 29 C.F.R. 826.140(c) (explaining the records an employer should retain).

[4] The rules provide additional explanation of these categories and terms, such as what it means to be “seeking medical diagnosis” given the realities of limited testing; see 29 C.F.R. 826.20(a)(2)-(4).

[5] The new rules provide additional explanation of these categories, such as the limitations on collecting sick pay to care for another individual; see 29 C.F.R. 826.20(a)(5)-(9).

[6] There are additional details and limitations; Dunkiel Saunders has a great explanation of how these policies operate on their blog [here](#).

PAID SICK LEAVE: EXEMPTIONS FOR SMALL BUSINESSES

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What must an employer do to elect the small business exemption?

You must make and document the determination 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(s) 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."

You are not to submit this determination to the DOL, but rather retain this information for your records.[8]

Does the small business exemption apply if an employee is requesting paid sick leave for reasons other than caring for a child whose school or childcare is closed?

No. The small business exemption only applies in childcare-related leave situations.

Can I make an employee stay home if they are showing symptoms associated with COVID-19, or if they have been exposed to someone with COVID-19?

The [Vermont Occupational Safety and Health Administration \(VOSHA\)](#) is recommending that employers follow guidelines from federal OSHA and Centers for Disease Control (CDC). Current [CDC guidelines](#) state that employers can (and suggest that they should) encourage sick employees to stay home. However, you will want to consider whether your action would result in the employee receiving paid sick leave under the FFCRA, or rather it would constitute suspension or termination of employment, in which case paid sick leave may be unavailable to the employee, but unemployment insurance under the CARES Act (discussed on the following page) is likely available.[9]

For more FFCRA details, limitations, how to calculate pay, etc. we recommend you visit the US Department of Labor (DOL) [website](#) and [FAQ](#). There are also helpful resources broken out by [employee rights](#) and [employer obligations](#). The DOL regulations implementing these new programs are available [here](#).

[7] 29 C.F.R. 826.40(b)(1)(i)-(iii).

[8] 29 C.F.R. 826.20(b)(2).

[9] It is also worth considering your liability in the event that your employee exposes one of your customers to COVID-19. While such direct causation is

likely quite difficult if not impossible to prove, the damage to your reputation could be severe if your community has the perception that your employees came to work sick and infected others.

Are farm workers, whether full-time or part-time/seasonal, eligible for unemployment insurance?

Under existing federal and Vermont law, farm employers are not required to pay unemployment taxes until they have more than 10 employees during at least some part of a day for 20 or more weeks over the last year, or have paid more than \$20,000 in wages to farm workers during the current or previous year.

- If either threshold is exceeded, then the farm employer must pay unemployment tax and their employees would be eligible for unemployment in certain circumstances.
- Farm employers falling below these thresholds may elect to pay into unemployment. However, if the farm employer has not been paying unemployment tax because they are exempt from doing so, then their employees are generally not eligible to file unemployment insurance claims.

The federal Coronavirus Aid, Relief, and Economic Security (CARES) Act has extended unemployment benefits for individuals who had already collected or exhausted their unemployment benefit prior to the pandemic, increases the amount of the benefit available, and expands as those eligible for the benefit to include self-employed people. The Vermont Department of Labor (DOL) administers the unemployment insurance program; for more information, visit the VT DOL website [here](#) or the federal DOL website [here](#).

Important for farmers and their employees: The CARES Act also establishes a new Pandemic Unemployment Assistance program for people that are otherwise ineligible for state unemployment insurance. This may be the best option for farmers and farm workers otherwise ineligible for unemployment insurance because their employers are exempt from paying into traditional unemployment insurance.

To apply for pandemic unemployment assistance, follow the same process to start filing a claim through the Vermont DOL; more information [here](#).

- As of April 3, 2020, the state's website did not yet reflect details about this new option; however, sign up for a newsletter [here](#) to be alerted to relevant changes. We will update this document to reflect changes as soon as possible.

In addition, newly-passed Vermont law ([H.742](#)) relaxes some obligations in obtaining compensation for COVID-19-related unemployment:

- Employers will not be charged for up to eight weeks if they rehire or offer to rehire employees within a reasonable time after restarting operations if the employer temporarily closed because of an emergency order, request from a public health authority, or actual exposure to COVID-19 in the workplace; if the employee became unemployed because of an order or directive; or if the employee is self-quarantined following the recommendation of a medical professional or public health authority.
- Employees are eligible for COVID-19-related unemployment benefits where they:
 - Have been temporarily laid off because the business closed for a COVID-19 related reason or as a direct result of an order by the Governor or President, or because the employee needs to isolate or quarantine; or
 - Left their employment because they are sick or have been advised to quarantine by a medical professional; because they have an "unreasonable" risk of exposure where they work; to care for a family member who is sick or isolated due to COVID-19, or who had an unreasonable risk of exposure at their work; or to care for a child who had their school or child care center closed due to COVID-19.
 - Employees may also be eligible if their work hours are reduced, though certain limitations may apply.

Visit the [VT DOL website](#) for more details and information on any limitations. [This brief](#) from Vermont law firm Dinse is also very helpful.

Vermont Law School's Center for Agriculture and Food Systems

Farm & Food Law: A Guide for Lawyers in the
Legal Food Hub, Vermont Edition (Mar. 2020)

Housing and Employment Rights for Vermont
Dairy Workers (Jan. 2019)

Legal Food Hub

Resource Library

COVID-19 Resources for Farmers

Farm Commons

Podcast series and other COVID-19 related
resources

Hiring a Farm Employee in Vermont: Tax and
Paperwork Checklist (Jan. 2017)

Vermont Law Firms Providing Free COVID-19 Resources

Dunkiel Saunders

Dinse

MSK Attorneys

Paul Frank & Collins

Other COVID-19 resources from Vermont agriculture support organizations:

VAAFM: [COVID-19 Information for
Agriculture and Food Businesses](#)

UVM Extension/VVBGA: [COVID-19
Resources for Vermont Vegetable
and Berry Growers](#)

Vermont Agency of Commerce and
Community Development: [COVID-19
Resource Center](#)

VHCB: [Farm and Forest Viability
Program Resources](#)

NOFA: [Dairy Farmer Support](#);
[Relief Milking](#) and [Farmer
Emergency Fund](#)

Vermont Farm Bureau: [COVID-19
Information](#)

Rural Vermont: [Resources for
COVID-19](#)

Vermont Farm to Plate: [COVID-19
Support](#)

