

# Coronavirus: What Employers Need to Know Now and For the Future: Part 1

May 6, 2020



# Presenter

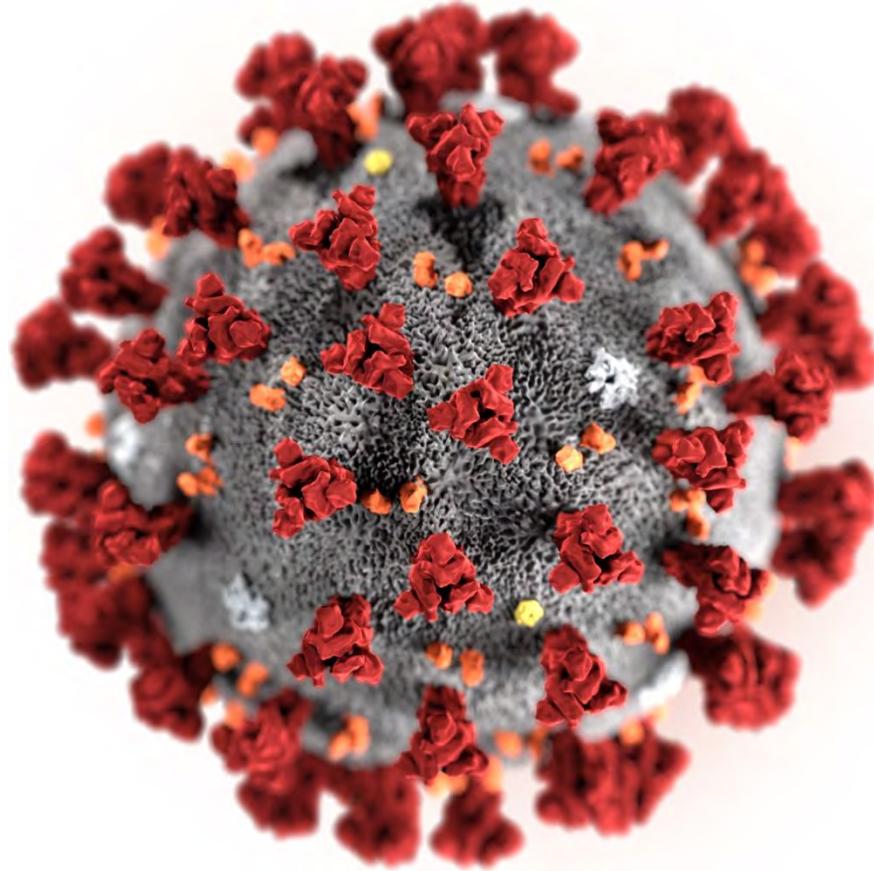


**Paul Buehler**  
Albany, NY  
pbuehler@bsk.co  
m

# Agenda

- **COVID-19 Leave**
  - *Federal FFCRA*
  - *New York COVID-19 Leave Law*
- **ADA and Regular FMLA Implications**
- **EEOC Guidance and Covid-19**
  - ***Business Implications***
  - ***Common Workplace considerations***
  - ***Business Closures***
  - ***Expanded Unemployment Insurance***
  - ***Paycheck Protection Program***

# Federal COVID-19 Law - FFCRA



# Federal FFCRA: Basics

- Families First Coronavirus Response Act: Signed March 18, 2020; effective April 1, 2020
  - Does not apply retroactively
    - Leave provided under leave policies or state law prior to April 1 cannot be counted
  - Expires at the end of 2020
- Provides two main types of leave:
  - Emergency Paid Sick Leave (“EPSL”)
  - Emergency FMLA leave (“EFMLA”)

# Eligibility

- Applicable to private employers with fewer than 500 employees (at the time of leave) and certain public employers
  - Exception for health care providers and first responders
  - Limited exception for employers with less than 50 employees in certain circumstances
- Employees eligible for EPSL immediately and EFMLA after 30 days

# Types of EPSL Leave

- Provides for two weeks of paid sick leave, up to 80 hours, at the employee's regular rate of pay when an employee is unable to work (or telework) due to one of the following reasons:
  1. Employee is subject to a governmental quarantine or isolation order related to COVID-19
  2. Employee has been advised by a health care provider to self-quarantine due to COVID-19 concerns
  3. Employee is experiencing symptoms of COVID-19 and is seeking a medical diagnosis
- Leave is capped at \$511 per day and \$5,110 total per employee

## Types of EPSL (cont.)

- Provides for two weeks of paid sick leave, up to 80 hours, at 2/3 of the employee's regular rate of pay when employee is unable to work (or telework) due to one of the following reasons:
  4. Employee is caring for an individual subject to a governmental quarantine/isolation order or health care provider recommendation
  5. Employee is caring for an eligible “son or daughter” under age 18 if the school or place of care has been closed or care provider is unavailable due to COVID-19 precautions
  6. Employee is experiencing any other “substantially similar condition” specified by Health and Human Services Secretary
- Leave is capped at \$200 per day and \$2,000 total per employee

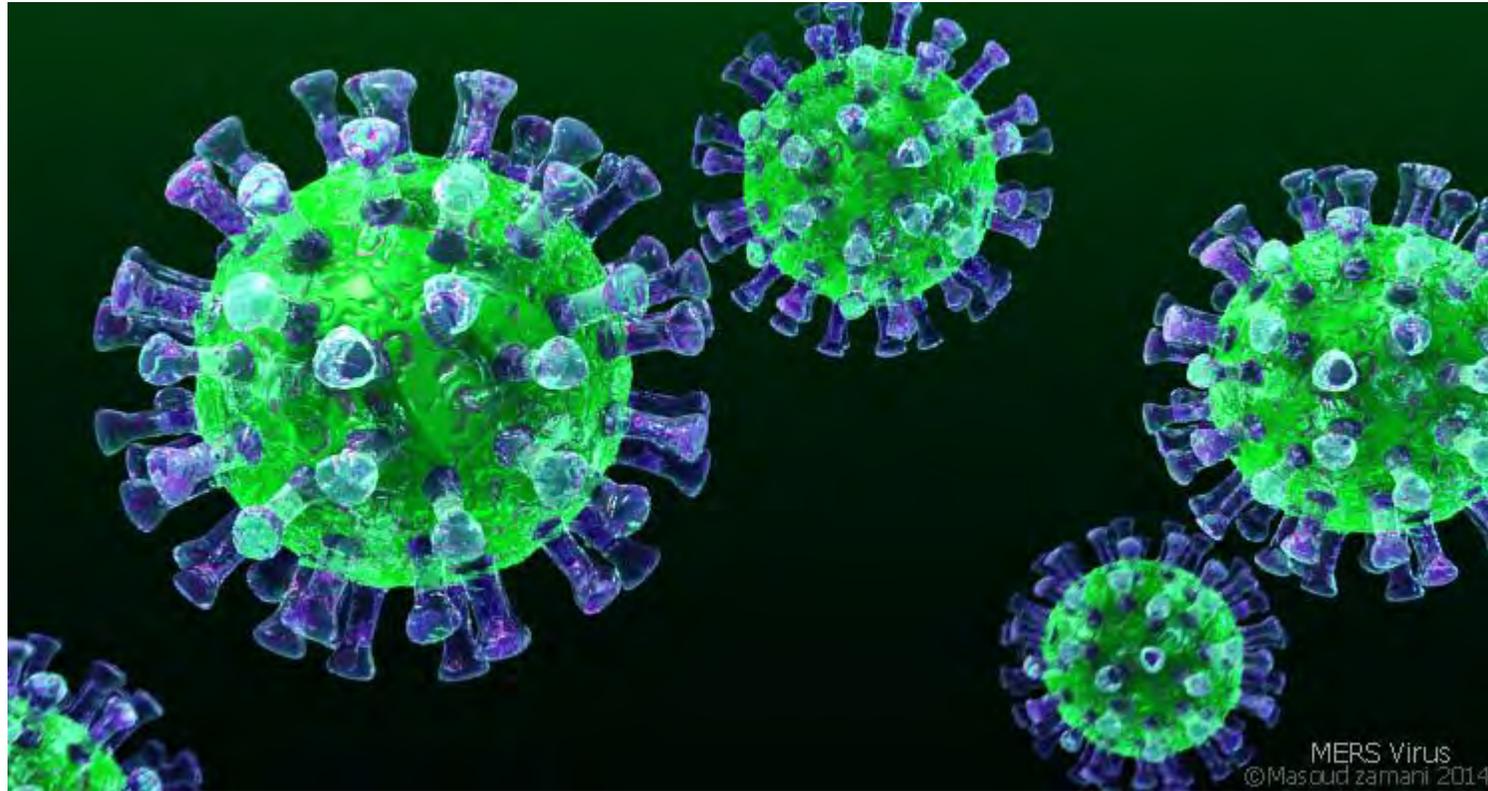
# EFMLA Leave

- Provides 12 weeks of leave where employee is unable to work (or telework) because employee must care for a son or daughter because the child's school or place of care has been closed or the child care provider is not available due to a public health emergency related to COVID-19
- First 10 days of leave are unpaid
- Remaining leave paid at a rate of:
  - 2/3 of an employee's regular rate, multiplied by the number of hours the employee is regularly scheduled to work
  - Pay capped at \$200 per day and \$10,000 total

# FFCRA Employer Notice

- Poster:  
[https://www.dol.gov/sites/dolgov/files/WHD/posters/FFCRA\\_Poster\\_WH1422\\_Non-Federal.pdf](https://www.dol.gov/sites/dolgov/files/WHD/posters/FFCRA_Poster_WH1422_Non-Federal.pdf)
- Can e-mail or direct mail to employees, or post notice on an employee information internal or external web site
- No translation of notice is required

# New York COVID-19 Law



# New York COVID-19 Paid Sick Leave

- Enacted March 18, 2020; effective immediately
- Provides leave if:
  - An employee is subject to an “order of quarantine or isolation”
  - An “order of quarantine or isolation” must be issued by New York State, the Department of Health, local Board of Health, or a governmental entity
    - An employee’s physician cannot create this order
    - An employee cannot create his/her own order
    - Self-isolation is not sufficient
- Exceptions:
  - Employees who traveled despite CDC travel health notice
  - Asymptomatic telecommuters

# NY COVID-19 Paid Sick Leave Chart

Employer Size (as of 1/1/20)	Paid Sick Leave (calendar days)	Additional PFL/STD
<b>10 or fewer employees &amp; net income &lt; \$1M</b>	N/A	Until termination of quarantine/isolation order
<b>10 or fewer employees &amp; net income &gt; \$1M</b>	5 days	Until termination of quarantine/isolation order
<b>11 to 99 employees</b>	5 days	Until termination of quarantine/isolation order
<b>100+ employees</b>	14 days	N/A?
<b>All “public employers”</b>	14 days	If opted-in - N/A?

# New PFL Benefits

- Definition of “family leave” expanded to include leave taken by employees because they and/or their minor dependent children are subject to an order
  - Does not include most “family members”
- Same benefit level – up to **\$840.70** per week
- But no cap on benefit weeks

# New DBL Benefits

- Definition of “disability” expanded to apply where employee (1) is unable to work due to order and (2) has exhausted all paid sick leave provided by employer under this law
- Benefits payable on **first day** of disability
- Maximum weekly benefit is the difference between maximum weekly PFL benefit (\$840.70) and the employee’s **total** average weekly wage from each covered employer, up to maximum benefit of **\$2,043.92**
- No cap on benefit weeks

# Interplay of New PFL and DBL

- ***Normally, PFL and disability benefits cannot be taken at the same time***
- ***PFL and disability benefits payable under this act only may be taken concurrently, starting on first full day of unpaid period of disability***
- ***Employee may not collect any benefits that would exceed **\$840.70** in PFL and **\$2,043.92** in disability benefits per week***

# ADA and Regular FMLA Leave Implications

# ADA and NYHRL

- ***Two laws protect employees with disabilities in the workplace: the Americans with Disabilities Act (ADA) and the New York Human Rights Law (NYHRL)***
- ***Both prohibit disability discrimination, and both require reasonable accommodations for disabilities***

# Is a Contagious Disease a “Disability?”

- Yes, a contagious disease can be a disability if it meets the criteria under ADA and NYHRL
- Contagious diseases can cause individuals to be unavailable for work, and may be subject to reasonable accommodations

# Job Qualifications

- In order to be protected by the ADA or NYHRL, a disabled person must be “qualified” to perform their job duties
- Courts have held that if a person poses a “direct threat” to the health and safety of others, they are not “qualified” within the meanings of the laws
- The EEOC has published guidance indicating that the risk of transmission of COVID-19 is a direct threat

# Does a Reasonable Accommodation Exist?

- Leave is a form of a reasonable accommodation
- Placing infected employees on leave reduces the risk to others, and allows the employee to recover
- Leave may be paid or unpaid, at the employer's discretion (employees may also be able to use accrued paid time off)

# How Long Should the Leave Be?

- Employee should be placed on leave until they are free of the contagious disease
- Can require documentation from medical professional that the employee can return to work
- Depending on the illness, this could be different periods of time

# FMLA Implications

- Is a contagious disease a “serious health condition” eligible for leave under FMLA?
- “Serious health condition:” an illness, injury, impairment or other condition that involves inpatient care or continuing treatment by a health care provider

# FMLA Implications

- If the contagious disease involves a hospital stay, then FMLA applies (maximum of 12 weeks)
- FMLA applies for as long as the employee cannot return to work (ex. period of quarantine could be considered course of treatment)
- FMLA also applies to intermittent absences for treatment or other health condition-related reasons

# FMLA Implications

- If an employee's physician recommends quarantine, likely FMLA applies for that period of time, as it could be considered "continuing treatment"
- If an employee decides to quarantine themselves, without any medical certification, then FMLA may not apply

# Paid Family Leave Implications

- Paid Family Leave is available to qualifying New York employees to care for a family member with a “serious health condition”
- “Serious health condition” is defined the same way as under FMLA
- Coronavirus, and other contagious diseases, can qualify as “serious health conditions”

# EEOC Guidance and Covid-19

# Preventing Discrimination

- ***Employers should make employees, especially supervisors, aware that discrimination is illegal***
- ***Discrimination can take many forms, such as:***
  - ***Preventing an Asian employee from sitting near other employees for fear of contamination***
  - ***Prohibiting an employee who has recently returned from overseas (who does not show symptoms) from coming to work, unless the employee is put on paid leave***
  - ***Allowing employees to spread rumors that an Asian employee who is out sick has the coronavirus***

# Preventing Discrimination

- Employers may ask about travel plans for employees, as long as they do so for every employee (this includes questions for employees returning from an unknown destination)
- Employers may ask employees who are ill to stay home from work, as long as they do so for all employees with similar symptoms

# Preventing Discrimination

- EEOC Pandemic Preparedness in the Workplace (2010)
  - Employers may not ask employees if they have health conditions that would make them more susceptible to the virus
  - Employers may ask employees if they are experiencing symptoms consistent with coronavirus
  - Employers may require employees to wear personal protective equipment
  - Employers may require hygiene practices, such as handwashing
  - Employers may ask employees why they have been absent from work

# Business Implications

- ***Common Workplace considerations***
- ***Business Closures***
- ***Expanded Unemployment Insurance***
- ***Paycheck Protection Program***

# Common Workplace Considerations

# Practical Tips for Employers

- ***Encourage handwashing among employees***
- ***Regularly clean the workplace***
- ***Tell employees who are sick to use good judgment about reporting to work (especially if the employees have fever or flu-like symptoms)***
- ***Allow employees to work from home if appropriate***

# Practical Tips for Employers

- Require employees to notify Human Resources immediately if they are diagnosed with a contagious disease
- If an illness is suspected, have supervisors and HR carefully document basis for that suspicion
- Train employees, especially supervisors, to recognize and prevent discrimination
- Mandate PPE and/or COVID-19 testing – but be aware of potential reasons employees can refuse or testing may not be appropriate

# Practical Tips for Employers

- Create an Infectious Disease Outbreak Response Plan (CDC Guidance):
  - Appoint an individual or a team of people responsible for creating, updating, and implementing the plan
  - Explore whether flexible work policies, such as remote working and flexible hours, can be put in place
  - Identify essential business functions, and essential jobs and roles; plan for how increased absenteeism will affect those roles
  - Set up methods for alerting employees about when to stay home and when to come to work
  - Determine procedures for employees who will need to stay home for childcare purposes for sick children, or if schools are closed

# Practical Tips for Employers

- Create an Infectious Disease Outbreak Response Plan (CDC Guidance):
  - Develop policies on how non-essential business travel will be conducted
    - Consider travel restrictions of other countries
  - Review current human resource policies to ensure that they are compliant with the current laws
  - Plan communications to prevent misinformation and discrimination
    - Use CDC resources (including posters and handouts) to educate employees about the realities of the disease
  - Instruct employees on how they should alert the employer if they become ill or suspect they have the contagious disease

# Practical Tips for Employers

- Employee Communication
  - Create a policy or other type of communication to inform employees about the virus and the employer's procedures
  - This can include practical advice, such as handwashing, and other disease-prevention tactics
  - It can also inform employees of government sources where up-to-date, accurate information is provided

# *Business Closures Due to COVID-19:*



# COVID-19 and Business Closures

- Many employers have been forced to close due to government orders, or have been effectively forced to close due to lack of business
- For these employers, leave law issues are created for employees who are already out on leave

# Workforce Reduction



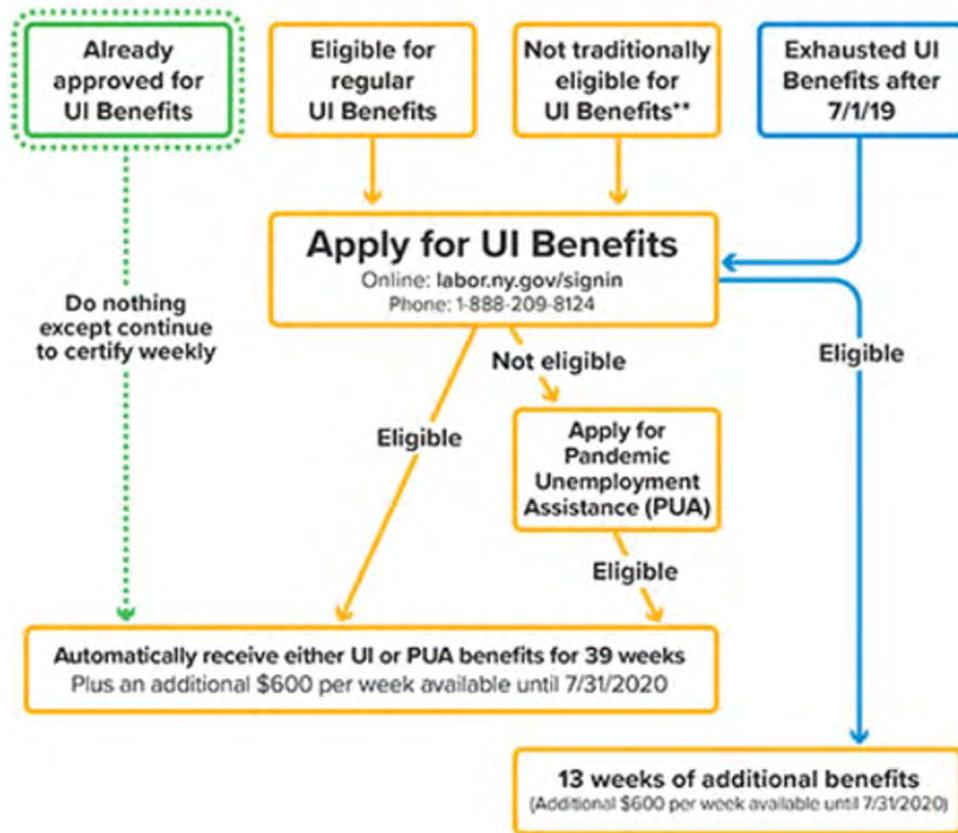
# Enhanced Unemployment Benefits



# Unemployment Insurance (UI) Benefits

- Laid-off and furloughed employees will likely be eligible for UI
- State and federal legislation eliminated one-week waiting period
  - Extra \$600 – paid for by state and then reimbursed by federal gov't
- Employees who have had hours reduced may be eligible for UI
  - Work less than 4 days/week and earn less than NYS UI max of \$504/week
- Employees who voluntarily leave may be deemed ineligible for UI
- All UI eligibility decisions rest with NYS
  - Do not make promises to employees that they will (or won't) receive UI benefits

# Unemployment Insurance (UI) Benefits



## RELIEF FOR WORKERS AFFECTED BY CORONAVIRUS ACT WHAT YOU NEED TO KNOW AND DO ABOUT THE CARES ACT



The federal CARES Act was signed into law March 27, 2020. The Act provides enhanced Unemployment Insurance (UI) benefits and Pandemic Unemployment Assistance (PUA) for New Yorkers. Here's what you need to know.

### IF YOU ARE ALREADY APPROVED FOR UI BENEFITS:

#### WHAT YOU SHOULD DO

- Do nothing except continue to certify weekly. Your benefits will automatically be updated. Please do not call, it will only make it difficult for others to reach an agent.

#### WHAT YOU MAY QUALIFY TO RECEIVE

- 39 weeks of UI benefits.
- An additional \$600/week until 7/31/2020. (Payments begin 4/5/2020)

### IF YOU ARE NOT TRADITIONALLY ELIGIBLE FOR UI BENEFITS:

#### WHAT YOU SHOULD DO

- Check your eligibility for PUA [labor.ny.gov/ui/pdfs/pandemic-unemployment-assistance.pdf](http://labor.ny.gov/ui/pdfs/pandemic-unemployment-assistance.pdf)
- If you believe you are eligible, apply online at [labor.ny.gov/signin](http://labor.ny.gov/signin).
- You may also call 1-888-209-8124 if you do not have access to a computer.

#### WHAT YOU MAY QUALIFY TO RECEIVE

- 39 weeks of PUA benefits.
- An additional \$600/week until 7/31/2020. (Payments begin 4/5/2020)

### IF YOU ARE FILING A NEW UI CLAIM:

#### WHAT YOU SHOULD DO

- Apply online at [labor.ny.gov/signin](http://labor.ny.gov/signin).
- You may also call 1-888-209-8124 if you do not have access to a computer.

#### WHAT YOU MAY QUALIFY TO RECEIVE

- 39 weeks of UI benefits.
- An additional \$600/week until 7/31/2020. (Payments begin 4/5/2020)

### IF YOU'VE EXHAUSTED 26 WEEKS OF BENEFITS AFTER 7/1/2019:

#### WHAT YOU SHOULD DO

- Apply online at [labor.ny.gov/signin](http://labor.ny.gov/signin).
- You may also call 1-888-209-8124 if you do not have access to a computer.

#### WHAT YOU MAY QUALIFY TO RECEIVE

- 13 weeks of benefits.
- An additional \$600/week until 7/31/2020. (Payments begin 4/5/2020)

# How to Keep Employees on Payroll



# *Paycheck Protection and Loan Forgiveness Program*

## Who is eligible?

- In operation on February 15, 2020
- Have fewer than 500 paid employees or independent contractors
- Can certify that current economic conditions make the loan necessary to support ongoing business operations, and have not received other loans from SBA for the same purpose

# *Paycheck Protection and Loan Forgiveness Program*

- How Much Can You Borrow?

Each employer is eligible to borrow the lesser of 2.5 times the borrower's monthly payroll or \$10 million

# *Paycheck Protection and Loan Forgiveness Program*

## What Can the Money Be Used For?

- Payroll costs
- Continuation of group health care benefits
- Employee salaries (with caps)
- Payments of interest on mortgage obligations
- Rent
- Utilities
- Interest on other debt obligations incurred before February 15, 2020 through June 30, 2020

# *Paycheck Protection and Loan Forgiveness Program*



# *Paycheck Protection and Loan Forgiveness Program*

## Loan Forgiveness

- Limited to the lesser of
  - The principal amount of the loan –or–
  - Total eligible costs incurred for an 8-week period starting from the PPP loan origination date

Eligible costs include: payroll costs, payment of interest on a covered mortgage obligation which existed before 2/15/2020, rent obligations which existed before 2/15/2020, and utility payments related to gas, electricity, water, transportation, telephone or internet access in effect before 2/15/2020

# *Paycheck Protection and Loan Forgiveness Program*

## Effect of Reductions on Forgiveness

The amount of forgiveness is reduced by reductions in salary or wages during the 8 week period starting from the loan origination date in excess of 25% (excluding employees with salaries in excess of \$100,000).

# Employee Retention Credits

## Who is eligible?

- Employers who fully or partially suspend operation during any quarter in 2020 due to orders from a governmental authority limiting commerce, travel, or group meetings due to COVID-19; or
- Experiences a significant decline in gross receipts during the calendar quarter. (more than 50% decline compared to same quarter last year)

# Employee Retention Credits

## How much is the credit?

- 50% of the qualified wages paid to employees during the COVID-19 pandemic (up to \$10,000 per employee)
- So, a maximum benefit of \$5,000 credit per employee

# Employee Retention Credits

- How do I claim the credit?
- Eligible Employers will report their total qualified wages and the related credits for each calendar quarter on their federal employment tax returns, usually Form 941, Employer's Quarterly Federal Tax Return.

# Employee Retention Credits

Can I get Employee Retention Credits and participate in the Paycheck Protection Program?

- No. You may not receive and should not claim the Employee Retention Credit if you receive a loan under the Paycheck Protection Program.

# Questions?



# Bond Resources on COVID-19

- ***<https://www.bsk.com/new-york-labor-and-employment-law-report>***
- ***<https://www.bsk.com/coronavirus/overview>***