

## COVID-19 SPECIAL EDITION #4



### **BREAKING: Congress Replenishes Paycheck Protection Program Funds**

With the passing of the Paycheck Protection Program and Health Care Enhancement Act on (date), Congress has replenished the small business loan plan first introduced in the CARES Act with an additional \$310 billion with \$125 billion specifically set aside for businesses that are minority owned, rural, un-banked, and "mom and pop" stores.

To read more about the Paycheck Protection Program and other small business loans passed in the CARES Act, [click here for our breakdown](#).

### **How to Get Your Paycheck Protection Program Loan Forgiven: An FAQ Guide for Small Businesses and Self-Employed Individuals**



by **Zack R. Gardner, Esq.**  
and Law Clerk Zach Kiffmeyer

On March 27, 2020, President Trump signed the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act") to provide emergency assistance for individuals, families, and businesses affected by the coronavirus pandemic.

The Small Business Administration ("SBA") received funding and authority through the CARES Act to modify existing loan programs and establish a new loan program to assist small businesses nationwide. Section 1102 of the Act temporarily permits the SBA to guarantee 100 percent of 7(a) loans under a new program titled the **Paycheck Protection**

**Program (“PPP”)**. Notably, section 1106 of the Act provides for forgiveness up to the full principal amount of qualifying loans guaranteed under the PPP.

So now that you have received your loan, how do you ensure that you take the correct steps to have that loan forgiven? What are other issues that you should be concerned about? Below you will find a series of questions and answers Kennerly Montgomery has prepared regarding the necessary steps to help small businesses stay “healthy” during these rather unhealthy times.

To begin, let’s go over the general terms of the loan under the PPP. The loan amount you received was based on your average monthly payroll cost for 2019. You could have received up to 2.5 times that amount to help cover eight weeks of payroll. The day your lender distributed your first loan payment is when your eight-week period begins covering those expenses. Please note: it is expected that you spend 100% of the loan proceeds in that eight-week period.

### **1) Can you spend your loan proceeds on anything related to your business?**

No. These are the acceptable uses of your loan proceeds if you want your loan to be forgiven:

1. **Payroll costs:** salary and wages; vacation pay, parental, and family leave; sick leave; medical and health benefits; retirement benefits; and state and local taxes assessed on employee compensation.
2. **Mortgage Interest:** as long as the mortgage was signed before February 15, 2020.
3. **Rent:** as long as the lease agreement was in effect before February 15, 2020.
4. **Utilities:** as long as the service began before February 15, 2020.

### **2) Will the loan be forgiven if proceeds are used for any combination of amounts for the above reasons?**

No. Thus, it is very important for small business owners to remember the 75/25 Rule; this rule is the foundation of the PPP. The 75/25 Rule states that in order to receive loan forgiveness after the eight-week period, you **must have spent at least 75%** of your loan proceeds on payroll costs and no more than 25% toward the three other permitted expenses.

Note: Payments to independent contractors cannot be included in the payroll costs.

### **3) When do you need to contact your lender to apply for loan forgiveness?**

Essentially, you can send the required documents to your lender after the eight-week period ends. Since the principal and interest payments on the loan are deferred for six months, there is likely a two-to-three month period after the covered period ends when you should make your loan forgiveness application available to your lender, but we recommend compiling the documentation and submitting as early as possible.

Once the lender has received your documentation, it will then provide you with instructions on how to apply specifically within their organization. After you submit your application for loan forgiveness, **your lender is required by law to give you a response within 60 days.**

### **4) What information needs to be presented to your lender to have the loan forgiven?**

These are the required documents you will need to collect to provide with your PPP forgiveness application. Your lender may have additional requirements, and it is good practice to immediately contact your lender at the end of your 8-week covered period to confirm documentation for forgiveness. Below are the requirements set forth under the Act:

- Documents verifying the number of full-time equivalent (“FTE”) employees on payroll and their pay rates for the periods used to verify you met the staffing and pay requirements:
  - Payroll reports from your payroll provider;
  - Payroll tax filings (Form 941);

- Income, payroll, and unemployment insurance filings from your state; and
- Documents verifying any retirement and health insurance contributions.
- Documents verifying your eligible interest, rent, and utility payments such as canceled checks, payment receipts, or account statements.
- Certification from a representative of the eligible recipient, such as a payroll manager, authorized to make a certification which states that:
  - The documentation presented is true and correct; and
  - The amount for which forgiveness is requested was used to retain employees, make mortgage interest payments, make rent payments under a qualified lease agreement, and/or make utility payments.
- Any other documentation the SBA administrator determines necessary.

Here is an example of what a Tennessee SBA lender has drafted in order to help you, the borrower, stay on top of what you need in order to have all documentation prepared for loan forgiveness:

- Create a separate bank account for the loan proceeds for easy expenditure tracking.
- Document how loan proceeds are spent by:
  - Creating a spreadsheet listing all employees on payroll during the eight-week covered period following the loan distribution with the dollar amount of payroll costs; and
  - Providing evidence of mortgage interest payments, rent payments, and utility payments by providing: copies of cancelled checks, bank statements with ACH info, utility bills, mortgage statements, and lease agreements.
- Maintain evidence that workers were kept on payroll or rehired once loan was received, including:
  - A calculation of the average monthly number of full-time equivalent employees for the period February 15, 2019 through June 30, 2019 or January 1, 2020 through February 29, 2020—you select the time period; and
  - The average monthly number of full-time equivalent employees for the eight-week period following the date of the loan.
- Maintain evidence of restoration by June 30, 2020 of pay for any individual whose pay was reduced by 25% or more.
- Maintain evidence of payroll costs, utilities, rent/lease payments, and mortgage interest paid before February 15, 2020 to compare to what is paid or incurred during the eight weeks following the loan closing to ensure it aligns.
  - Note: If **self-employed**, these expenses are allowed to the extent they are deductible on Form 1040 Schedule C.
- Maintain a copy of paperwork submitted to bank for the initial PPP loan.
- Maintain evidence you were in business on February 15, 2020 and paid employees or independent contractors—of which the Payroll Tax Filing for Quarter 1, 2020 qualifies.

**5) What happens if any of your employees leave, retire, or you choose to reduce the number of employees on your payroll after you received your loan money? Will the loan still be able to be forgiven if that portion of your loan proceeds are no longer needed since those employees are no longer on the payroll?**

There are two key provisions of the Act related to this question of employees: staffing and salaries.

**Staffing:** You **must** maintain the number of employees on your payroll during the eight-week period. Here's a calculation, step by step, you can use to determine if you've met the staffing requirement.

First, determine the average number of full-time equivalent employees ("FTEs") for three baseline periods as provided in the Act:

1. FTEs for the eight-week period following your initial loan (**X**);
2. FTEs from February 15, 2019 to June 30, 2019 (**Y**); and
3. FTEs from January 1, 2020 to February 29, 2020 (**Z**).

The SBA has not yet definitively stated how to calculate FTE employees. The general consensus is that it will be similar to the Affordable Care Act ("ACA"), such that FTE refers to a combination of employees, each of whom individually is not a full-time employee because they are not employed on average at least thirty hours per week, but who, in combination, are counted as the equivalent of a full-time employee. For example, two employees, each of whom works 15 hours per week, are the equivalent of one full-time employee.

Second, take **X** and divide by **Y**, then also take **X** and divide by **Z**; whichever equation has the larger answer is the one you will use.

Note: If you are a seasonal employer, you must divide by **Y**.

Third, determine the results:

1. If you get a number **equal to or greater than 1**, you successfully maintained your headcount and met the staffing requirement.
2. If you got a number **less than 1**, you did not maintain your headcount and your forgivable expenses will be reduced proportionately. For example, if you had 10% fewer FTEs in the eight-week period than in your chosen baseline period, then your loan forgiveness is proportionately reduced by that same 10%.

**Salaries:** you must maintain 75% of the total salary on your payroll. Here is another step-by-step process.

First, identify all employees employed during the covered eight-week period that you also employed at any point during 2019. The qualifying employees for this calculation are those that made less than \$100,000 on an annualized basis during these periods.

Second, determine the average wage/salary rate for the most recent full quarter they were employed.

Third, if  $1/8^{\text{th}}$  of the total amount of salary/wages paid to that employee for the covered eight-week period is at least 75% of her average weekly rate during Q1 of 2020, then there is no further reduction in loan forgiveness. But if the employee experienced a reduction in salary/wages by more than 25%, then the dollar amount of the portion beyond 25% reduces, dollar-for-dollar, the amount of loan forgiveness.

Here's an example: One employee earns \$18,000 during Quarter 1 of 2020. Her average weekly salary in Quarter 1 is \$1,285.71. Now, during your eight-week period of using loan proceeds, you paid this employee \$8,000 over eight weeks, therefore her weekly pay during the period is \$1,000.

Now, to determine whether your forgiveness will be affected, divide  $1,000/1285.71$ : this gives you a percentage of 77%. Here, your forgiveness would not be affected, meaning that the loan proceeds you used for this employee's salary would be fully forgiven, because  $1/8^{\text{th}}$  of the total amount of salary you paid to that employee for the eight-week period was at least 75% of her average weekly rate during Quarter 1 of 2020.

Notably, for both of the staffing and salary issues, the CARES Act provides an exemption for each scenario.

For the staffing requirement, if you experienced a reduction in employees during the eight-week period, you have until June 30, 2020 to bring your FTE count back up to where it was on February 15, 2020. If you do that, the reduction in forgiveness that would have

been attributable to a decrease in staffing between February 15, 2020 and April 26, 2020 is excused.

For the salary requirement, if you restored the salary/wage level of the employees who earn less than \$100,000 by June 30, 2020 to their salary/wage level on February 15, 2020, then that excuses any reduction in forgiveness that would have been attributable to a decrease in salary/wages for any changes made between February 15, 2020 and April 26, 2020.

### **6) Can I defer payments on my loan under the Paycheck Protection Program?**

Yes. The SBA, in its Second Interim Final Rule on April 15, stated, “You will not have to make any payments for **six months** following the date of disbursement of the loan. However, interest will continue to accrue on PPP loans during this six-month deferment. The Act authorizes the Administrator to defer loan payments for up to one year.” In other words, you won’t have to make payments for six months, but interest will still accrue. That being said, the interest that accrues during that six-month period is also eligible for forgiveness.

### **7) What happens if you don’t get approved for forgiveness by your lender?**

Your lender may allow you to provide additional documentation so they can reevaluate your request. Otherwise, your outstanding balance will continue to accrue interest at 1% for the remainder of the two-year repayment period. You can pay off the outstanding balance at any time with no additional fees.

### **8) I’m self-employed, can my loan be forgiven?**

Yes. If you are a self-employed individual, your loan is designated for certain purposes, just like business recipients, and your loan may be forgiven.

To begin, when you applied for the loan, you had to determine your “Owner Compensation Replacement” figure which is determined by:

- (i) dividing the net profit amount listed on line 31 of your 2019 Form 1040 Schedule C (up to \$100,000) by 12 to determine the average monthly net profit amount; and
- (ii) multiplying that average monthly net profit amount by 2.5.

This would have equated to your total loan amount that you could have borrowed. This is an important reminder because there are implications on this amount when it comes to forgiveness. We have outlined that under “Loan Forgiveness” below.

### **Permitted Uses for Self-Employed Individuals:**

1. The self-employed individual’s compensation replacement, based on Schedule C 2019 net profits;
2. Payroll costs;
3. Mortgage interest payments on any business mortgage obligation—not including prepayment or principal payments, business rent payments, and business utility payments; and
4. Interest payments on debt obligations incurred *before* February 15, 2020—however, these payments **are not eligible** for forgiveness.

As with other PPP loan recipients, the 75/25 Rule applies: 75% of the loan proceeds spent must be used toward **payroll costs** including self-employment income (up to \$100,000 annualized).

**Loan Forgiveness:** The full loan proceeds used during the eight-week period plus its accrued interest are eligible for forgiveness, and the actual amount of forgiveness will be calculated based on:

1. Payroll costs, including salary with a maximum of \$15,385 per individual during the eight-week period, and **covered employee benefits, but not including the owner’s;**
2. The self-employed individual’s “Owner Compensation Replacement,” but only up to an amount limited to eight weeks’ worth (8/52 weeks) of the 2019 Schedule C net

- profit amount;
3. Mortgage interest payments incurred before February 15, 2020 to the extent deductible on Form 1040 Schedule C;
  4. Rent payments under a covered lease agreement entered into before February 15, 2020 to the extent deductible on Form 1040 Schedule C; and
  5. Utility payments under an agreement entered into before February 15, 2020 to the extent deductible on Form 1040 Schedule C.

Lastly, during these unusual and unprecedented times, there may be instances where you cannot, or have difficulty, spending 75% of your loan proceeds on the permitted payroll costs due to ever-changing circumstances with operations and personnel. Note that loan forgiveness is not all or nothing. If you have not met all of the requirements for loan forgiveness, a portion of the loan will be forgiven based on what you were able to spend on permitted expenses in the period.

That being said, the loan forgiveness provisions of the Paycheck Protection Program are complex and will require detailed planning, precise execution, and careful documentation. Our attorneys at Kennerly Montgomery will gladly advise you and assist you in that planning, execution, and documentation. Please call us at (865) 546-7311 for any of your needs related to the PPP loan forgiveness provisions under the CARES Act or any of your related business needs.

**Please Note: The information provided in this article does not, and is not intended to, constitute legal advice; instead, all information and content is for general informational purposes only.**

## A reminder on the Families First Coronavirus Response Act

With cities and states across America beginning to re-open for business with Shelter in Place and Safer at Home orders being lifted or expiring, we wanted to share a few reminders for our clients and readers (that we'd love to be clients one day).

First and foremost, the CDC is still highly encouraging the practice of social distancing. We want to echo that and say that, for as much as business allows, continue to allow those employees who are capable of working from home **to** do so until CDC recommendations change. Other best practices include providing ample hand sanitizer and antibacterial hand soap, gloves, disinfectant wipes, and masks around the office.

Second, it is important to remember that all six reasons allowed for paid FMLA leave under the Families First Coronavirus Response Act ("FFCRA") remain valid from **April 1, 2020 to December 31, 2020**. For a refresher of these reasons and the Department of Labor's regulations on them, please check out [this article](#) and [this article](#).

One best practice we want to highlight is for when an employee takes paid leave in regard to childcare related to school and daycare closings. We recommend requesting a copy of the academic calendar for both Spring 2020 and Fall 2020 from the employee so that the dates of coverage are known. In the rare case of someone who attends a year-round school, still request the academic calendar to see the dates of their breaks scheduled throughout the year. Keep the schedule in their HR/payroll file for reference.

A reminder for this specific example from the [referenced article above](#): An employee may take paid sick leave to care for his or her child only when the employee needs to, and actually is, caring for his or her child. An employee is not eligible for paid leave if another suitable individual—such as a co-parent, co-guardian, or the usual childcare provider—is available to provide the care the employee's child needs.

If you have any questions or clarifications needed, please do not hesitate to reach out and contact us at (865) 546-7311.

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**[Are COVID-19 Business Losses Covered By Insurance?](#)**

There is no question that the COVID-19 pandemic has adversely affected the American economy, and that businesses had little time to prepare and react. Many business owners have questions regarding whether their existing insurance policies provide coverage for losses associated with this crisis. The short answer? “Maybe.”



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**by Toby R. Carpenter, Esq.**

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An insurance policy consists of forms that fall into four general categories:

- 1) Declarations identify the persons and/or property that is insured;
- 2) Coverages state what the policy covers;
- 3) Conditions state the duties of the insured persons; and
- 4) Exclusions state the circumstances under which coverage is limited or does not exist.

So, to decide if the policy applies to a particular loss, we have to determine:

- (1) whether the person and/or property is covered in the declarations;
- (2) whether the policy provides coverage for the loss;
- (3) whether the conditions have been met; and
- (4) whether an exclusion applies.

This requires examination of the facts of the loss, and a careful reading of the policy language.

Insurance policies are just contracts, and courts deciding how to interpret policy language will use the ordinary meaning of any disputed terms. However, insurance policies are also considered by most courts to be contracts of adhesion—a fancy term that essentially means the insurance company presents the contract to you as “take it or leave it.” In other words, you don’t get to negotiate the terms. Courts will interpret such contracts strictly, and any vague or ambiguous terms or provisions are construed against the insurer and in favor of the policyholder.

The most common form of “business interruption” insurance coverage is provided by a commercial property insurance policy under a Business Income (And Extra Expense) Coverage Form. The typical policy language looks like this:

We will pay for the actual loss of Business Income you sustain due to the necessary “suspension” of your “operations” during the “period of restoration.” The “suspension” must be caused by direct physical loss of or damage to property at premises which are described in the Declarations and for which a Business Income Limit of Insurance is shown in the Declarations. The loss or damage must be caused by or result from a Covered Cause of Loss.

Notice that there must be a “direct physical loss of or damage to property” to trigger coverage. Insurers are taking the position that COVID-19 losses do not result from direct

physical loss to the property, as with a fire or flood.

That interpretation is reasonable, but it may not be the end of the discussion. Courts in different jurisdictions have reached different conclusions regarding what is a “direct physical loss,” and since insurance policies are construed according to the laws of the states where they are issued, a loss that is not considered direct and physical in one state may be direct and physical in another.

It does not appear that the Tennessee appellate courts have considered the specific question of direct physical loss or damage in the context of the Business Income coverage form, but they have required a direct loss to the insured property when construing similar policy language. In any event, to determine whether a claim is covered requires a close examination of the facts of the loss and the applicable law of the governing jurisdiction.

Also, there are some types of specialized policies and policy endorsements that expressly provide coverage for losses caused by communicable disease regardless of whether there is direct physical loss or damage to the insured property. And some policies provide coverage for income losses that result from civil or governmental authorities restricting access to the insured premises, and these policies may or may not require that the restricted access be associated with direct physical loss or damage.

Moreover, sometimes insurance companies are just plain sloppy or careless when they issue policies. The only part of an insurance policy that is specific to the insured persons and/or property is the declarations page(s). The remainder is simply a compilation of forms that are assembled to create an insurance contract that is, hopefully, consistent with the coverages that the insured has purchased. Mistakes happen, and sometimes key exclusions or endorsements are omitted, or forms are included that create ambiguities that are construed against the insurer.

Finally, the highly unusual nature of the COVID-19 situation has prompted a few states to take action and require insurance carriers to cover business interruption claims. So far, Tennessee is not among them. But, in a recent news conference, President Trump expressed his approval of such actions, essentially stating that the insurance industry should bear some of the economic burden of this crisis. It remains to be seen whether this movement will gain momentum, but it certainly bears watching.

In summary, while business interruptions caused by the COVID-19 pandemic and resulting economic shutdown are probably not covered by most insurance policies, there are exceptions. Determining whether your claim is one of those exceptions requires an examination of the facts of your particular loss, a careful reading of the policy, and knowledge of the applicable law. If you have questions about your insurance coverage, we will be happy to talk to you. Please give us a call at (865) 546-7311.

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## **We've Got Your Six (Reasons for Paid Sick Leave Under the FFCRA) Covered.**

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by **Ashley N. Trotto, Esq.**

with assistance from Law Clerk Zach Kiffmeyer

The DOL has issued some much-needed guidance on applying the six qualifying reasons for paid sick leave under the Families First Coronavirus Response Act (“Act”). We’ve summarized the six qualifying reasons, including the new guidance, below:



**1) An employee is unable to work because he or she is subject to a Federal, State, or local COVID-19 quarantine or isolation order.**

a) An employee may take paid sick leave only if being subject to one of these orders prevents him or her from working or teleworking. Quarantine or isolation orders include orders advising some or all citizens to shelter in place, stay at home, quarantine, or otherwise restrict their own mobility. The key question is whether the employee would be able to work or telework “but for” being required to comply with a quarantine or isolation order.

b) An employee subject to one of these orders may not take paid sick leave where the employer does not have work for the employee (e.g., if the employer is temporarily closed due to COVID-19). This is because the employee would be unable to work even if he or she were not required to comply with the quarantine or isolation order.

**2) An employee is unable to work because he or she has been advised by a health care provider to self-quarantine for a COVID-19 reason.**

The regulations clarify that the advice to self-quarantine must be based on the health care provider’s belief that the employee has COVID-19, may have COVID-19, or is particularly vulnerable to COVID-19. And, self-quarantining must prevent the employee from working.

**3) An employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis.**

a) The regulations list the following symptoms that could trigger an employee to seek a medical diagnosis: fever, dry cough, shortness of breath, or other COVID-19 symptoms identified by the CDC.

b) Paid sick leave must be limited to the time the employee is unable to work because he or she is taking “affirmative steps” to obtain a medical diagnosis. Affirmative steps include time spent making, waiting for, or attending an appointment for a test for COVID-19.

c) An employee may continue to take leave while:

- experiencing any COVID-19 symptoms or after testing positive for COVID-19, provided that the health care provider advises the employee to self-quarantine; or
- awaiting a test result.

In the case of an employee who exhibits COVID-19 symptoms and seeks medical advice but is told that he or she does not meet the criteria for testing and is advised to self-quarantine, he or she is eligible for leave under the second reason, provided he or she meets all the requirements spelled out above.

**\*\*For the first three qualifying reasons** , an employee who can telework is not entitled to paid sick leave if: (a) the employer has work for the employee to perform; (b) the employer permits the employee to perform that work remotely; and (c) there are no extenuating circumstances, including serious COVID-19 symptoms, that prevent the employee from performing that work.

**4) An employee is unable to work because he or she needs to care for an individual who (a) is subject to a Federal, State, or local quarantine or isolation order; or (b) has been advised by a health care provider to self-quarantine based on the health care provider’s belief that he or she has COVID-19, may have COVID-19, is particularly vulnerable to COVID-19 or the health care provider has other COVID-19 related concerns.**

The regulations clarify that the individual being cared for must be an immediate family member, roommate, or a similar person with whom the employee has a relationship that creates an expectation that the employee would care for the person if he or she self-quarantined or was quarantined.

**5) An employee is unable to work because the employee needs to care for his or her son or daughter if (a) the child's school or place of care has closed; or (b) the childcare provider is unavailable, due to COVID-19 related reasons.**

An employee may take paid sick leave to care for his or her child only when the employee needs to, and actually is, caring for his or her child. An employee is not eligible for paid leave if another suitable individual—such as a co-parent, co-guardian, or the usual childcare provider—is available to provide the care the employee's child needs.

**6) An employee is unable to work because the employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services in consultation with the Secretary of the Treasury and the Secretary of Labor.**

This is a "catch-all" provision for other circumstances not specifically mentioned in this regulation. To date, no additional conditions have been listed.

**A reminder:** The required rate of compensation is generally the employee's regular rate of pay. However, for uses described in (4), (5) or (6) above, the employee's required rate of compensation shall generally be 2/3 of the employee's regular rate of pay. Paid sick leave under the Act shall not exceed \$511 per day (\$5,110 in the aggregate) for uses described in (1), (2), or (3) above or \$200 per day (\$2,000 in the aggregate) for uses described in (4), (5), or (6) above.

Kennerly Montgomery appreciates your time, and our attorneys are here to assist you during these unusual and unprecedented times. If you have any questions, please reach out to one of our attorneys at (865) 546-7311.

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## Prior Coverage

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### CARES Act: Small Business Loans

This overview and breakdown by [Eli C. Lovingfoss, Esq.](#) includes information on the Paycheck Protection Program, Loan Forgiveness, and the new Economic Injury Disaster Loan rules.

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### CARES Act Provides Early Access to Retirement Funds and Other Retirement Plan Relief Due to COVID-19

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**DOL Provides  
Limited Guidance  
on New Families  
First Coronavirus  
Response Act**

**Ashley N. Trotto, Esq.**

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**A Summary of the Families  
First Coronavirus Response  
Act for Employers and  
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**Leave Policy Review:  
Coronavirus (COVID-19)**

