Frequently Asked Questions

Responding to COVID-19 in the Workplace

Monday, April 13, 2020

HUB

Contents

We understand that there is a significant amount of information derived from a variety of sources. The HUB team has developed this comprehensive FAQ in an effort to consolidate the various questions and answers into one document. Some of these questions you may recognize from federal publications such as EEOC and DOL FAQs. Other questions are the most common or tricky questions being asked by our clients.

This document is updated weekly.

Italicized text denotes a change from the prior week's document.

Underlined text provides a hyperlink to source references.

I. Health and Safety

1. **During a pandemic, may an employer require its employees to adopt infection-control practices, such as regular hand washing, at the workplace?**

   Yes. Requiring infection control practices, such as regular hand washing, coughing and sneezing etiquette, and proper tissue usage and disposal, does not implicate the ADA.

2. **During a pandemic, may an employer require its employees to wear personal protective equipment (e.g., face masks, gloves, or gowns) designed to reduce the transmission of pandemic infection?**

   Yes. An employer may require employees to wear personal protective equipment during a pandemic. However, where an employee with a disability needs a related reasonable accommodation under the ADA (e.g., non-latex gloves, gowns designed for individuals who use wheelchairs, etc.), the employer should provide these, absent undue hardship.

3. **Is COVID-19 considered an "Illness" under OSHA's recordkeeping rules?**

   It Depends. OSHA's recordkeeping rules apply only to injuries or "illnesses." The rule defines an injury or illness as "an abnormal condition or disorder." Illnesses include "both acute and chronic illnesses, such as, but not limited to, a skin disease, respiratory disorder, or poisoning." Despite this broad definition, OSHA has essentially excluded from coverage cases of the common cold or the seasonal flu. OSHA has made a determination that COVID-19 should not be excluded from coverage of the rule – like the common cold or the seasonal flu – and, thus, OSHA is considering it an "illness."

   However, OSHA has stated that only confirmed cases of COVID-19 should be considered an illness under the rule. Therefore, if an employee simply comes to work with symptoms consistent with COVID-19 (but not a confirmed diagnosis), the recordability analysis would not necessarily be triggered at that time.

4. ***Is a COVID-19 case considered recordable?***

It Depends. *If an employee has a confirmed case of COVID-19 (as noted above), the employer would need to assess whether the case was "work-related" under the rule and, if so, whether it met the rule's additional recordability criteria (i.e., resulted in a fatality, days away from work, restricted duty, or medical treatment beyond first aid). Given current protocols for treating COVID-19, it is likely that for any case that is confirmed, the additional severity criteria will be met, as affected persons are instructed to self-quarantine and stay home. The primary issue for employers therefore becomes whether a particular case is "work-related."*

On April 10, 2020 OSHA provided enforcement guidance for recording cases of COVID-19. Specifically, in areas where there is ongoing community transmission, employers other than those in the healthcare industry, emergency response organizations (e.g., emergency medical, firefighting, and law enforcement services), and correctional institutions may have difficulty making determinations about whether workers who contracted COVID-19 did so due to exposures at work.

Employers of workers in the healthcare industry, emergency response organizations (e.g., emergency medical, firefighting, and law enforcement services), and correctional institutions must continue to make work-relatedness determinations as noted in this section. Until further notice, however, OSHA will not enforce 29 CFR § 1904 to require other employers to make the same work-relatedness determinations, except where:

(1) There is objective evidence that a COVID-19 case may be work-related. This could include, for example, a number of cases developing among workers who work closely together without an alternative explanation; and

(2) The evidence was reasonably available to the employer. For purposes of this guidance, examples of reasonably available evidence include information given to the employer by employees, as well as information that an employer learns regarding its employees' health and safety in the ordinary course of managing its business and employees.

5. **Should I document a COVID-19 case on my OSHA 300 and 300a forms?**

It Depends. OSHA's recordkeeping requirements at 29 CFR Part 1904 mandate covered employers record certain work-related injuries and illnesses on their OSHA 300 and 300a logs. If an employee meets the criteria as noted above, then you are required to record that illness on your OSHA 300 and 300a.

6. **Is a COVID-19 case reportable?**

It Depends. As with the recordability analysis above, if an employee has a confirmed case of COVID-19 that is considered work-related, an employer would need to report the case to OSHA if it results in a fatality or in-patient hospitalization of one or more employees. It is important to note, however, that the reporting obligation is time-limited. Thus, if a fatality due to COVID-19 occurs after 30 days from the workplace

incident leading to the illness, an employer is not required to report it. Similarly, if the in-patient hospitalization occurs after 24 hours from the workplace incident leading to the illness, an employer is not required to report. Given the nature of COVID-19 and the disease progression, this may result in fewer reports to OSHA despite expected hospitalization of cases going forward.

II. Claims Guidance

7. **If my employee informs me they are positive for COVID-19, should notify my workers' compensation carrier?**

   Yes. If your employee informs you that they have tested positive for COVID-19 and allege that it occurred at work or may have arisen from work activities, you should follow your pre-pandemic procedures for reporting a workplace illness or injury. Each individual policy and state may provide prescriptive periods in which to file. Ensure that you document all information related to the filed claim and classify it as "COVID-19" in the description.

8. **Is COVID-19 is compensable under my workers' compensation policy?**

   It depends. Under certain circumstances, claims from health care providers and first responders may be allowed and, as the pandemic evolves, certain states are expanding coverage for workers compensation as it relates to them. Additionally, employees that are able to medically document that their illness arose out of their individual state's and/or policy's definitions of illnesses may be compensable. Each claim will be reviewed upon its own merits.

9. **Has the government mandated coverage for workers' compensation?**

   Yes, But. This only applies to a select few states. Certain states (WA, CO, MI) have asked carriers to provide coverage in the quarantine stage for health care and first responder workers. The application of this coverage by the respective state governments evolve daily.

10. **Will all workers' compensation claims filed for individual in quarantine be covered?**

    No. If the worker is in healthcare and/or a first responder, the workers' compensation claim will be strongly considered. Employees that are quarantined outside of those lines of work (and without a positive COVID-19 test that meets the requirements for work relatedness that caused their quarantine) are not being covered at this time.

11. **My business shut down and my employee lost his/her job, is this a covered workers' compensation claim?**

    No. This is not a covered workers' compensation claim. The worker did not contract COVID-19 while in the course and scope of employment.

12. If me or my employee files a claim (with the respective policies listed below), will it be denied?

It depends. Each line of coverage will be evaluated based on the terms of the underlying insurance policy and applicable state and federal laws. Due to the evolving nature of the pandemic, carriers may take longer than usual in evaluating a submitted claim.

(1) Workers' Compensation: when contracting Coronavirus is incidental to the workplace or common to all employment (such as an office worker who contracts the condition from a fellow employee), the carrier may deny the claim.

(2) Business Interruption:
  (a) Policy language, endorsements, and exclusions will be reviewed against any orders from the government that may alter or impact those endorsements and/or exclusions.
  (b) The collection of data related to the claim will be essential for evaluation. Due to the fluidity of COVID-19, business interruption claims are being evaluated at a much lengthier pace than prior to the pandemic.

(3) Other Lines: there is minimal information with respect to all other lines of coverage.

13. What should I be thinking of or documenting when I file a claim?

It depends. Each line of coverage should be evaluated individually.

(1) Workers Compensation:
  (a) Was the worker exposed to someone with COVID-19 and how? When did the symptoms occur? Did they contract this from their normal course and scope of employment?
  (b) Provide employee documents as you typically would when filing a claim.

(2) Business Interruption:
  (a) Compile all financial and cleanup data and supporting documents as it relates to your business.

(3) Cyber Criminal:
  (a) Retain all related and relevant e-mails and communications
  (b) Compile all financial data and documentation related to the claim

14. **My business was forced to shut down due to a "stay at home" order by the government, will my business interruption claim be covered?**

    It depends. You are encouraged to file the claim and allow the carrier to investigate. Coverage typically requires a physical loss and has viral exclusions. Currently, government intervention is not mandating business interruption coverage.

15. **Is COVID-19 a physical loss under a business interruption insurance policy?**

    No. COVID-19 is not classified as a physical loss under a business interruption policy.

16. **May I file a cyber-insurance policy claim for a "phishing" email that I (or an employee) opened?**

    Yes. We strongly encourage clients to immediately file a claim with your cyber insurance policy carrier.

17. **My concert has been cancelled. May I file with my event cancellation insurance carrier?**

    It depends. You should immediately file your claim with your event cancellation insurance carrier. If you have a buy back clause for the virus exclusion there is a chance the claim may be covered. However, there is no coverage for attendees. Additionally, the event cancellation insurance policy may cover the management company, venue, and/or performer.

18. **Can there be a Directors' and Officers' claim?**

    It depends. Shareholders may file a claim for lack of notice of the pandemic. In the event of a demand or litigation, you should immediately file a claim with your directors and officers insurance policy carrier.

III. Ability to Work and Employee Attendance

19. **Can I prohibit an employee from personal travel to an affected area?**

    No. Employers cannot prohibit employees from taking personal trips and vacations.

20. **Can I ask an employee where he or she may be traveling?**

    Yes. Employers may ask employees where they are traveling.

21. **Can I require an employee who travels to an affected area to take a COVID-19 test and provide the results before returning to work?**

Likely No. However, employers can ask employees to self-quarantine for 14-days prior to returning to work. Additionally, the Department of Homeland Security has issued guidance that American citizens, legal permanent residents, and their immediate families who are returning home to the U.S. to travel through one of 13 airports upon arrival to the U.S. from travel to China, Iran, or certain European countries submit to an enhanced entry screening and self-quarantine for 14 days once they reach their final destination.

22. ***May I permit my "critical infrastructure workers" to continue working following potential exposure to COVID-19?***

    It Depends. *On April 8th, 2020 the CDC released Interim Guidance for Implementing Safety Practices for Critical Infrastructure Workers Who May Have Had Exposure to a Person with Suspected or Confirmed COVID-19 which instructs employers that "critical infrastructure Workers" may continue to work "provided they remain asymptomatic and additional precautions are implemented to protect them and the community".*

23. ***Under the April 8th CDC guidance, what is considered a "potential exposure"?***

    A potential exposure means being in a household or having close contact (within 6 feet) with an individual with confirmed or suspected COVID-19. The timeframe for having contact with an individual includes the period of time of 48 hours before the individual became symptomatic.

24. ***Are there certain steps employers should take to mitigate the risk of "critical infrastructure workers" who have been exposed and return to the workplace?***

    Yes. *The CDC has provided a detailed screening process:*

    (1) ***Pre-Screen:*** *Employers should measure the employee's temperature and assess symptoms prior to them starting work. Ideally, temperature checks should happen before the individual enters the facility.*

    (2) ***Regular Monitoring****: As long as the employee doesn't have a temperature or symptoms, they should self-monitor under the supervision of their employer's occupational health program.*

    (3) ***Wear a Mask****: The employee should wear a face mask at all times while in the workplace for 14 days after last exposure. Employers can issue facemasks or can approve employees' supplied cloth face coverings in the event of shortages.*

    (4) ***Social Distance****: The employee should maintain 6 feet away from other individuals and practice social distancing as work duties permit in the workplace.*

    (5) ***Disinfect and Clean work spaces****: Clean and disinfect all areas such as offices, bathrooms, common areas, shared electronic equipment routinely.*

25. ***What should an employer do if a Critical Infrastructure Worker becomes sick during the work day and while at work?***

    If the employee becomes sick during the day, they should be sent home immediately. Surfaces in their workspace should be cleaned and disinfected (see CDC guidance for cleaning and disinfecting). Information on persons who had contact with the ill employee during the time the employee had symptoms (and two-days prior to symptoms) should be compiled. Others at the facility with close contact within 6 feet of the employee during this time would be considered exposed.

26. **How can I determine if I am an "essential employer" or my staff are "essential employees"?**

    In accordance with the Department of Homeland Security mandate, and in collaboration with other federal agencies and the private sector, CISA developed an initial list of "Essential Critical Infrastructure Workers" to help State and local officials as they work to protect their communities, while ensuring continuity of functions critical to public health and safety, as well as economic and national security. The list can also inform critical infrastructure community decision makers to determine the sectors, sub-sectors, segments, or critical functions that should continue normal operations, appropriately modified to account for Centers for Disease Control (CDC) workforce and customer protection guidance.

    The list identifies workers who conduct a range of operations and services that are essential to continued critical infrastructure viability, including staffing operations centers, maintaining and repairing critical infrastructure, operating call centers, working construction, and performing management functions, among others. The industries they support represent, but are not necessarily limited to, medical and healthcare, telecommunications, information technology systems, defense, food and agriculture, transportation and logistics, energy, water and wastewater, law enforcement, and public works.

27. **If an employee is diagnosed with COVID-19, can I require that he or she provide a release to work from his/her doctor prior to returning to work?**

    Yes, But. The CDC, OSHA, and the DOL all urge employers to be flexible. It is likely that healthcare providers are overwhelmed with patients and care therefor, documentation requests are likely going to be put aside for some time. In its March 27th webinar, the EEOC recommended that employers be "flexible" and "creative" with respect to acceptable documentation.

28. **Can I send sick employees home? Similarly, may employers prevent employees who may be sick or have a contagious condition from coming to work?**

    Yes, But. Be sure to treat all contagious conditions the same. Employees should be sent home not because of fear of COVID-19 but in a consistent effort to minimize other

employees' exposure to any sort of contagious condition. In fact, the CDC recommends that employers require all sick employees to stay home.

29. Do I have to allow employees to work from home?

No, But. Employers generally are not required to allow employees to work from home. However, the EEOC has been clear that allowing a worker to work from home may be a reasonable accommodation under the ADA. Moreover, if employers have allowed employees to work from home for other reasons then they should be consistent in allowing work-from-home arrangements under these circumstances.

The underlying reason for the employees' request to work from home may be a determining factor. Employees who are merely afraid to come to work may not be eligible for work from home. Conversely, employees who have greater health risks associated with exposure or who may have been exposed may be eligible to work from home.

Employers should also consider the OSHA General Duty Clause which imposes on employers' the obligation to provide a safe working environment. Employers may want to allow employees to work remotely if requiring employees (who could otherwise work remotely) to come in the office would great a health and safety risk for the employees.

30. Can an employer require an employee to disclose his or her diagnosis of COVID-19? Likewise, can an employer require an employee to disclose his/her exposure to someone diagnosed with COVID-19?

It Depends. Under the FMLA, employers are entitled to all of the information contained on the Certificate of Health Care Provider for Employee's own Serious Health Condition. Likewise, under the ADA, the diagnosis information is allowed so long as it's pursuant to the employer's effort to identify a reasonable accommodation for the employee to perform the essential functions of the job.

The CDC advises that employees who are well but who have a sick family member at home with COVID-19 should notify their supervisor and refer to CDC guidance for how to conduct a risk assessment of their potential exposure. If an employee is confirmed to have COVID-19, employers should inform fellow employees of their possible exposure to COVID-19 in the workplace but maintain confidentiality as required by the Americans with Disabilities Act (ADA). Employees exposed to a co-worker with confirmed COVID-19 should refer to CDC guidance for how to conduct a risk assessment of their potential exposure.

31. Must I allow an employee to work remotely if the employee is under government-imposed quarantine?

It Depends. The CDC encourages employers to be accommodating and flexible with workers impacted by government-imposed quarantines. Employers may offer alternative work arrangements, such as teleworking, and additional paid time off to such employees.

32. If I temporarily close my business may I lay off some of the employees and retain other in a "furlough" status?

Yes, But. Employers must be sure that they are not disparately selecting those who are laid off versus those who are "furloughed". In other words, employers must be sure that those who are adversely affected are not of one predominant protected class (such as race, religion, gender, age, or disability).

IV. Employee Relations

(Includes updated questions and answers from the March 27th EEOC webinar and EEOC April 9th updated guidance)

33. My employee continues to complain that my work environment is not safe – can I fire my employee? The complaints are scaring other workers and creating stress for everyone.

Generally, No. *The Department of Labor recently issued a reminder to employers "that it is illegal to retaliate against workers because they report unsafe and unhealthful working conditions during the coronavirus pandemic. Acts of retaliation can include terminations, demotions, denials of overtime or promotion, or reductions in pay or hours."*

34. Can I actually be sued for firing an employee that complains about unsafe or unhealthy working conditions?

Yes*. "Employees have the right to safe and healthy workplaces," said Principal Deputy Assistant Secretary Loren Sweatt. "Any worker who believes that their employer is retaliating against them for reporting unsafe working conditions should contact OSHA immediately." Workers have the right to file a whistleblower complaint online with OSHA if they believe their employer has retaliated against them for exercising their rights under the whistleblower protection laws enforced by the agency.*

35. May an employer postpone the start date or withdraw a job offer because the individual is 65 years old or pregnant, both of which place them at higher risk from COVID-19?

No*. The fact that the CDC has identified those who are 65 or older, or pregnant women, as being at greater risk does not justify unilaterally postponing the start date or withdrawing a job offer. However, an employer may choose to allow telework or to discuss with these individuals if they would like to postpone the start date.*

36. What practical tools are available to employers to reduce and address workplace harassment that may arise as a result of the COVID-19 pandemic?

Employers can help reduce the chance of harassment by explicitly communicating to the workforce that fear of the COVID-19 pandemic should not be misdirected against individuals because of a protected characteristic, including their national origin, race, or other prohibited bases.

Practical anti-harassment tools provided by the EEOC for small businesses can be found here:

(1) Anti-harassment policy tips for small businesses;

(2) Select Task Force on the Study of Harassment in the Workplace (includes detailed recommendations and tools to aid in designing effective anti-harassment policies; developing training curricula; implementing complaint, reporting, and investigation procedures; creating an organizational culture in which harassment is not tolerated):

(a) report;
(b) checklists for employers who want to reduce and address harassment in the workplace; and,
(c) chart of risk factors that lead to harassment and appropriate responses.

37. May I ask if an employee if he/she has family members who are experiencing COVID-19 symptoms?

No. Asking employees about family member medical conditions would violate the Genetic Information Nondiscrimination Act. Employers may ask instead, about contact with anyone who has been diagnosed or may have symptoms associated with COVID-19. The EEOC has stated that this more broad-based question is more sound.

38. The CDC has said that individual age 65 or older are at a greater risk. May an employer exclude form the workplace an employee who is 65 or older and does not have COVID-19 symptoms or a diagnosis?

***No**. On April 9th, the EEOC issued clarification and additional guidance:*

The EEO laws, including the ADA and Rehabilitation Act, continue to apply during the time of the COVID-19 pandemic, but they do not interfere with or prevent employers from following the guidelines and suggestions made by the CDC or state/local public health authorities about steps employers should take regarding COVID-19. Employers should remember that guidance from public health authorities is likely to change as the COVID-19 pandemic evolves. Therefore, employers should continue to follow the most current information on maintaining workplace safety.

39. Must you GRANT a request to telework from an employee who is 65 or older for the same reasons?

No. The ADEA does not require an accommodation on the basis of age. In fact, it requires that employers treat all ages the same and offer the same telework opportunities.

40. Can I layoff or furlough a pregnant worker who does not have COVID-19 or symptoms?

No. Pregnancy is protected class and actions based on pregnancy are decisions on based on sex which is prohibited under Title VII of the Civil Rights Act of 1964.

41. Must an employer grant a pregnant employee's request to telework because she is concerned about contracting the Coronavirus?

No. Employers must treat pregnant employees the same as similar situated employees. Employers cannot deny a needed adjustment provided to similarly situated workers who are not pregnant. Under certain circumstances, medical complications associated with a pregnancy may be a disabling condition and require an accommodation but otherwise, pregnancy is not a disability.

42. I'm concerned that our employees from a particular country may be a Coronavirus carrier – can I send them home?

No. Employers cannot single employees out on the basis of any protect class, including national origin which is protected under Title VII of the Civil Rights Act of 1964. Likewise, the EEOC has been clear that employers may not allow or tolerate workplace discrimination, harassment, or a hostile working environment.

43. Can I prohibit an employee from personal travel to an affected area?

No. Employers cannot prohibit employees from taking personal trips and vacations.

44. Can I ask an employee where he or she may be traveling?

Yes. Employers may ask employees where they are traveling.

45. Can I require an employee who travels to an affected area to take a COVID-19 test and provide the results before returning to work?

Likely No. However, employers can ask employees to self-quarantine for 14-days prior to returning to work. Additionally, the Department of Homeland Security has issued guidance that American citizens, legal permanent residents, and their immediate families who are returning home to the U.S. to travel through one of 13 airports upon arrival to the U.S. from travel to China, Iran, or certain European countries submit to an enhanced entry screening and self-quarantine for 14 days once they reach their final destination.

V. Pay and Compensation Rules

46. May I deduct time not-worked from an exempt employee's pay?

Generally, No. Exempt, salaried employees generally must receive their full salary in any week in which they perform any work, subject to certain very limited exceptions. Where an employer offers a bona fide benefits plan or vacation time to its employees, there is no prohibition on an employer requiring that such accrued leave or vacation time be taken on a specific day(s). This will not impact the employee's salary basis of payment so long as the employee still receives in payment an amount equal to the employee's guaranteed salary.

However, an employee will not be considered paid "on a salary basis" if deductions from the predetermined compensation are made for absences occasioned by the office closure during a week in which the employee performs any work. Exempt salaried employees are not required to be paid their salary during full weeks in which they perform no work.

47. Do employers have to pay employees their same hourly rate or salary if they work at home?

It Depends. If telework is being provided as a reasonable accommodation for a qualified individual with a disability, or if required by a union or employment contract, then you must pay the same hourly rate or salary.

If this is not the case and you do not have a union contract or other employment contracts, under the FLSA employers generally have to pay employees only for the hours they actually work, whether at home or at the employer's office. However, the FLSA requires employers to pay non-exempt workers at least the minimum wage for all hours worked, and at least time and one half the regular rate of pay for hours worked in excess of 40 in a workweek. Salaried exempt employees generally must receive their full salary in any week in which they perform any work, subject to certain very limited exceptions.

48. May an employer cancel an employee's pre-scheduled vacation time?

Yes. The FLSA does not require employer-provided vacation time. Therefore, an employer may direct employees when to use (or not use) vacation time and/or take time off. Further, a private employer may direct exempt staff to take vacation or debit their leave bank account in the case of an office closure, whether for a full or partial day, provided the employees receive in payment an amount equal to their guaranteed salary. In the same scenario, an exempt employee who has no accrued benefits in the leave bank account or has limited accrued leave and the reduction would result in a negative balance in the leave bank account, still must receive the employee's guaranteed salary for any absence(s) occasioned by the office closure in order to remain exempt.

49. Are businesses and other employers required to cover any additional costs that employees may incur if they work from home (internet access, computer, additional phone line, increased use of electricity, etc.)?

Generally, Yes. Employers may not require employees who are covered by the FLSA to pay or reimburse the employer for such items that are business expenses of the employer if doing so reduces the employee's earnings below the required minimum wage or overtime compensation. Employers may not require employees to pay or reimburse the employer for such items if telework is being provided to a qualified individual with a disability as a reasonable accommodation under the Americans with Disabilities Act.

For example, Bob makes $10.00 an hour. Bob is now working from home and requires a company laptop to do his work. Mr. McCreedy wants to charge Bob for the laptop incrementally until the entire cost of the laptop is covered. As a result, Mr. McCreedy wants to take $5.00 per hour from Bob's pay. Mr. McCreedy cannot do this because it will reduce Bob's wages below the minimum wage of $7.25 per hour.

VI. Medical Inquiries

50. Can I take the temperature of each employee, each day, to be sure that there aren't any workers who may be ill?

Yes, But. Measuring an employee's body temperature is a medical examination prohibited by the Americans with Disabilities Act (ADA). In 2009 the EEOC issued guidance in connection with the H1N1 influenza virus pandemic and concluded that temperature checks of individual employees in the event of a pandemic may be legally permissible under the ADA if it is job-related and consistent with business necessity. If an influenza pandemic becomes more severe or serious according to the assessment of local, state or federal public health officials, ADA-covered employers may have sufficient objective information from public health advisories to reasonably conclude that employees will face a direct threat if they contract pandemic influenza. Only in this circumstance may ADA-covered employers make disability-related inquiries or require medical examinations of asymptomatic employees to identify those at higher risk of influenza complications.

On March 18, the EEOC issued updated guidance, noting that the CDC has recognized COVID-19 having community spread. Therefore, while temperature testing ordinarily would be prohibited, EEOC has made it permissible to temperature test in light of COVID-19. However, the EEOC has cautioned employers that individuals with COVID-19 do not always present with a fever. As with all medical information, the fact that an employee had a fever or other symptoms would be subject to ADA confidentiality requirements. See also the EEOC March 27th webinar.

51. May an employer covered by the ADA and Title VII of the Civil Rights Act of 1964 compel all of its employees to take the influenza vaccine regardless of their medical conditions or their religious beliefs during a pandemic?

No. An employee may be entitled to an exemption from a mandatory vaccination requirement based on an ADA disability that prevents him from taking the influenza vaccine. This would be a reasonable accommodation barring undue hardship (significant difficulty or expense). Similarly, under Title VII of the Civil Rights Act of 1964, once an employer receives notice that an employee's sincerely held religious belief, practice, or observance prevents him from taking the influenza vaccine, the employer must provide a reasonable accommodation unless it would pose an undue hardship as defined by Title VII ("more than de minimis cost" to the operation of the employer's business), which is a lower standard than under the ADA).

52. An employee has tested positive for COVID-19, can we share the diagnosis with our employees?

It Depends. An employer may share only the diagnosis and not the identity of the employee with the workforce. The employee's identity may be shared only with those who "need to know". "Need to know" is strictly construed an extremely limited. For example, the employer may let the workforce know that the workers may have been exposed to

someone who has tested positive for COVID-19. The identity of the employee is not important – only the "what" (i.e. the exposure).

If the employer learns of the employee's medical information, condition, diagnosis etc. through the health plan, then that information is likely Protected Health Information (PHI) and protected under the Health Insurance Portability and Accountability Act (HIPAA). In that case, the employer cannot share the identity of the employee AND the medical diagnosis or other medical information unless it is facing a true medical emergency where: (1) the employee's diagnosis becomes imperative for health and safety reasons; or (2) the employee has given a written HIPAA-compliant authorization to share the information. In certain circumstances, the employer may also disclose information to public health authorities without authorization, although those circumstances are limited.

53. An employee has self-quarantined due to potential exposure to COVID-19, can we share this information with our employees?

Generally, No. If an employee has self-quarantined due to potential exposure to COVID-19 this may involve the PHI and/or highly-regulated confidential information of the employee. In that case, the employer who know cannot share the identity of the employee along with the medical diagnosis or other medical information unless: (1) it is facing a true medical emergency where the employee's diagnosis becomes imperative for health and safety reasons; or (2) the employee has given a written HIPAA-compliant authorization to share the information.

54. Can an employer ask an employee medical questions before allowing them to work?

It Depends. In its March 27th webinar, the EEOC explained that an employer may ask an employee who is physically entering the workplace questions regarding COVID-19 symptoms, diagnosis, and exposure to others with symptoms or diagnosis. For example, the employer may ask an employee or worker entering the workplace if he or she is having any specific CDC identified COVID-19 symptoms (such as cough, shortness of breath, fever, chills, sore throat), if they have been diagnosed or tested for COVID-19. An employer cannot ask medical questions to an employee who is teleworking and not entering the workplace.

55. Can an employer send an employee home who refuses to answer questions or submit information regarding medical information or testing?

Yes. An employer may bar an employee from physical presence in the workplace if the employee refuses to answer questions about their CDC identified COVID-19 symptoms, testing, or diagnosis, or refuses to have their temperature taken. The EEOC guidance has encouraged employers to ask employees why they are refusing to answer questions in the event that the employer can overcome the employee's concerns. For example, employees may be reluctant to disclose information due to potential confidentiality concerns.

56. Is an employer obligated to provide an accommodation under ADA for an employee who has a current disability that puts the employee at greater risk of complications if they contract COVID-19?

It Depends. The CDC has identified a number of conditions that can potentially put individuals at greater risk if they contract COVID-19. If the employee requests a change in the workplace due to an underlying medical condition outlined by the CDC, the employer is responsible for following the interactive process under ADA to determine if a reasonable accommodation can be made. The employer can verify the employee's disability and that the accommodation is needed because (1) the disability puts the employee at higher risk if they contract COVID-19; or (2) the employee's disability would be exacerbated by COVID-19. Due to health care providers being overwhelmed at this time, there may be difficulty in an employee providing documentation to verify their disability. In these cases, employers should be flexible and look for other ways to confirm the information, such as an employee providing health insurance record of a prescription used to treat the disability. Additionally, providing employees a temporary accommodation while further discussing the request or waiting for documentation is encouraged by the EEOC.

In addition to leave as an accommodation, an employee who is advised to self-quarantine by a health care provider due to a medical condition that would but them a greater risk due to COVID-19 may be eligible for Emergency Paid Sick Leave under FFCRA. See question #102.

57. Can an employee request an accommodation under ADA if the employee lives with someone who is at a greater risk of complications if they contract COVID-19 due to an underlying disability?

No. Under the ADA, reasonable accommodations are only required for an employee's own disability and does not cover disabilities of other individuals that the employee lives or interacts with.

58. May an employer notify public health authorities of an employee with COVID-19 diagnosis?

Yes. Because COVID-19 poses a "direct threat" employers may contact public health officials. A "direct threat" is "Significant risk of direct harm to himself or others". The ADA does not preempt local, state, or federal laws designed to protect the public health from a direct threat like that posed by COVID-19

59. Can an employer require an employee to disclose his or her diagnosis of COVID-19? Likewise, can an employer require an employee to disclose his/her exposure to someone diagnosed with COVID-19?

It Depends. Under the FMLA, employers are entitled to all of the information contained on the Certificate of Health Care Provider for Employee's own Serious Health Condition. Likewise, under the ADA, the diagnosis information is allowed so long as it's

pursuant to the employer's effort to identify a reasonable accommodation for the employee to perform the essential functions of the job.

The CDC advises that employees who are well but who have a sick family member at home with COVID-19 should notify their supervisor and refer to CDC guidance for how to conduct a risk assessment of their potential exposure. If an employee is confirmed to have COVID-19, employers should inform fellow employees of their possible exposure to COVID-19 in the workplace but maintain confidentiality as required by the Americans with Disabilities Act (ADA). Employees exposed to a co-worker with confirmed COVID-19 should refer to CDC guidance for how to conduct a risk assessment of their potential exposure.

60. If the Employer grants telework because of recommendation to slow/stop COVID-19, does that make telework a reasonable accommodation to every employee?

No. In order to be accommodated, an employee must have a disability as defined under the ADA. If there is no disability, there is no need for accommodation. If the employee does have a disability as defined under the ADA, the employer is required to review the essential job functions and see if telework may be a reasonable accommodation based on the employee's disability and physical limitations. If during this crisis the employer temporarily excuses one or more essential job functions that allows for telecommuting, it does not mean that the essential job functions are permanently changed.

61. If a co-worker is aware of an employee with symptoms, can the employee disclose this?

Yes. Nothing in the ADA prevents employees from disclosing information they are aware of, even if it is information from another employee. Once the manager/supervisor becomes aware, they must follow the information plan, tell officials and follow all confidentially rules.

VII. Leaves of Absence

62. Are employees eligible to take FMLA for his or her own diagnosis for COVID-19?

It Depends. The two most relevant qualifying events are: (1) employee's own serious health condition; and (2) to provide care for a family member with a serious health condition. A "serious health condition" is an illness, injury, impairment, or physical or mental condition that involves inpatient care or continuing treatment by a health care provider. This means that the FMLA will not apply to an employee who is simply afraid to come to work. To qualify as a serious health condition, the employee is unable to work, perform any one of the essential functions of his or her position, attend school, or perform other regular daily activities because of the serious health condition. A serious health condition also requires a regime of treatment or recovery from the serious health condition.

So long as FMLA eligibility requirements are satisfied, employees who are diagnosed with the Coronavirus or are medically quarantined for suspicion of having Coronavirus may be

eligible for FMLA since Coronavirus satisfies both the inpatient care and the continuing treatment prongs of the FMLA.

63. Must an employer grant leave to an employee caring for a family member that is diagnosed with COVID-19?

It Depends. FMLA has a narrow definition of "family member," therefore, if the employee is seeking leave to care for a family member that is not covered under FMLA, then FMLA would not apply. Furthermore, the family member must be experiencing a "serious health condition," and the employee's need for leave is because (1) the family member is unable to care for his/her own medical, safety or other needs; (2) the family member needs help in being transported to the doctor; and/or (3) the employee is providing psychological comfort and reassurance to the family member. However, employers may be subject to Families First Coronavirus Response Act (FFCRA).

64. Must I allow an employee to take time off because he or she is afraid of contracting COVID-19?

Generally, No. Employers have been encouraged to review current leave of absence / time off policies and be ready to be more flexible. While "being afraid to come to work" is itself not a qualifying leave reason under any regulated leave entitlement, employers may nonetheless consider how flexibility to their leave of absence / time off policies – which includes telecommuting policies – help balance the current situation. Maintaining open lines of communication is encouraged.

65. Must I allow parents time off to care for children who have been dismissed from school?

It Depends. There are no federal laws requiring private employers to provide time off if/when employees child(ren) schools or childcare facilities are closed. However, state/municipal paid sick leave requirements may provide this time away, so employers need to mindful of any applicable paid sick leave requirements. In addition to considering additional flexibility at this time, employers may be subject to Families First Coronavirus Response Act (FFCRA).

66. Must I provide paid sick leave to employees who are out of work because they have COVID-19 or have been exposed to a family member with influenza?

It Depends. Federal law generally does not require employers to provide paid leave to employees. However, there are states/municipalities that have paid sick leave requirements that may provide the paid sick time for these situations. Furthermore, employers may be subject to Families First Coronavirus Response Act (FFCRA).

67. May employers change their existing paid sick leave or paid time off policy?

Yes, But. Employers may change their sick leave or paid time off policy so long as it is done in a manner that does not discriminate between employees because of a protected class (such as race, gender, age, religion, national origin, and/or disability). Furthermore,

employers should contemplate any paid sick leave requirements that apply to them. Finally, employers subject to Families First Coronavirus Response Act (FFCRA) are prohibited from diminishing their paid sick leave program because of the new law.

68. Will employees who are personally affected by COVID-19 receive Short Term Disability benefits?

It Depends. Generally, Short Term Disability insurance carriers have indicated that they are remaining status quo with respect to their STD claims handling. They will review each claim submitted on a case-by-case basis, whether the reason for initiating a STD claim is due to quarantine or because the employee has been diagnosed with COVID-19. In either scenario, the employee has to satisfy the definition of "disability" per the STD plan.

69. May employers change their STD plan designs to provide STD benefits to individuals affected by COVID-19?

Generally, No. If you have a fully insured STD plan with a disability insurance carrier, the short answer is "no." If you have a self-funded STD plan, the disability carrier/vendor may work with you to expand your STD program, particularly to provide STD benefits for those quarantined due to COVID-19. However, be prepared to provide very specific parameters and definitions to the disability carrier/vendor for how this expanded STD benefit would exist. Furthermore, clients have asked whether they can eliminate any STD elimination period for those filing for STD benefits due to COVID-19. We advise against this because of disability discrimination concerns.

70. Has COVID-19 impacted statutory disability insurance and paid family/medical leave requirements?

Yes, But. Not all statutory disability insurance and paid family/medical leave requirements have responded similarly. For instance, California has expanded their State Disability Insurance (SDI) and Paid Family Leave (PFL) benefits to cover those quarantined or diagnosed with COVID-19. By contrast, Washington's Paid Family Medical Leave (PFML) has expanded to cover those diagnosed with COVID-19, but not those who are quarantined. Furthermore, not all states with statutory disability and/or paid family/medical leave requirements have made changes – as of now, some have not yet expanded their programs.

71. If I outsource leave administration to a third-party vendor, will they track COVID-19-related absences for me?

It Depends. Third party vendors who provide leave administration services, including Short Term Disability benefit administration, are continuing to closely monitor the impact of COVID-19 and assessing how best to evolve their administrative services in turn. If you outsource leave administration, we encourage you to contact your vendor partner to understand how their capabilities and services are or are not changing.

VIII. Leave of Absence: Families First Coronavirus Response Act (FFCRA)

For the most up-to-date information/guidance, please visit the DOL's Q&A webpage here, and the final rule by the DOL Wage and Hour Division here.

For questions related to tax implications associated with FFCRA, please visit the IRS FFCRA webpage here, or consult your tax professional.

72. How should employers provide notice to employees of FFCRA?

A model poster has been provided by the DOL Wage and Hour division and is available here. The DOL has also provided an FAQ regarding notice requirements and is available here.

73. How is "500 employees" defined for purposes of FFCRA?

An employer is considered to have fewer than 500 employees if, at the time an employee's FFCRA leave, you employ fewer than 500 full-time and part-time employees within the United States, which includes any State of the United States, the District of Columbia, or any Territory or possession of the United States. In making this determination, you should include employees on leave; temporary employees who are jointly employed by you and another employer (regardless of whether the jointly-employed employees are maintained on only your or another employer's payroll); and day laborers supplied by a temporary agency (regardless of whether you are the temporary agency or the client firm if there is a continuing employment relationship). Workers who are independent contractors under the Fair Labor Standards Act (FLSA), rather than employees, or employees who have been placed on a furlough or laid off are not considered employees for purposes of the 500-employee threshold. Employers need to check at the time an employee requests leave to see if they meet the 500 person threshold.

74. What if there are multiple entities within my organization? How does that affect the "500 employees" threshold?

Typically, a corporation (including its separate establishments or divisions) is considered to be a single employer and its employees must each be counted towards the 500-employee threshold. Where a corporation has an ownership interest in another corporation, the two corporations are separate employers unless they are joint employers under the FLSA with respect to certain employees. If two entities are found to be joint employers, all of their common employees must be counted in determining whether paid sick leave must be provided under the Emergency Paid Sick Leave Act and expanded family and medical leave must be provided under the Emergency Family and Medical Leave Expansion Act.

In general, two or more entities are separate employers unless they meet the integrated employer test under the Family and Medical Leave Act of 1993 (FMLA). If two entities are an integrated employer under the FMLA, then employees of all entities making up the

integrated employer will be counted in determining employer coverage for purposes of expanded family and medical leave under the Emergency Family and Medical Leave Expansion Act. Employers are only required to count employees within the United States. If a company has 2,000 employees but 1,600 of those employees are employed in countries other than the U.S., the employer would pass the 500 employee test and be required to provide benefits to its U.S. based employees. *HUB has created a flowchart for guidance.*

75. Are employers with less than 50 employees exempt from FFCRA?

No, But. Small businesses with fewer than 50 employees may be exempt from providing child care-related Emergency Paid Sick Leave and Emergency Family Medical Leave. Small businesses must comply with all other reasons for Emergency Paid Sick Leave and cannot claim an exemption for those other leave reasons.

An authorized officer of the business must review each request for leave on a case-by-case basis for the specific employee at the time of the employee's request for leave. In order for the exemption to apply to each specific employee leave request, the authorized officer of the business must determine that at least one (1) of the three (3) conditions below are met:

(1) such leave of the specific employee would cause the small employer's expenses and financial obligations to exceed available business revenue and cause the small employer to cease operating at a minimal capacity;

(2) the absence of the employee or employees requesting such leave would pose a substantial risk to the financial health or operational capacity of the small employer because of their specialized skills, knowledge of the business, or responsibilities; or

(3) the small employer cannot find enough other workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services the employee or employees requesting leave provide, and these labor or services are needed for the small employer to operate at a minimal capacity. In the case that a small employer decides to deny paid sick leave or expanded family and medical leave to an employee or employees whose child's school or place of care is closed, or whose child care provider is unavailable, the small employer must document the facts and circumstances that meet the criteria to be exempt to justify such denial.

The employer should not send such material or documentation to the Department, but rather should retain such records for its own files for a minimum of four (4) years.

76. Does FFCRA apply to government agencies?

Yes. The FFCRA applies to all public agencies regardless of size. The definition of a public agency is the Government of the United States; the government of a State or

political subdivision of a State; or an agency of the United States (including the United States Postal Service and Postal Regulatory Commission), a State, or a political subdivision of a State; or any interstate governmental agency.

Federal employees are only eligible for Emergency FMLA under FFCRA if those federal employees are covered by Title I of the FMLA. Of note, most employees of the federal government are covered by Title II of the Family and Medical Leave Act and are not covered by Emergency FMLA under FFCRA.

77. What is the impact of FFCRA to non-profits, especially with respect to the noted tax credits considering non-profits may not pay certain federal taxes?

The Department of Labor confirmed in their temporary rules that were posted on April 1, 2020 that the FFCRA applies to all non-profit entities so long that they meet all other requirements for coverage.

The DOL and IRS have not issued any specific guidance to date regarding tax credit specific to non-profit organizations.

78. For purposes of Emergency FMLA, how do I know whether an employee has been employed for at least thirty (30) calendar days?

Employees are considered to have been employed for at least thirty (30) calendar days if:

(1) the employer had the employee on its payroll for the 30 calendar days immediately prior to the first day of the employee's leave; or

(2) the employee was laid off or otherwise terminated by the employer on or after March 1, 2020, and rehired or otherwise reemployed by the employer on or before December 31, 2020, provided that the employee had been on the employer's payroll for thirty (30) or more of the sixty (60) calendar days prior to the date the employee was laid off or otherwise terminated. If an employee has been working for a company as a temporary employee, and the company subsequently hires the employee on a full-time basis, then any days previously worked as a temporary employee would count towards this 30-day eligibility period.

Note that an employee who has been employed for at least 30 calendar days is eligible for Expanded FMLA regardless of whether the employee would otherwise be eligible for leave under the FMLA.

79. What if an employee has already exhausted their 12 weeks of FMLA entitlement prior to FFCRA becoming effective? Will the employee be eligible for additional leave under Emergency FMLA?

No. An eligible employee is entitled to a combined total of 12 weeks of FMLA and Emergency FMLA within a 12-month period. Here are three examples:

(1) An employee who exhausted his/her 12 weeks of FMLA entitlement before needing Emergency FMLA will not have any entitlement available to use for Emergency FMLA purposes.

(2) An employee who used eight (8) weeks of FMLA entitlement before Emergency FMLA will have up to four (4) weeks of entitlement remaining to use for Emergency FMLA purposes. The remaining entitlement may also be used for traditional FMLA purposes.

(3) An employee who used five (5) weeks of Emergency FMLA entitlement will have up to seven (7) weeks of entitlement remaining to use for traditional FMLA purposes.

To clarify, employees are entitled to Emergency Paid Sick Leave regardless of FMLA or EFMLA entitlement available.

(4) An employee who exhausted his/her 12 weeks of FMLA entitlement before needing Emergency Paid Sick Leave is still eligible to take the full amount of Emergency Paid Sick Leave available to them.

80. Does the "50 employees within a 75-mile radius" provision outlined in the standard FMLA apply to Emergency FMLA under FFCRA?

No. Unlike FMLA, FFCRA does not impose the 50/75 rule for purposes of eligibility. Similarly, Emergency FMLA does not apply the FMLA's eligibility criteria whereby an employer must have at least 50 employees working each day during the 20 or more calendar workweeks in the current or preceding calendar period.

81. If an employee was placed on furlough prior to the effective date of FFCRA, and is still on furlough as of April 1, will that employee be eligible for FFCRA benefits?

No. Employees who have been laid off or placed on a furlough status are not eligible for benefits under FFCRA as of the start date of their furlough or layoff. The employee may be eligible for state/federal unemployment assistance. Employees should contact their local State workforce agency or State unemployment insurance office for specific questions about his/her eligibility for unemployment benefits. For additional information, please refer to this link.

82. Are employees eligible for FFCRA benefits if they are subject to a state mandated "shelter in place" or "stay at home" order?

It Depends. The DOL has provided full guidance on this matter. Please carefully review the information below.

Emergency Paid Sick Leave can be taken by an employee that is unable to work because he or she is subject to a federal, state or local COVID-19 quarantine or isolation order. This definition includes a broad range of governmental orders, including orders that advise some or all citizens to shelter in place, stay at home, quarantine, or otherwise restrict their own mobility.

An employee subject to a government shelter in place or stay at home order may not take paid sick leave if:

(1) The employer does not have work for the employee. This is because the employee would not be able to work even if he or she were not required to comply with the quarantine or isolation order. An example provided in the Department of Labor temporary rule:

(a) If a coffee shop closes temporarily or indefinitely due to a downturn in business related to COVID-19, it would no longer have any work for its employees. A cashier previously employed at the coffee shop who is subject to a stay-at-home order would not be able to work even if he were not required to stay at home. As such, he may not take paid sick leave because his inability to work is not due to his need to comply with the stay-at-home order, but rather due to the closure of his place of employment. This employee may be eligible for unemployment.

This analysis holds even if the closure of the coffee shop was substantially caused by a stay-at-home order. If the coffee shop closed due to its customers being required to stay at home, the reason for the cashier being unable to work would be because those customers were subject to the stay-at-home order, not because the cashier himself was subject to the order. Similarly, if the order forced the coffee shop to close, the reason for the cashier being unable to work would be because the coffee shop was subject to the order, not because the cashier himself was subject to the order.

OR

(2) The employee is able to telework and:

(a) His or her employer has work for the employee to perform;
(b) The employer permits the employee to perform that work from the location where the employee is being quarantined or isolated; and

(c) There are no extenuating circumstances that prevent the employee from performing that work.

An example provided in the Department of Labor temporary rule regarding what is considered an "extenuating circumstance":
If a law firm permits its lawyers to work from home, a lawyer would not be prevented from working by a stay-at-home order, and thus may not take paid sick leave as a result of being subject to that order. In this circumstance, the lawyer is able to telework even if she is required to use her own computer instead of her employer's computer. But, she would not be able to telework in the event of a power outage or similar extenuating circumstance and would therefore be eligible for paid sick leave during the period of the power outage or extenuating circumstance due to the quarantine or isolation order.

83. Can an employee collect unemployment insurance benefits simultaneous to receiving FFCRA benefits?

No. Employees who receive FFCRA benefits are not eligible for unemployment insurance.

84. If an employee's scheduled work hours are reduced due to lack of work, can the employee receive FFCRA benefits for the time not worked?

No, But. Employees are not entitled to FFCRA benefits for the hours not worked because the employee is not prevented from working those hours due to a COVID-19 qualifying reason, even if the reduction in hours was somehow related to COVID-19.

However, each State has its own unique set of rules and the DOL has recently clarified additional flexibility to the States to extend partial unemployment benefits to workers whose hours or pay have been reduced. Therefore, individuals should contact their State workforce agency or State unemployment insurance office for specific questions about eligibility. For additional information, please refer to this link.

85. If an employee is teleworking, are they eligible for FFCRA benefits?

Generally, No. FFCRA clarified that Emergency FMLA and Emergency Paid Sick Leave benefits are available only if the employee is unable to work or telework due to a qualifying event. Therefore, if the employee is able to telework, then FFCRA benefits would not apply.

The inability to work or telework is defined as follows: You are unable to work if your employer has work for you and one of the COVID-19 qualifying reasons set forth in the FFCRA prevents you from being able to perform that work, either under normal circumstances at your normal worksite or by means of telework.

An employee would be eligible for benefits under Emergency PSL or Emergency FMLA if there is an extenuating circumstance that prevents the employee from teleworking. Examples of extenuating circumstances include:

(1) The employee is quarantined at home and is unable to telework due to a power outage, or

(2) The employee is experiencing serious COVID-19 symptoms that cause them to be unable to telework.

If the employer and employee agree that the employee will work their normal number of hours, but outside of the employee's normally scheduled hours (for instance, early in the morning or late at night), then the employee is able to work and leave is not necessary unless a COVID-19 qualifying reason or extenuating circumstance prevents the employee from working that schedule.

86. If an employee self-isolates to "flatten the curve," is the employee eligible for FFCRA benefits?

Generally, No. Qualifying events under Emergency Paid Sick Leave include—among other reasons--quarantine/isolation by Federal, state or local order or by a health care professional. If the employee is not experiencing any symptoms and is not directed to quarantine or isolate, then FFCRA benefits likely do not apply.

87. If an employee becomes ill with COVID-19 symptoms and self-quarantines for 14 days without seeking a medical diagnosis or advice of a health care provider, is the employee eligible for benefits under FFCRA?

No. If an employee becomes ill with COVID-19 symptoms, they are eligible for benefits under Emergency Paid Sick Leave only if the employee is seeking a medical diagnosis or if a health care provider otherwise advises the employee to self-quarantine.

88. Can FFCRA be taken intermittently?

It Depends. This answer is dependent on whether the employee is teleworking or working at his/her usual worksite. One basic condition applies to all employees who seek to take their Emergency Paid Sick Leave or Emergency FMLA intermittently- the employee and employer must agree on an arrangement. If no agreement can be achieved between the employee and the employer, no leave under the FFCRA may be taken intermittently. The Department of Labor encourages employers and employees to collaborate to achieve flexibility and meet mutual needs, and the Department is supportive of voluntary arrangements where permissible.

(1) Teleworking employees:
An employee is allowed to take Emergency Paid Sick Leave or Emergency FMLA on an intermittent basis if the employer allows it and if the employee is unable to telework their normal schedule of hours due to a qualifying reason. The employee may take intermittent leave in any increment, provided that the employee and employer agree. For example, if the employer agrees on a 90-minute increment,

the employee could telework from 1:00-2:30 pm, take leave from 2:30-4:00 pm, and then return to teleworking.

(2) Employees working at his/her usual worksite (not teleworking):
Emergency Paid Sick leave must be taken in full-day increments if the employee's need for leave is:

(a) the employee is subject to a Federal, State, or local quarantine or isolation order related to COVID-19;
(b) the employee is advised by a health care provider to self-quarantine due to concerns related to COVID-19;
(c) the employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis;
(d) the employee is caring for an individual who either is subject to a quarantine or isolation order related to COVID-19 or has been advised by a health care provider to self-quarantine due to concerns related to COVID-19; or
(e) the employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services.

Once beginning to take Emergency Paid Sick Leave for any of the reasons above, the employee **must** continue to take paid sick leave each day until the employee either (1) exhausts the full amount of Emergency Paid Sick Leave, or (2) the employee no longer experiences a qualifying reason.

This limit is imposed because if the employee is sick or possibly sick with COVID-19 or caring for an individual who is sick or possibly sick with COVID-19, the intent of FFCRA is to provide such paid sick leave to keep employees from spreading the virus to others.
By contrast, an employee may take Emergency Paid Sick Leave or Emergency FMLA on an intermittent basis if the employer allows it and if the employee is unable to telework due to care for a child whose school or childcare provider/facility is closed due to COVID-19-related reasons. For example, if the employee's child is at home because of school closure, the employee may take leave on Mondays, Wednesdays and Fridays to care for their child, but work on Tuesdays and Wednesdays.

89. What documentation/certification can the employer require of employees for FFCRA?

Employees are required to provide appropriate documentation for their Emergency FMLA or Emergency Paid Sick Leave. To date, the DOL has not released any forms for employers to provide employees to complete for a request for leave. *HUB has created a sample FFCRA leave request form, which can be located on the HUB Coronavirus Resource Center.*

Documentation for EPSLA and EFMLEA must include a signed statement from the employee containing the following information:

(1) Employee's name;
(2) The date(s) for which leave is requested;
(3) The COVID-19 qualifying reason for leave; and
(4) A statement representing that the employee is unable to work or telework because of the COVID-19 qualifying reason.

Additionally, the employee must provide additional documentation based on the specific reason for leave:

(1) For Quarantine Related Reasons under Emergency Paid Sick Leave:
  (a) The name of the government agency ordering the quarantine or the name of the healthcare professional advising self-quarantine, and;
  (b) If the person subject to quarantine or advised to self-quarantine is the not the employee, that person's name and relationship to the employee.

(2) Emergency FMLA & EPSL for School/Childcare Closure:

Employees are required to provide appropriate documentation in support of their need for leave to care for a child whose school or childcare provider/facility is closed due to COVID-19. The following information will need to be provided:
  (a) The name and age of the employee's child (or children);
  (b) The name of the school, place of care, or child care provider that has been closed or became unavailable due to COVID-19 related reasons;
  (c) a statement representing that no other suitable person is available to care for the child during the period of requested leave;
  (d) For any child(ren) who are between the ages of 14-17, an employee must provide what special circumstances are occurring that would prevent the employee from working or teleworking during daylight hours so they can care for their child(ren); and,
  (e) If the child is over the age of 18, the employee must also provide documentation that the child is incapable of self-care due to a mental or physical disability

In order for an employer to receive tax credits for benefits paid under FFCRA for school/child care closures, the IRS has made it clear that the employee alone is the person providing care for the child. This means that benefits under FFCRA are unavailable to an employee if both parents or another individual are present to help care for the child.

Of note, employees seeking a leave of absence for "normal" FMLA-qualifying reasons, such as for an employee's own serious health condition related to COVID-19, or to care for the employee's spouse, child, or parent with a serious health condition related to COVID-19, are still subject to all existing certification requirements under the FMLA.

90. Is an employer required to provide an employee documentation acknowledging the receipt of a requested leave, or that the employee's leave is approved or denied, similar to requirements under FMLA?

No. The FFCRA regulations to not require employers to respond to an employee who requests or uses Emergency Paid Sick Leave or Emergency FMLA leave with notices of eligibility, rights and responsibilities, or written designations that leave use counts against an employees' FMLA leave allowances as required under FMLA taken for non COVID-19 qualifying reasons. However, the DOL did note that an employer who has established practices for providing individual employees with specific notices compliant with the FMLA can apply their existing practices to FFCRA leave users.

91. What records do employers need to keep?

The Department of Labor and IRS have advised that an employer is required to retain all documentation regarding employee's leave for 4 (four) years, regardless of whether leave was granted or denied. This includes:

(1) If an employee provided oral statements to support his or her request for leave, the employer is required to document and retain such information.

(2) If an employer denies an employee's request for leave due to the small business exemption, the employer must document and retain its authorized officer's determination, including rationale for meeting the exemption criteria.

If the employer intends to claim a tax credit for benefit payments made to employees under FFCRA, the IRS has released the following additional requirements to establish that the employee legitimately took either Emergency Paid Sick Leave or Emergency FMLA and that the employer has a right to the tax credit. These records must be maintained for at least four (4) years after the date the tax becomes due or is paid, whichever comes later:

(1) Documentation showing how the employer determined the amount of benefits paid to employees under Emergency Paid Sick Leave or Emergency FMLA. This includes records of work and/or telework performed, as well as qualified time taken as FFCRA leave.

(2) Documentation showing how the employer determined the amount of qualified healthcare plan expenses that were allocated to the employee's wages. Employers should review the various methods for calculating this from the IRS FAQ #31 "Determining the Amount of Allocable Qualified Health Care Plan Expense";

(3) Copy of completed Form 7200 (Advance of Employer Credits Due to COVID-19) that was previously submitted to the IRS;

(4) Copy of completed Form 941 (Employer's Quarterly Federal Tax Return) that the employer previously submitted to the IRS. If an employer uses a third-party payer to meet employment tax obligations, the employer must keep records of information provided to the third-party payer regarding the employer's entitlement to the credit claimed on Form 941 in absence of the actual Form 941 filed by the third-party payer.

92. Since FMLA is an unpaid leave entitlement, do employers really need to provide pay under Emergency FMLA?

Yes. The first ten (10) days of Emergency FMLA is unpaid. If an employee continues to require Emergency FMLA leave, then the employer must pay the employee two-thirds of their regular rate of pay for up to ten (10) weeks.

93. Is all leave under FMLA now paid leave?

No. Emergency FMLA leave—which provides leave if an employee is unable to work or telework due to care for a child whose school or childcare facility is closed due to public health emergency—provides pay if the leave exceeds ten (10) days. All other FMLA qualifying leave reasons continue to be unpaid.

94. Can an employee take 80 hours of Emergency Paid Sick Leave for one qualifying reason, and then take another 80 hours of Emergency Paid Sick Leave for a different qualifying reason at a later time?

No. Emergency Paid Sick Leave provides up to 80 hours total of paid sick time. (Of note, full time employees are eligible for up to 80 hours, whereas part time employees receive a prorated amount of Emergency Paid Sick Leave.) The 80 hours may be used for any combination of Emergency Paid Sick Leave qualifying reasons, but again, not to exceed a total of 80 hours.

It is important to note that, once an employee stops experiencing an Emergency Paid Sick Leave qualifying event, the employee will also cease to use Emergency Paid Sick Leave entitlement. If an employee has any Emergency Paid Sick Leave remaining, the employee may use it at a later time for a qualifying reason before December 31, 2020 when FFCRA sunsets.

95. FFCRA indicates that employers of health care providers or emergency responders may elect to exclude such employees from FFCRA. What constitutes a "health care provider"? Does it include health care professions like dentistry?

For the purposed of employees who may be exempted from Emergency Paid Sick Leave or Emergency FMLA by their employer under FFCRA, a health care provider is defined as anyone employed at any:

(1) A doctor's office;

(2) Hospital;
(3) Health care center;
(4) Clinic;
(5) Post-secondary educational institution offering health care instruction;
(6) Medical school;
(7) Local health department or agency;
(8) Nursing facility;
(9) Retirement facility;
(10) Nursing home;
(11) Home health care provider;
(12) Any facility that performs laboratory or medical testing;
(13) Pharmacy;
(14) Any other similar institution, employer or entity; or
(15) Any permanent or temporary institution, facility, location or site where medical services are provided that are similar to such institutions.

Furthermore, the following groups/individuals may also be exempt from FFCRA benefits:

(1) Individuals employed by an entity that contracts with any of the above institutions/employers/entities to provide services or maintain the operation of the facility;

(2) Anyone employed by an entity that provides medical services, produces medical products, or is otherwise involved in the making of COVID-19-related medical equipment, tests, drugs, vaccines, diagnostic vehicles, or treatments; or

(3) Any individual that is determined to be a health care provider necessary for the response to COVID-19 as determined by the highest official of a state or territory, including the District of Columbia.

96. <u>What constitutes an "emergency responder"</u>?

An "emergency responder" is an employee who is necessary for the provision of transport, care, health care, comfort, and nutrition of such patients, or whose services are otherwise needed to limit the spread of COVID-19. This includes, but is not limited to:

(1) Military or national guard;
(2) Law enforcement officers;
(3) Correctional institution personnel;
(4) Fire fighters;
(5) Emergency medical services personnel;
(6) Physicians;
(7) Nurses;
(8) Public health personnel;

(9) Emergency medical technicians;
(10) Paramedics;
(11) Emergency management personnel;
(12) 911 operators;
(13) Public works personnel;
(14) Persons with skills or training in operating specialized equipment or other skills needed to provide aid in a declared emergency;
(15) Individuals who work for the above facilities and whose work is necessary to
(16) maintain the operation of the facility
(17) Any individual that is determined to be an emergency responder for the response to COVID-19 as determined by the highest official of a state or territory, including the District of Columbia

97. Who is a "health care provider" for purposes of determining whether an individual should self-quarantine or isolate for COVID-19-related reasons to be eligible for of Emergency Paid Sick Leave?

A "health care provider" is a licensed Doctor of Medicine, nurse practitioner or other health care provider permitted to issue a certification for purposes of the FMLA. In other words, Emergency Paid Sick Leave relies on FMLA's definition of "health care provider."

98. What is considered "regular rate of pay" for purposes of FFCRA?

For purposes of FFCRA, "regular rate of pay" is the average of the employee's regular rate over a period of up to six months prior to the date the employee takes FFCRA leave. If the employee has not worked for the employer for at least six months, the regular rate is the average of the employee's regular rate of pay each week worked to date. If an employee is paid with commissions, tips, or piece rates, these wages are incorporated into the rate calculation.

99. If an employer provides pay in excess of the $200 per day or $511 per day noted under FFCRA, will the employer receive more tax credits?

No. The tax credits are capped at $200 per day ($2000 in aggregate per employee) or $511 per day ($5110 in aggregate per employee) depending on the EPSL reason. For benefits under E-FMLA, the maximum credit is $200 per day ($10,000 in aggregate per employee).

100. Are employees allowed to use employer-provided leave entitlements/paid time off concurrently with FFCRA benefits to "top up" their earnings to their regular wages?

It Depends. During the first two weeks of unpaid expanded family and medical leave, an employee cannot take Emergency Paid Sick Leave simultaneously with any preexisting paid leave unless the Employer agrees to allow the employee to supplement the amount

the employee receives from Emergency Paid Sick Leave with preexisting paid leave, up to the employee's normal earnings.

After the first two workweeks of Emergency FMLA, however, an eligible employee may elect to use, or an employer may require that an employee use Emergency FMLA concurrently with any leave offered under the employer's policies that would be available for the employee to take to care for his or her child, such as vacation, personal leave, or paid time off. For example, if an employee is receiving 2/3 their regular rate of pay, the employer may allow employees to use employer-provided paid time off to supplement the 1/3 of normal earnings so that the employee receives his/her full normal earnings for each day.

Of note, the employer may not claim tax credits for supplemental amounts paid above the Emergency Paid Sick Leave or Emergency FMLA benefit.

101. If an employer requires an employee to stay off work and self-quarantine, does that invoke FFCRA?

It Depends. If the employee exhibits symptoms of COVID-19 and that is the basis for the employer's order for quarantine and the employee subsequently seeks diagnosis from a health care professional, this may invoke Emergency Paid Sick Leave under FFCRA. However, if the employer is simply requiring employees to stay home without any specific Federal, State or local order, and the employee does not seek treatment from a medical provider, then this likely will not invoke FFCRA. Furthermore, if the employee is able to telework, then the employee is not eligible for FFCRA.

102. I am an employer that is part of a multiemployer collective bargaining agreement. May I satisfy my obligations under the Emergency Family and Medical Leave Expansion Act through contributions to a multiemployer fund, plan or program?

Yes. You may satisfy your obligations under the Emergency Family and Medical Leave Expansion Act by making contributions to a multiemployer fund, plan, or other program in accordance with your existing collective bargaining obligations. These contributions must be based on the amount of paid family and medical leave to which each of your employees is entitled under the Act based on each employee's work under the multiemployer collective bargaining agreement. Such a fund, plan, or other program must allow employees to secure or obtain their pay for the related leave they take under the Act. Alternatively, you may also choose to satisfy your obligations under the Act by other means, provided they are consistent with your bargaining obligations and collective bargaining agreement.

103. I am an employer that is part of a multiemployer collective bargaining agreement. May I satisfy my obligations under the Emergency Paid Sick Leave Act through contributions to a multiemployer fund, plan or program?

Yes. You may satisfy your obligations under the Emergency Paid Sick Leave Act by making contributions to a multiemployer fund, plan, or other program in accordance with your existing collective bargaining obligations. These contributions must be based on the hours of paid sick leave to which each of your employees is entitled under the Act based on each employee's work under the multiemployer collective bargaining agreement. Such a fund, plan, or other program must allow employees to secure or obtain their pay for the related leave they take under the Act. Alternatively, you may also choose to satisfy your obligations under the Act by other means, provided they are consistent with your bargaining obligations and collective bargaining agreement.

104. Are contributions to a multiemployer fund, plan or other program the only way an employer that is part of a multiemployer collective bargaining agreement may comply with the paid leave requirements of the FFCRA?

No. Both the Emergency Paid Sick Leave Act and the Emergency Family and Medical Leave Expansion Act provide that, consistent with its bargaining obligations and collective bargaining agreement, an employer may satisfy its legal obligations under both Acts by making appropriate contributions to such a fund, plan, or other program based on the paid leave owed to each employee. However, the employer may satisfy its obligations under both Acts by other means, provided they are consistent with its bargaining obligations and collective bargaining agreement.

105. What is the definition of "son" or "daughter" for purposes of FFCRA?

FFCRA maintains the definition of "son" or "daughter" as used under FMLA. A "son or daughter" is the employee's child, including biological, adopted, or foster child, the employee's stepchild, a legal ward, or a child for whom the employee is standing/stood in loco parentis. Furthermore, FFCRA includes an adult son or daughter ("adult" meaning older than 18 years old), and again, maintains the definition of "adult child" as used under FMLA: an adult child (1) has a mental or physical disability and (2) is incapable of self-care because of that disability.

106. Do I have the right to return to work if I take FFCRA leave?

Generally, yes. An employer is generally required to restore an employee to his/her same or equivalent job upon returning from FFCRA leave. However, there may be a few instances where such job restoration is not necessarily required.

First, an employee is not protected from employment actions, such as layoffs, that would have affected the employee regardless of whether leave was taken. This is the same under FMLA. This means an employer may lay off an employee for legitimate business

reasons and would have to be able to demonstrate that the employee would have been laid off even if the leave was not taken.

Second, an employee may not be reinstated if the employee is considered a "key" employee as defined under FMLA. This is the same under FMLA.

Third, an employer with fewer than 25 employees are generally exempt from job restoration requirements when an employee takes Emergency FMLA leave and all four (4) of the following hardship conditions exist:

(1) the employee's position no longer exists due to economic or operation conditions that affect employment and due to COVID-19-related reasons during the employee's leave;

(2) the employer made reasonable efforts to restore the employee to the same/equivalent position;

(3) the employer made reasonable efforts to contact the employee if an equivalent position becomes available; and,

(4) the employer continues to make reasonable efforts to contact the employee for one (1) year[1].

107. How do I claim the tax credit?

Employers claim the tax credit by offsetting the amount that they would pay quarterly to their Social Security and Medicare taxes. Examples include:

(1) An employer owes $8000 in taxes for a reporting quarter for social security or Medicare taxes. During that reporting quarter, the employer has employees take either EPSL or E-FMLA and is eligible for $5500 in tax credits. The employer (or their designated third-party payor) would deduct the eligible credits from the tax due and remit the remaining $2500.00.

(2) An employer owes $8000 in taxes for a reporting quarter for social security or Medicare taxes. During the reporting quarter, the employer has employees take either EPSL or E-FMLA and is eligible for $10,000 in tax credits. The employer would not remit any taxes and could file for emergency relief with the IRS to collect the remaining $2000.00.

(3) The employer is eligible for $8000 in tax credits but is unable to pay the employee the wages based on funding. The employer could file for emergency relief and request an advance on the $8000 tax credit.

[1] This one (1) year period begins either on the date the COVID-19-related leave concludes or twelve (12) weeks after the leave began, whichever is earlier.

Employers should consult with their tax professionals as well as review the IRS documentation guidelines listed on the IRS FAQ site, which can be found here.

108. Who qualifies as an "individual" under Emergency Paid Sick Leave that an employee can take time to care for due to COVID-19?

An individual under Emergency Paid Sick leave is much broader than the "Family Member" definition under FMLA for non-COVID-19 related leaves. An individual is defined as someone who genuinely needs the employee's care and has a personal relationship that creates an expectation that the employee would care for that individual if care was required. Examples provided by the Department of Labor of a covered individual are an immediate family member or someone who regularly resides in an employee's home.

109. Is an employee eligible to take Emergency Paid Sick Leave in the event the employee must care for an individual who has been advised by a health care provider to self-quarantine or isolate due to a condition that makes the individual particularly vulnerable to COVID-19?

Yes, But. An employee can take Emergency Paid Sick Leave to care for an individual who, as a result of being subject to quarantine or isolation order, is unable to care for him or herself and depends on the employee for care, and the care being provided prevents the employee from working or teleworking. The individual must have been advised by a health care provider of the need to self-quarantine or isolate due to an underlying medical condition. If the employee is able to telework or the individual who is quarantined is not reliant on the employee for care during the employee's normal working hours, then Emergency Paid Sick Leave would not apply.

110. Is an employee eligible to take Emergency Paid Sick Leave in the event the employee has been advised by a health care provider to self-quarantine or isolate due to a condition that makes the employee particularly vulnerable to COVID-19?

Yes, But. An employee is eligible to take Emergency Paid Sick Leave in this case. The employee must have been advised by a health care provider of the need to self-quarantine or isolate due to an underlying medical condition. If the employee is able to telework while self-quarantining or self-isolating, then Emergency Paid Sick Leave would not apply.

111. What is considered a "place of care" and who is considered a "child care provider" for purposes of taking FFCRA benefits to care for a child who's "place of care or child care provider is closed or unavailable"?

Place of Care: A "place of care" is a physical location in which care is provided for the employee's child. The physical location does not have to be solely dedicated to such care. Examples include: day care facilities, preschools, before and after school care programs, schools, homes, summer camos, summer enrichment programs, and respite care programs.

Child Care Provider: A "child care provider" is considered someone who cares for the employee's child. This includes individuals paid to provide child care, like nannies, au pairs, and babysitters. It also includes individuals who provide child care at no cost and without a license on a regular basis, for example, grandparents, aunts, uncles, or neighbors.

112. Can more than one guardian take benefits under FFCRA for the same period of time to care for a child due to school or child care being unavailable or closed?

No. An employee is only eligible for Emergency Paid Sick Leave and/or Emergency FMLA to care for a child only when the employee needs to actually provide care to that child, and the employee is unable to work or telework as a result of such care. If a co-parent, co-guardian, or a usual child care provider is available to provide care to the child, the employee is not eligible for benefits under FFCRA for that period of time.

113. What does the Emergency Paid Sick Leave reason "the employee is experiencing a substantially similar condition as specified by the Secretary of Health and Human Services, in consultation with the Secretaries of the Treasury and Labor" mean?

The U.S. Department of Health and Human Services (HHS) has not yet outlined any "substantially similar condition" that would allow an employee to take Emergency Paid Sick Leave under this reason. If the HHS does identify a condition that would fall under this leave reason, the Department of Labor will issue guidance providing additional details.

IX. Employee Benefits

114. If my employee elects to take paid expanded family and medical leave or sick leave, must I continue the employee's health coverage? If the employee remains on leave beyond the maximum period of expanded family and medical leave, does the employee have a right to keep the health coverage?

If you provide group health coverage that your employee has elected, the employee is entitled to continued group health coverage during his/her expanded family and medical leave on the same terms as if the employee continued to work. If the employee is enrolled in family coverage, you must maintain coverage during the expanded family and medical leave. However, the employee generally must continue to make any normal contributions to the cost of health coverage. See WHD Fact Sheet 28A here.

If the employee does not return to work at the end of the expanded family and medical leave, check your plan document and with your carrier to determine whether you can continue the employee's health coverage. If the employee is no longer eligible, you may be required to offer continuation coverage under the Consolidated Omnibus Budget Reconciliation Act (COBRA). COBRA, which generally applies to employers with 20 or more employees, allows covered employees and their families to continue group health coverage. (Plan of employers with fewer than 20 employees offer continuation coverage

State laws that are similar to COBRA. These laws are sometimes referred to as "mini COBRA" and vary from State to State.)

If your employee elects to take paid sick leave, you must continue the employee's health coverage. Under the Health Insurance Portability and Accountability Act (HIPAA), an employer cannot establish a rule for eligibility or set any individual's premium or contribution rate based on whether an individual is actively at work (including whether an individual is continuously employed), unless absence from work due to any health factor (such as being absent from work on sick leave) is treated, for purposes of the plan or health insurance coverage, as being actively at work.

115. Must employer sponsored health plans cover testing for and treatment of COVID-19?

Yes. Under the Coronavirus Aid, Relief, and Economic Security Act (CARES Act), all health plans, whether private, governmental or church plans are required to cover COVID-19 testing without cost sharing. This applies to all types of group health plans as well, including PPO, HMO, high deductible health plans, and even minimum essential coverage plans. However, this does not extend to treatment.

The testing includes FDA-approved tests, tests that are being fast-tracked by the FDA and pending approval, tests for which the manufacturer says they intend to seek FDA approval, state-developed tests from states that have notified the U.S. government that they are reviewing potential tests, and other tests approved by the federal government.

While not legally-required, some insurance carriers are automatically covering COVID-treatment without cost sharing. In some cases, this only applies for a specific time period (e.g., treatment through the end of 2020). For self-funded plans using carriers as their TPA/administrative services only providers, some of those carriers have issued notices to their customers offering the opportunity to opt-in or opt-out of this coverage voluntarily.

116. Is there cost sharing for these services?

No. Under the CARES Act, all health plans are required to cover screening and COVID-19 testing without cost sharing. This does not extend to treatment *(but see the answer to the question above regarding carriers voluntarily covering treatment without cost sharing)*.

117. Can High Deductible Health Plans (HDHPs) provide testing for and treatment of COVID-19 without cost sharing?

Yes. Under IRS Notice 2020-15, an HDHP may cover testing and treatment related to COVID-19 before the deductible is met without compromising the plan's status as a qualified High Deductible Health Plan. This means employees participating in these plans can continue to contribute to the health savings accounts.

118. Must employer sponsored health plans cover a vaccine for COVID-19 when it becomes available?

Yes. Under the CARES Act, all health plans, whether private, governmental or church plans are required to cover U.S.-government approved measures to prevent COVID-19, including vaccines, without cost sharing. This applies to all types of group health plans as well, including PPO, HMO, high deductible health plans, and even minimum essential coverage plans.

Once a vaccine or other preventive measure is approved by the U.S. Preventive Services Task Force or Advisory Committee on Immunization Practices, plans will need to cover on a first dollar basis starting 15 business days after it is approved. This is significantly faster than the normal timeframe, which is the first plan year that begins at least 12 months after a preventive item or service is approved.

119. Can employer sponsored health plans be modified to expand their coverage for treatment of COVID-19, such as waiving deductibles, or lowering ER copays related to COVID-19 for treatment (in addition to the required coverage for screening and testing)?

Maybe, Yes. However, fully-insured health plans are limited to the changes their insurance carrier will allow. Individual carriers establish their own policies for plan modification, which includes not allowing any form of modification.

Self-insured plans may make mid-year plan design changes by working with their TPA and stop-loss carriers. *Note that for self-funded plans using carriers as their TPA/administrative services only providers, some of those carriers have issued notices to their customers offering the opportunity to opt-in or opt-out of this coverage voluntarily.*

120. Do self-insured plans face any unique risks related to modification of plan terms?

Yes. Employers with self-insured plans face potential risks related to their stop-loss coverage if they make mid-year plan design changes. Stop-loss policies apply to claims properly incurred under the terms of the plan in effect at the beginning of the plan year. Mid-year modification of plan terms risks claims incurred under the new plan terms being denied by the stop-loss carrier. Employers who “carve out” (i.e., use a different stop-loss carrier than TPA) their stop-loss coverage are especially at risk as the carrier will not be made aware of any plan design changes unless notified by the employer. However, since the plan is legally-required to cover testing, stop-loss carriers should cover it. Even so, self-insured employers with stop-loss may want to confirm that with their stop-loss carriers.

121. Can telemedicine be included in the categories of services covered without cost sharing?

Yes. Several states have required, and some insurance carriers have recently announced they will provide their integrated telemedicine services to plan participants without cost sharing. Self-insured plans have discretion whether they cover telemedicine without cost sharing or not.

In recognition of this fact, the CARES Act allows high deductible health plans (HDHPs) to cover telemedicine for any condition (not just COVID-19) before the deductible is met. This means employees participating in HDHPs that are offering these services can continue to contribute to the health savings accounts. This change is only effective for HDHP plan years before January 1, 2022.

122. Are COVID-19-related treatment expenses reimbursable from a health flexible spending account (FSA) or health reimbursement arrangement (HRA)?

Yes. Medical expenses that are not reimbursed from the health plan or otherwise are reimbursable from these accounts. This includes otherwise proper medical expenses for the treatment of COVID-19.

123. Did the CARES Act change any other rules related to health flexible spending arrangements (FSAs), health reimbursement arrangements (HRAs), or health savings accounts (HSAs)?

Yes. The CARES Act expands what items can be reimbursed from health FSAs, HRAs, and HSAs in two ways. First, it allows these accounts to, once again, reimburse for over-the-counter medicines. The Affordable Care Act previously said over-the-counter medicines were not reimbursable by these accounts. That rule is now reversed with the CARES Act. Secondly, the CARES Act allows the costs of menstrual products, like maxi pads and tampons, to be reimbursed by those accounts as well.
These changes are effective retroactively to January 1, 2020. This means that purchases for over-the-counter medicines and menstrual products made in 2020 before the CARES Act became law are eligible for reimbursement.

Note that an employer may choose not to include the reimbursement of over-the-counter medications or menstrual products from their health FSA and HRA plans. If they choose not to cover the reimbursement of these products, they should contact their third-party administrator to ensure their plan documents exclude said coverage.

124. An employee is on a leave of absence related to COVID-19, what happens to their benefits?

It Depends. This answer will vary depending on the applicability of FMLA and/or state leave of absence laws to the employee's request for leave. If FMLA applies, benefits are protected for up to 12 weeks of leave. During this time, employees on leave are entitled

to maintain the same benefits offered to active employees and at the same rates. Employees are however required to pay their portion of benefits while on leave. Employers can offer one or more of the following options for payment:

(1) Payment up front. Under this method the employee pays for their benefits prior to taking leave. This cannot be the only option offered to employees.

(2) Periodic payments. Under this method employees on leave make regular payments to the employer directly for their benefits. This method can also include payroll deductions if any portion of the leave is paid, such as via the use of PTO or vacation time.

(3) Payment upon returning to work. Under this method, the employer pays the premium in full and the employee repays the employer for their portion of the premium when they return to work.

Employers must describe what options for payment are available under the plan and offer these options to all eligible employees under the plan.

Employers may also establish their own leave policies that may extend benefits in situations where FMLA does not apply, or after FMLA is exhausted. Employers policies must be written into the plan language. Employers who do not have a leave policy currently written into their plans but wish to add one will need to work with their insurance provider (for fully-insured plans) or third-party administrator and stop-loss carriers (for self-funded plans).

125. An employee on FMLA has not paid their portion of their premiums, can we terminate their coverage for non-payment?

It Depends. This answer is dependent on the options the employer offers for payment of benefits while on FMLA described in the question above. Employers who offer payment upon returning to work cannot terminate benefits for non-payment while on leave.
If an employer requires payments to be made periodically while on leave benefits can be terminated when payment is 30 days late (unless the employer allows a longer grace period). To terminate benefits, the employer must provide written notice to the employee that the payment has not been received and allow at least 15 days after the date of the letter before coverage may be terminated.

126. Do we count hours of service under the ACA employer mandate for employees on leave due to COVID-19?

It Depends. The ACA rules regarding hours of service and how they should be counted during an initial or a standard measurement period vary depending on the employee's source of income during a furlough, their illness, or the illness of a family member, or a reduction in hours of employment. Below please find a summary on how the rules work:

(1) If the employer continues to pay employees' salary without disruption as a result of a furlough, temporary closure, or if employees' work hours are reduced, these hours WILL count as hours worked.

(2) If an employee uses vacation and/or sick time while in quarantine, due to illness, during a furlough or temporary closure, or to supplement their income during a reduction in hours, those hours WILL count as hours worked.

(3) If the employee receives state disability insurance benefits, state Paid Family Leave benefits, or state Unemployment Insurance benefits, those hours WILL NOT count as hours worked.

(4) If employee receives benefits under an employer paid or an employee paid (pre-tax) disability insurance program, the hours WILL count as hours worked. However, if the employee paid for the disability insurance program with post-tax dollars, and the employer did not contribute to the arrangement, then the employee will not be credited with hours of service while receiving disability payments.

Self-funded employers should review their plan documents to ensure measurement periods and stability periods are referenced, as stop-loss carriers will follow the terms of the plan document when paying claims. For insured plans, it is important to confirm that carriers are honoring measurement periods and benefit continuation rules during a furlough or reduction in hours.

127. Our business has slowed down, and we are temporarily furloughing/laying off employees, what happens to their health insurance?

It Depends. If employees are terminated/laid off, even if potentially for a limited amount of time they will no longer be eligible for benefits as active employees and will be eligible for COBRA and/or state continuation coverage, as applicable.

If employees are furloughed (i.e., still employed but not actively working due to a business slowdown), they may potentially be eligible to continue coverage. Employers are urged to check with their insurance or stop-loss carriers on this point. However, if the furlough is unpaid, the cafeteria plan rules will allow employees to change their election to drop health and other coverages, if they so choose. (Note also that ACA rules may apply to applicable large employers. See the question above *"How do we count hours of service under the ACA employer mandate for employees on leave due to COVID-19?")*

128. Can we amend our plan to allow employees to be temporarily furloughed and remain eligible for benefits?

It Depends. If furloughs are not currently addressed in the plan language, it may be possible to modify existing plan terms to allow for the continuation of benefits while on

furlough. Employers will need to work with their insurance carrier or TPA and stop-loss carriers on any modification of plan terms.

However, furloughed employees may not have the means to pay for continued coverage. Therefore, unless the employer is willing to absorb the costs, continuing coverage may not be practical. If the employer expects the employee to repay the premiums upon return to work, the employer should have employee's sign an agreement that allows for the repayment of past premiums upon the employee's reinstatement to a full-time position. If employees lose access to employer sponsored coverage, they can enroll in Exchange coverage, if they request enrollment within 60-days of the loss. Depending on their household income, employees may also receive premium tax credits to pay for their coverage or qualify for Medicaid coverage.

129. Does putting employees on furlough impact affordability under the ACA employer mandate?

Potentially Yes. If employees are furloughed (i.e., continuing to be treated as an employee, but for no or reduced pay) and remain on the health plan, it could impact how the employer determines affordability for ACA employer mandate purposes. Whether it impacts a particular employer depends on how the employer determines affordability.

Recall that for coverage to be "affordable" the cost of employee-only coverage cannot exceed 9.78% (for 2020) of an employee's household income. However, the IRS offers three safe harbors that are treated as meeting this standard, even if the employer does not know the employee's household income. Recall also that ACA employer mandate liability is determined on a monthly basis. Therefore, if coverage is unaffordable for a month, and an employee obtains subsidized individual coverage from an ACA Exchange/Marketplace, the employer could be assessed an ACA employer mandate penalty.

(1) General Affordability Rule. If an employer is relying on the general rule for affordability (i.e., the monthly premium is no more than 9.78% of the employee's monthly household income), the coverage may become unaffordable if the employee is receiving less or no pay from the employer. It would depend on whether other members of the employee's household are receiving additional income, which the employer would not be able to know. Additionally, it is unclear whether stimulus checks from the government would count toward household income for affordability purposes. As a result, if possible, employers may want to waive premium requirements for employees on furlough or look to move to the Federal Poverty Line Safe Harbor, if possible.

(2) Federal Poverty Line ("FPL") Safe Harbor. Employees receiving less or no pay on furlough would not have an impact on this safe harbor; the coverage would still be deemed affordable. Employers meet the FPL Safe Harbor if the cost of self-only coverage is no more than 9.78% of the FPL. For plan years starting before July 1, they would typically use the 2019 FPL, which was $12,490 for the mainland. This

means the monthly cost of self-only coverage cannot exceed $101.79. More details on this safe harbor are available in our article here.

(3) Rate of Pay Safe Harbor**.** If an employer has employees on furlough, this safe harbor is unavailable for salaried employees and may not be available for hourly employees. For salaried employees, the IRS rules state that this safe harbor is not available if the employee's monthly salary is reduced. Employees on furlough would likely have their monthly salary reduced, and so the employer would have to look to the FPL safe harbor or the general affordability rule.

For hourly employees, if the employer reduces the employee's hourly rate of pay for a month, the employer must use that lower hourly rate of pay for this safe harbor. However, if the employee's hourly rate stays the same, but his/her hours are reduced, this safe harbor should still be available. In that latter case, the employer would multiply the employee's hourly rate of pay by 130 hours (even though the employee is likely not working that many hours) and multiply that figure by 9.78% to determine if the coverage is affordable.

(4) Form W-2 Safe Harbor. Under the Form W-2 Safe Harbor, the employee's required contribution for self-only coverage cannot exceed 9.78% of the employee's Form W-2 wages for the calendar year. Because it is based on total year wages, this safe harbor is determined at the end of the year.
First, to use this safe harbor, the employer cannot make adjustments to the employee's share of the premium during the year. Specifically, this means an employer cannot reduce (or increase) the percentage or dollar amount, as applicable, employees pay for the coverage.

If the employer is charging a specified dollar amount as an employee contribution, that dollar amount must remain the same to use this safe harbor. Therefore, even if an employer wants to give employees a break, it cannot do so if it wants to continue to use this safe harbor. However, an employee on furlough will have reduced wages for the year. As a result, this safe harbor may not be available at the end of the year anyway. Employers in this situation may want to look at one of the other safe harbors or the general affordability rule.

On the other hand, if the employer is charging a percentage of compensation as the premium, that percentage must stay the same. Most plans do not structure their contributions this way. However, the good news is, for employers that do, the cost to employees will go down as their pay goes down and the employer can still use this safe harbor.

130. If we change the status of full-time employees to part-time, what happens to their benefits?

It Depends. If an ongoing full-time employee transfers to a position that would have been considered part-time if the employee had originally been hired into that position (including by having his/her hours cut to a point where the employee would be considered part-time), the employer has two options:

(1) Continue to offer coverage until the end of the stability period (typically the plan year). This is the only option for most employees; or

(2) Offer coverage for three full months following the change in status and then terminate coverage on the first day of the fourth month following the status change (sometimes called the "downshift" rule).

Employers must also consider the following points with regard to the downshift rule:

(1) To be eligible to use the downshift rule, the employee must have been offered minimum value coverage continuously from the at least the first day of the fourth calendar month after they are hired through the date of the employment change. Therefore, employees whose hours were measured over a measurement period and determined to be full time are not eligible.

(2) To terminate coverage, the employer must measure the employee's hours during the 3 full months following the status change to determine if the employee average less than 130 hours per month. If the employee average more than 130 hours per month then coverage cannot be terminated, and the employer must again measure hours for another 3 months.

(3) If coverage is terminated, the employer will use the monthly method for counting hours for the remainder of the measurement period. This means that if the employee loses coverage and goes to the exchange and receives a subsidy, the employer will be penalized for not offering coverage for any month the employee works more than 130 hours.

Note that a reduction in hours of employment that does not also make them ineligible for coverage is not a family status change. Therefore, unless the reduction in hours makes employees ineligible for benefits, the employees cannot change their elections in make benefit plan changes.

131. Can we reduce the hours required to be eligible under our plan from 30 per week to 20 per week to maintain eligibility for employees working reduced hours?

It Depends. Plans may be able to modify existing plan eligibility if their insurance or stop-loss carriers agree to the changes. Before considering modification of plan eligibility, employers should consider the long-term impact of this. For example, if only those who

work 30 or more hours per week on average are currently eligible, reducing eligibility to 20 or more hours per week may allow those whose hours are reduced to remain eligible, but it will also create plan eligibility for those not currently eligible. Employers will need to work with their insurance or stop-loss carriers on any modification of plan terms.

132. If employees are terminated and rehired, what happens to their benefits?

It Depends. Under the ACA, Applicable Large Employers (ALEs) with 50 or more full-time equivalent employees must treat those employees who are rehired within 13 weeks (26 weeks for educational institutions) of separation as ongoing employees. These employees must become eligible immediately upon rehire, or as soon as administratively practicable.

Alternatively, the ACA allows ALEs to use the Rule of Parity. Under this rule, employees who are separated for at least four consecutive weeks and the separation is longer than their last period of employment can treat these rehired employees as newly hired employees who must satisfy the applicable waiting period for benefits eligibility.

We discuss these rules in more detail here. Additionally, employers may be more generous than required by the ACA so long as their practice is consistent with their plan language.

In addition, employers (whether or not they are ALEs) should consider other issues with rehired employees, including the following:

(1) Cafeteria plan elections. Some cafeteria plans require elections to be reinstated if employees are rehired within a short period of time (e.g., 30 days). Employers should consult their cafeteria plan documents to determine if elections should be reinstated or whether employees should be given new elections.

(2) Evidences of Insurability. Life and disability insurance may require new evidences of insurability (or waive those requirements) for rehired employees. Employers should work with the HUB consultant and carriers to determine whether those requirements apply. Employers should communicate those requirements (or the waiver) to rehired employees.

(3) Dependent Care FSA Elections. Even if employees are rehired, they may need to revisit their dependent care FSA elections they made prior to being let go to determine if they need to, or can, continue them based on their new working and child care situations.

133. Can we, as the employer, pay all or a portion of the cost of COBRA for employees who are laid off?

Yes, But. There are potential complications employers need to consider, such as eliminating an employee's opportunity to enroll in Exchange coverage and qualify for premium tax credits. We discussed this in detail here. Employers may choose to subsidize all or a portion of the cost of COBRA for a period of time. Employers are urged to take a consistent approach for all impacted employees and should be aware of all the potential issues raised by subsidizing COBRA.

134. Does our STD or LTD policy cover employees who are quarantined?

It Depends. STD and LTD policies are designed to provide financial protection for covered individuals suffering from their own disability. An employee who is diagnosed with COVID-19 may be eligible for STD or LTD depending on the terms of the policy. Quarantine is not by itself a disability and thus generally would not fall under an applicable STD or LTD plan. However, a small minority of STD plans do cover quarantine. Clients should work with their HUB consultant to confirm.

135. Do leaves of absence impact Flexible Spending Accounts (FSAs), Health Reimbursement Arrangements (HRAs) and Health Savings Accounts (HSAs)?

It Depends. Employees on leaves of absence continue to have access to health FSAs and HRAs subject to the terms of the plan. HSAs are individual accounts that belong to the accountholder and therefore are not impacted by leaves of absence.

However, employees may want to make election changes for their Health FSAs and HSAs, depending on their economic situations. Employees can change HSA contributions at any time. For Health FSAs, employees will need to have a permitted change in status. Going on an unpaid leave would generally qualify.

136. Do leaves of absence impact Dependent Care Assistance Programs (DCAP)/Dependent Care FSAs?

It Depends. DCAPs or Dependent Care FSAs may only be used on expenses considered employment-related. This means the expenses are for the care of one or more qualifying individuals and are incurred to enable the employee (or the employee's spouse) to be gainfully employed. An individual can be considered gainfully employed and experience short, temporary absences from work, such as for vacation or illness. The IRS safe harbor treats an absence of up to two consecutive weeks as a short temporary absence. Therefore, DCAP funds can still be used during the first two weeks of a leave of absence. Expenses incurred during a leave of absence that exceeds two weeks cannot be reimbursed by a DCAP without falling outside the applicable safe harbor, absent special circumstances.

137. Can employees change their elections for Dependent Care Assistance Programs (DCAP)/Dependent Care FSAs if their dependent care facilities close due to the virus?

Likely, Yes. While there is no direct guidance on point, the rules regarding DCAPs or Dependent Care FSAs are pretty flexible in allowing election changes. Examples in the regulations allow employees to make changes if they change dependent care providers or to reduce their election if their child starts school and dependent care expenses are reduced. Based on these examples, it seems likely the IRS would allow an employee to reduce his/her DCAP/Dependent Care FSA election to $0 due to the closure of a day care facility if no alternative arrangements are available, or if the employee is no longer working.

138. If we lay off employees and are now under 50 full-time equivalent employees are we still an applicable large employer and subject to the employer mandate? Are we still required to do reporting?

Yes. An employer who is an ALE based on their 2019 employee counts is considered an ALE for the entire 2020 calendar year. This means they need to offer coverage to their full-time employees or pay a penalty for all of 2020. They will also need to report on the coverage offered for 2020 in early 2021. This applies even if the employer no longer has 50 or more full-time equivalent employees. It is possible however that, depending on 2020 employee counts, this employer may not be an ALE in 2021.

139. Is COVID-19 expected to cause prescription drug shortages?

No. As of now, the major drug companies have indicated they do not expect any shortages of prescription drugs related to COVID-19.

140. Can employer plans allow prescriptions to be refilled more regularly to potentially mitigate disruption due to supply shortages?

It Depends. Many insurance carriers have already announced changes to their rules on timing of prescription refills. These changes allow participants to obtain refills sooner than otherwise allowed by the plan. Employers with fully-insured plans are urged to confirm with their insurance carriers what, if any changes have been made.

Employers with self-insured plans have leeway to modify existing plan terms, subject to (a) what the TPA and PBM can accommodate; and (b) what their stop loss carrier will allow. Employers with self-insured plans who wish to modify existing plan terms regarding prescription drugs will need to consult with their TPA, PBM, and stop-loss carriers.

141. Can I delay the deadline for completing wellness requirements because of COVID-19?

Yes, if. Employees still have a chance to qualify for the reward at least once this plan year. There are some practical considerations to keep in mind:

(1) If you delay deadlines too long, you may not be able to get the correct premium amounts loaded into the payroll system for the next plan year.

(2) The delay should apply uniformly to all similarly situated employees. If delaying the deadline to complete the wellness requirements is impractical, employers can consider waiving one or more requirements just for this year. They may also offer alternatives that employees can complete at home, such as exercise programs where employees exercise a specified number of minutes per week or online education seminars.

142. Are there other benefits issues to consider?

Life and Disability Plans: Life and disability insurance carriers may require that employees be actively-at-work for coverage to be honored. Please work with your HUB broker and your life and disability carrier to ensure benefit continuation will not be disrupted in the event of a furlough/temporary closure or when employee's hours are reduced below eligibility criteria. If you are changing life and disability carriers during this pandemic, confirm that they will not delay insuring employees who are not actively-at-work as a result of a closure or who have experienced a reduction in hours of employment.

Commuter Benefits: Notify employees to cease contributions into a commuter benefit program, if they are expected to work for home for a month or more. They can also reduce the monthly elections to reflect a decrease in the number of days they anticipate to commute into the office. If employees are terminated, note that unused amounts in their commuter benefit plans will forfeit, unless employees submit expenses for reimbursement incurred prior to the date of termination.

X. Cost Cutting Measures; Layoffs, Reductions in Pay/Hours. and Furloughs

(See also Employee Benefits Section)

143. Under the EEOC's laws, what waiver responsibilities apply when an employer is conducting layoffs?

Special rules apply when an employer is offering employees severance packages in exchange for a general release of all discrimination claims against the employer. More information is available in EEOC's technical assistance document on severance agreements.

144. Can I reduce my non-exempt (hourly) employees' rate of pay to help reduce expenses?

Yes, But. An employer is required by statute to pay a non-exempt employee at least the federal or state (whichever is higher) minimum wage (unless an employee has an employment agreement establishing a contractual rate of pay). *The 2020 federal minimum wage is:*

(1) $10.80 per hour for federal contractors;

(2) $7.25 per hour for private sector employers; and,

(3) $2.13 per hour for tipped employees

145. Can I reduce my exempt (salaried) employees' rate of pay to help reduce expenses?

Yes, But. An employer is required by to pay an exempt employee at least the federal or state (whichever is higher) minimum salary (unless an employee has an employment agreement establishing a contractual rate of pay). The 2020 federal minimum salary is $684 or $35,568 annually.

146. Can I reduce my non-exempt employee's scheduled hours?

Yes. An employer is required to pay only the hours actually worked by their non-exempt employees. Therefore, they are able to reduce scheduled hours for those employees. They may allow their hourly employees to supplement their wages with any available paid time off pursuant to the terms of the employer's leave policies.

147. Can I reduce my exempt employee's scheduled hours?

Yes, But. An employer is free to determine its employee's work schedules. However, employers may not reduce an exempt employee's pay by the hours (or days) worked. The general rule for salaried/exempt employees is that they are required to be paid if they perform work at some point during the workweek. Unless your business is shut down (or an employee does not perform any work) for more than an entire workweek, your exempt employees are generally entitled to be paid for the entire week in which they worked.

148. What is the difference between a furlough and a layoff?

A furlough means that an employee has been placed on an unpaid leave of absence and the employer-employee relationship remains intact. When an employer lays off an employee it has ended or terminated the employment relationship.

149. Can I furlough or place my employees in a leave status instead of terminating them?

Yes. A furlough or leave of absence is a temporary suspension of employment for a specified period of time during which employees do not receive wages. An employer may implement a furlough as a cost-saving mechanism. For example, in response to a downturn in, an employer may choose to place employees on furlough, rather than institute a permanent reduction in force. Employers must be careful when placing exempt employees on furlough, to ensure it is carried out in a manner that does not void their exempt status.

150. May I select certain employees to remain "employed" (but may or may not be working" and others that will separated from the company?

Yes, But. An employer implementing a RIF must carefully consider its layoff selection criteria to prevent a disparate impact on employees in a particular protected class (where, for example, employees in a protected class, such as race or age, are affected more than what would be statistically expected given the demographics of all employees in the selection pool). This can involve various statistical analyses. Employers also should avoid any implication that employees were selected for having engaged in prohibited activity, such as making a discrimination complaint.

Employers should use objective, non-discriminatory and consistently applied selection criteria. Adopting pure seniority-based layoff criteria is the best way to minimize liability exposure. Employers should avoid using subjective criteria to make selections for a RIF, as they allow laid-off workers to claim that decision-makers' true motives were discriminatory and that the subjective factors were a pretext for unlawful decisions. Other layoff selection criteria that have withstood legal scrutiny by some courts include elimination of:

(1) An entire job function;

(2) A particular department; or,

(3) Redundant positions.

Using high compensation levels as a selection criterion is not considered disparate treatment if it is not motivated by age. However, using this criterion can leave an employer more vulnerable to disparate impact claims under the ADEA because higher earning individuals tend to be among the older and more experienced employees.

151. Can I separate an employee on an FMLA leave of absence?

Yes, But. Employers are not required to continue FMLA benefits or reinstate employees who would have been laid off or otherwise had their employment terminated had they continued to work during the FMLA leave period as, for example, due to a general layoff. An employee on FMLA leave is not protected from actions that would have affected him or her if the employee was not on FMLA leave. (U.S. Department of Labor -

FMLA Compliance Guide). However, employers must be able to prove that the employee would have been laid off regardless of the FMLA leave.

152. Is there any special notice I must provide to employees during a mass layoff or business closure? (please see the HUB Resource Center for more information)?

It Depends. The federal Worker Adjustment and Retraining Notification Act (WARN Act) covers employers that employ either:

(1) 100 or more employees, excluding part-time employees.

(2) 100 or more employees, including part-time employees, if the employees collectively work at least 4,000 hours each week excluding overtime.

An employer is not required to give notice under the WARN Act if:

(1) A plant closing affects only a temporary facility.

(2) A plant closing, or mass layoff occurs because:
  (a) The particular facility, project, or undertaking was completed; and
  (b) Affected employees were hired with the understanding that their employment was limited to that facility, project, or undertaking.
  (c) A closing or layoff constitutes a strike or lockout not meant to evade the WARN Act.

If the WARN Act requirements are triggered, the employer must give written notice at least 60 days in advance of the plant closing or mass layoff to:

(1) The union representative of each affected employee (if applicable);

(2) Each affected employee not represented by a union;

(3) The state dislocated worker unit or office;

(4) The chief elected official of the unit of local government where the layoff or plant closing will occur; or

(5) The federal government if foreign nationals working on certain visas are laid off. Consult immigration experts whenever foreign nationals on visas are affected by a reduction in force.

In addition, some states apply their own notice requirements on employers implementing a RIF (these state statutes are often called “mini-WARN Acts”). Employers should check the states where their layoff or plant closing will occur to determine whether state WARN Act requirements apply.

153. Can I provide my employees with a separation and release agreement when conducting a layoff or reduction-in-force?

Yes. A separation agreement (also commonly referred to as a severance agreement) between an employer and a departing employee specifying terms of the employee's separation from employment, including a release of legal claims against the employer in exchange for a benefit. There are specific regulatory requirements for separation agreements that release age-related claims. Employers must be sure to work with an attorney who will draft a compliant separation agreement.

154. Can I provide my employees severance upon layoff?

Yes. Although employers are not required to offer severance benefits to their employees, severance policies are a common feature of employer-provided benefit packages. Severance benefits usually take the form of cash payments to an employee whose employment is involuntarily terminated because of circumstances beyond the employee's control.
Given the different reasons for adopting severance policies, severance arrangements range from informal practices to relatively formal employee benefit plans with significant ongoing administrative requirements. A more formal severance arrangement usually provides terminated employees with either:

(1) A lump-sum monetary payment.
(2) Payments in installments over time.

Compliance with ERISA is not necessarily required for all forms of severance benefits. It is possible to pay severance benefits through a mechanism that lies outside the scope of ERISA's mandates. On the other hand, severance plans, policies, and funds are governed by ERISA, regardless of the employer's intent. Therefore, employers that offer severance benefits may have to comply with ERISA's requirements despite their intentions to the contrary.

Severance benefits are subject to ERISA if they are a plan, fund, or program under ERISA (ERISA § 3(1) (29 U.S.C. § 1002(1))). The Supreme Court established the basic standard for determining whether the payment of severance benefits is pursuant to a plan, fund, or program. Employers choosing to provide severance agreements should work with counsel who can draft a compliant program.

XI. Retirement, Managing Cash Flow and Helping Participants During COVID-19

155. Has Congress passed new legislation impacting retirement plans?

Yes. The CARES Act passed the U.S. Senate on March 25, and the U.S. House of Representatives on March 27. The President signed the bill into law on March 27, 2020.

156. Are plan sponsors liable for investment losses associated with the COVID-19 virus?

It Depends. Plan fiduciaries are required under ERISA 404 to be prudent in the selection and monitoring of investments. Merely incurring losses as a result of COVID-19 does not necessarily create liability; however, not continuing to monitor investments or limiting participants' ability to change investments may incur liability.

That said, plans that allow participant direction but limit the frequency of changes may need to consider waiving the frequency limitations so that participants are not limited from moving assets in their account.

Additionally, plans that are considering fund line-up changes should consider whether the current market is appropriate to continue a black-out period or start a new black-out period which may constitute a fiduciary breach.

Particular attention should be given to investments in stable value funds or group annuity contracts. As to the former, the status of the funds should be monitored as well as any wrap insurance protection in light of decreasing interest rates.

As to the latter, be cognizant of any restrictions on withdrawals and additional fees that may be imposed in the event of a large volume of withdrawals.

Sponsors should also inquire whether their recordkeeper has adapted to the issues created by COVID-19, such as requiring employees to work remotely, to assure that plan services will not be affected.

157. What can plan sponsors do now to free up cash?

One of the biggest issues impacting plan sponsors is meeting plan contribution requirements, as businesses are impacted by the response to the pandemic.
In the current business climate, engaging service providers in plan design conversations could be timely and valuable. Among the amendments that plan sponsors could consider implementing include:

(1) Reducing or eliminating matching contributions and/or profit-sharing contributions,[2] which could help the employer reduce plan funding requirements; or,

(2) Freezing defined benefit (including cash balance) or money purchase plans to limit required contributions.[3]

Either of these provisions could potentially help plan sponsors manage cash flow differently, which may help them meet other business priorities during this difficult economic climate.

Plan sponsors who are interested reducing employer contributions may consider contacting service providers to:

[2] These changes could impact safe-harbor plan design. Please contact your service providers prior to amending the plan to understand the impact on plan design.

[3] Freezing these types of plans may require advanced notification to participants prior to the change being effective.

(1) Determine what is required to reduce employer matching and/or profit-sharing contributions in 401(k) plans; or

(2) Discuss options for reducing funding requirements in defined benefit and money purchase plans.

Changes to contributions in some defined contribution and defined benefit plans require an amendment to the plan.[4] Defined contribution plans that provide for discretionary employer contributions may require plan sponsor action and notification to employees. Some changes may also accelerate vesting provisions which may have an impact on costs.

158. How can plan sponsors help participants?

To help participants who may be facing financial difficulty, sponsors could amend their plans to offer loans and/or hardship distributions, if the plan does not currently permit them. Plan sponsors can contact their service providers to determine how to amend the plan properly.

Plan loans and hardship withdrawals come with unique compliance requirements. Any changes to requirements due to COVID-19 legislation or regulation will need to be understood, implemented properly and monitored.

Plan sponsors may wish to take the following actions:

(1) Review their procedures for approving loans and hardship distributions to see if there are ways to streamline without sacrificing compliance;

(2) Make sure there is clear understanding between the sponsor, the TPA, and the recordkeeper regarding roles and responsibilities of each for these transactions. Document those procedures in writing to streamline operations and in the event of questions later;

(3) Although it may be tempting to do so to help participants, sponsors should not approve loans or hardship withdrawals that do not conform to the plan terms and to the documented procedures outlined among the parties;
(4) For plan loans, sponsors should understand their role, if any, in making sure plan loans are repaid timely.[5]

159. Have participants' rights to distributions changed?

No. There have been no changes to the current rules requiring separation from service, death, disability or certain in-service distributions in order to receive a distribution. However, plans could be amended to allow distribution of rollover accounts without such requirement.

[4] As noted in an earlier footnote, some changes may require advanced notice to participants prior to becoming effective.
[5] As of this writing (March 24, 2020), Congress is considering legislation regarding distributions from qualified plans.

A key issue with the potential for businesses being impact is whether individuals are being furloughed, laid off, terminated or any other employment action which must be evaluated on the ability to make plan distributions and the possible impact on the vesting of participant accounts.

160. What are the major changes that impact plan sponsors and participants?

There are several changes that impact plan sponsors and participants, including:

(1) Relief impacting "Coronavirus Related Distributions" for qualified participants;

(2) Relief impacting plan loans to qualified participants;

(3) Waiver of Required Minimum Distributions for calendar year 2020;

(4) Changes to single-employer defined benefit plan-funding rules; and

(5) Expanded DOL author

(6) ity to postpone filing deadlines.

161. What changes impact "hardship" distributions? Are there different rules for Coronavirus related distributions?

Traditional hardship distributions are subject to an additional 10% tax on early withdrawals. The CARES Act waives the additional 10% for an individual who takes a distribution on or after January 1 and before December 31, 2020, and meets the following requirements:

(1) Is diagnosed with COVID-19;

(2) Has a spouse or dependent diagnosed with COVID-19;

(3) Experiences adverse financial consequences as a result of being quarantined, furloughed, laid off, having work hours reduced, being unable to work due to lack of childcare due to COVID-19, closing or reducing hours of a business owned or operated by the individual due to COVID-19; OR

(4) Meets other factors as determine by the Treasury Secretary.

In addition, for participants who meet the requirements above:

(1) Up to $100,000 can be withdrawn, aggregated across all qualified plans, 403(b) plans, governmental 457(b) plans or IRAs of the individual;

(2) Tax on the income due to the distribution can be spread over a three-year period; and

(3) Amount distributed can be repaid into the plan (or IRA) over the next three years. Any repayments would not be subject to the plan contribution limitations.

Distributions made pursuant to Coronavirus Related Distribution rules do not have to satisfy other plan related distribution requirements. Coronavirus Related Distributions will be treated as a rollover for the purpose of allowing repayments; however, they will not be subject to mandatory withholding on traditional distributions from plans or IRAs.

Coronavirus-Related Distribution provisions:

(1) Can be adopted immediately, even if the plan does not currently allow for hardship distributions, provided the plan is amended on or before the last day of the first plan year beginning on or after January 1, 2022 (or later if prescribed by the Treasury Secretary[6]).

Plan Sponsor Takeaways for those participants who meet the requirements above:

(1) This is an optional provision that can be implemented immediately;

(2) Verify that tax-reporting service providers are aware of which distributions qualify for special treatment;

(3) Verify that the party approving the distributions, the plan sponsor or service provider, properly evaluates qualification requirements for each impacted participant. Participants are able to self-certify that they meet the requirements;

(4) Make sure the plan is amended properly, if necessary, by the deadline stated above.

162. What changes impact plan loans?

Under the CARES Act, the following relief regarding plan loans is available to participants who meet the requirements identified above regarding Coronavirus Related Distributions:

(1) For plan loans taken between March 27, 2020 and September 23, 2020, the maximum loan amount is doubled from lesser of $50,000 or 50% of the participant's vested account balance to lesser of $100,000 or 100% of the vested account balance for loans to qualified participants;

(2) Participants who have a loan from their account that is due from March 27, 2020 through December 31, 2020, can delay their repayment(s) and extend the term of the loan for up to one year;[7]

[6] Governmental plans may have different deadlines. Plans sponsors should contact their service providers for more information.

7 Interest accrues during the delay period, but the one-year delay is disregarded in determining the term of the loan and the maximum five-year repayment period.

(3) Changes can be adopted immediately, even if the plan does not currently allow for loans, provided the plan is amended on or before the last day of the first plan beginning on or after January 1, 2022 (or later if prescribed by the Treasury Secretary).[8]

Plan Sponsor Takeaways:

(1) This is an optional provision that can be implemented immediately;

(2) A plan amendment is required by the last day of the plan year beginning on or after January 1, 2022, or such later deadline as stated above;[9]

(3) Absent guidance from the IRS or technical correction to the act, it appears employee self-certification is not available related to loans.

163. What changes impact required minimum distributions for 2020?

Required Minimum Distributions (RMDs) from defined contribution plans described in 403(a) and 403(b), eligible (governmental) 457(b) plans, and IRAs are waived for calendar year 2020. The statute does not include qualified plans, so a technical correction may be necessary since it is likely Congress intended to include these plans.

This includes the RMDs for participants that turned 70½ during 2019 and had not taken their distribution prior to January 1, 2020.

This change also provides that amounts that would have been RMDs, but for the CARES Act, that are (or were) distributed, are eligible rollover amounts that can be rolled over within 60 days. The CARES Act also excludes such amounts from the mandatory withholding requirements even though such amount could be rolled over.

Plan Sponsor Takeaways:

(1) This is an optional provision that can be made available immediately;

(2) Since it is optional, plan sponsors will need to make the decision on implementation and must then communicate the decision to service providers. Some plans experienced operational failures in 2009 because plan sponsors and service providers were not aligned, resulting in Voluntary Correction Program (VCP) filings with the IRS;

(3) For plan sponsors who choose to adopt this provision, the plan can be amended retroactively on or before the last day of the first plan year beginning on or after

[8] Governmental plans may have different deadlines. Plan sponsors should contact their service providers for more information.
[9] Caution: Plan sponsors may wish to contact their service providers or counsel to determine the impact on pre-approved plan reliance, if the IRS does not provide additional guidance.

January 1, 2022. For governmental plans, the deadline to amend is on or before the last day of the first plan year beginning on or after January 1, 2024.

164. What changes impact single-employer defined benefit plans?

Under the CARES Act, employers with single-employer defined benefit plans, including cash balance plans, will be given more time to meet their funding obligations by delaying the date for contributions due in 2020 until January 1, 2021. The delay applies both to final contributions due in 2020 for 2019 plan years as well as quarterly contributions due during the year. Delayed contributions will be subject to interest for the accruing period at the effect rate of interest for the plan, for the plan year which includes the payment date.

Additionally, plan sponsors can treat the plan's adjusted funding target attainment percentage for the last plan year ending before January 1, 2020 as the target for plan years which include 2020.

Plan Sponsor Takeaways:

(1) This applies immediately and can provide cash flow relief;

(2) No plan amendments are required to implement this provision;

(3) Plans who may not be able to make contributions to a defined benefit or cash balance plan in future years may wish to consider freezing or terminating their plans. Those sponsors should contact their service providers to discuss options.

165. Will DOL extend the deadlines for meeting certain filing requirements?

This is likely, given that under the legislation, DOL has been granted authority to extend deadlines imposed under ERISA. In a March 16 letter, the American Retirement Association has asked for relief on several filing requirements, including extensions of the following:

(1) Deadline to file Form 5500;

(2) Deadline for correcting an ADP or ACP test; and

(3) Period for distributing excess contributions from a plan.

Plan Sponsor Takeaway: Although DOL has been granted authority to extend deadlines, the agency has not issued guidance yet. Plan sponsors should check with their service providers regarding any changes.

166. Have the IRS or DOL issued any other guidance impacting retirement plans?

Separate from the CARES Act, on March 27, 2020, the IRS announced that the March 31, 2020 deadline for adopting a 403(b) plan document has been extended to June 30, 2020.

In addition, the IRS has also announced that the April 30, 2020 deadline for adopting a pre-approved defined benefit plan document has been extended to July 31, 2020.
Plan Sponsor Takeaway: This extension provides an additional 3 months to finalize documents that have not otherwise been adopted

167. Next steps?

Signing the CARES Act into law is an important step; however, there could very well be others in the days and weeks ahead, including:

(1) Given the authority granted to them under the CARES Act, it is possible that DOL will issue further guidance regarding filing deadlines;

(2) IRS may issue additional guidance impacting plans and IRAs;

(3) The American Retirement Association (ARA) has indicated that they will continue "to push for defined contribution funding relief"; and,

(4) As mentioned earlier in the brief, it is possible that Congress could issue technical corrections and/or additional bills to address the COVID-19 pandemic.

We will continue to monitor developments and update you as we know more.

HUB is here to help.

Get the latest information, guidance and resources on Coronavirus (COVID-19) to help you protect what matters most at **hubinternational.com/coronavirus**. For additional support, please reach out to your local HUB office.