Frequently Asked Questions

Responding to COVID-19 in the Workplace

Monday, June 22, 2020

HUB

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This document is updated weekly.
***Italicized* text denotes a change from the prior week's document.**
Underlined text provides a hyperlink to source references.

Please note that HUB International has developed the Back to Business Playbook: Compliance and Risk Management Considerations during the COVID-19 Pandemic.

Download the Playbook to get guidance on developing your risk mitigation strategy and coverage-specific issues.

This Week's Changes

Section	Question	Description of Changes
Employee Relations: Americans with Disabilities Act	71	Under the ADA may an employer require antibody testing before permitting employees to re-enter the workplace?

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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.

I. Occupational Health and Safety

i. Compliance

1. **Are employers still required to comply with all current OSHA standards?**

   Yes, But. On May 19, 2020 Patrick Kapust (acting director for the Directorate of Enforcement Programs for OSHA) stated in an updated enforcement memorandum that as workplaces reopen, OSHA will continue to ensure safe and healthy conditions for America's working men and women pursuant to the following framework:

   In geographic areas where community spread of COVID-19 has significantly decreased, OSHA will return to the inspection planning policy that OSHA relied on prior to the start of the COVID-19 health crises, as outlined in the OSHA Field Operations Manual (FOM), CPL 02-00-164, Chapter 2, when prioritizing reported events for inspections, except that:

   (1) OSHA will continue to prioritize COVID-19 cases;
   (2) OSHA will utilize non-formal phone/fax investigations or rapid response investigations in circumstances where OSHA has historically performed such inspections (e.g., to address formal complaints) when necessary to assure effective and efficient use of resources to address COVID-19-related events; and
   (3) In all instances, the Area Director (AD) will ensure that CSHOs utilize the appropriate precautions and personal protective equipment (PPE) when performing inspections related to COVID-19.

   In geographic areas experiencing either sustained elevated community transmission or a resurgence in community transmission of COVID-19, ADs will exercise their discretion, including consideration of available resources, to:

   (1) Continue prioritizing COVID-19 fatalities and imminent danger exposures for inspection. Particular attention for on-site inspections will be given to high-risk workplaces, such as hospitals and other healthcare providers treating patients with COVID-19, as well as workplaces, with high numbers of complaints or known COVID-19 cases.
   (2) Where resources are insufficient to allow for on-site inspections, the inspections for these types of reported events will be initiated remotely with an expectation that an on-site component will be performed if/when resources become available to do so.

(3) Where limitations on resources are such that neither an on-site nor remote inspection is possible, OSHA will investigate these types of reported events using a rapid response investigation (RRI) to identify any hazards, provide abatement assistance, and confirm abatement.

(4) OSHA will develop a program to conduct monitoring inspections from a randomized sampling of fatality or imminent danger cases where inspections were not conducted due to resource limitations.

(5) Utilize non-formal phone/fax investigation instead of an on-site inspection in industries where doing so can address the relevant hazard(s); and

(6) Ensure that CSHOs utilize the appropriate precautions and PPE to protect against potential exposures to COVID-19.

2. Is OSHA inspecting businesses that have had potential exposure to SARS-CoV-2?

Yes. OSHA stated in their updated enforcement memorandum that prior to any inspection related to COVID-19, each AD (Area Director) should evaluate the potential risk level of exposure to SARS-CoV-2 at the workplace, and prioritize his or her resources. When the AD determines an on-site inspection is warranted in light of this Updated Interim Enforcement Response Plan, CSHOs must carefully evaluate potential hazards and limit any possible exposure(s).

Whenever CSHOs identify a workplace with potential exposure to SARS-CoV-2—and determine that an inspection is warranted under this Updated Interim Enforcement Response Plan—they should immediately coordinate with their supervisors and regional office, and, if necessary, contact the Office of Occupational Medicine and Nursing (OOMN). OOMN may then serve as a liaison with relevant public health authorities, and can facilitate Medical Access Orders (MAOs) to obtain worker medical records from employers and healthcare providers.

In most cases, fatalities, imminent danger reports and life-critical unprogrammed activities (e.g., falls, struck-by, caught-in/between, or electrocutions) will result in on-site inspections. Formal complaints, such as complaints related to SARS-CoV-2 exposures in meat processing, may also be inspected on-site, based on case-specific facts or resource limitations constraining such investigations.

3. Do OSHA's regulations and standards apply to the home office? Are there any other Federal laws employers need to worry about if employees work from home?

No, However. The Department of Labor's Occupational Safety and Health Administration (OSHA) does not have any regulations regarding telework in home offices. The agency issued a directive in February 2000 stating that the agency will not conduct inspections of employees' home offices, will not hold employers liable for employees' home offices, and does not expect employers to inspect the home offices of their employees. If OSHA receives a complaint about a home office, the complainant will be advised of OSHA's

policy. If an employee makes a specific request, OSHA may informally let employers know of complaints about home office conditions but will not follow-up with the employer or employee.

Employers who are required to keep records of work-related injuries and illnesses will continue to be responsible for keeping such records for injuries and illnesses occurring in a home office.

4. Is there guidance from OSHA on how to reduce the risk of workplace exposure to COVID-19?

Yes. OSHA updated their April 2020 guidance on May 19, 2020 regarding their Interim Enforcement Response Plan for Coronavirus Disease 2019. Worker risk of occupational exposure to COVID-19 during an outbreak may depend in part on the industry type and need for contact within 6 feet of people known to have, or suspected of having, COVID-19. OSHA has divided job tasks into four risk exposure levels:

(1) Lower Exposure Risk: Lower exposure risk (caution) jobs are those that do not require contact with people known to be, or suspected of being, infected with COVID-19 nor frequent close contact with (i.e., within 6 feet of) the general public. Workers in this category have minimal occupational contact with the public and other coworkers.

(2) Medium Exposure Risk: Jobs that require frequent/close contact with (*i.e.,* within 6 feet of) people who may be infected, but who are not known or suspected patients. Workers in this category include those who may have contact with the general public (e.g., schools, high-population-density work environments, some high-volume retail settings), including individuals returning from locations with widespread COVID-19 transmission.

(3) High Exposure Risk: Jobs with a high potential for exposure to known or suspected sources of COVID-19. Workers in this category include healthcare delivery, healthcare support (hospital staff who must enter patients' rooms), medical transport, and mortuary workers exposed to known or suspected COVID-19 patients or bodies of people known to have, or suspected of having, COVID-19 at the time of death.

(4) Very High Exposure Risk: Jobs with a high potential for exposure to known or suspected sources of COVID-19 during specific medical, postmortem, or laboratory procedures. Workers include healthcare and morgue workers performing aerosol-generating procedures on or collecting/handling specimens from potentially infectious patients or bodies of people known to have, or suspected of having, COVID-19 at the time of death.

5. **Has OSHA issued guidance on additional controls for Lower Exposure Risk (Caution) jobs?**

   Yes. Additional engineering controls and personnel protective equipment are not recommended by OSHA for workers in the lower exposure (caution) risk group, but there is guidance for administrative controls:

   (1) Monitor public health communications about COVID-19 recommendations and ensure that workers have access to that information.

   (2) Collaborate with workers to designate effective means of communicating important COVID-19 information.

6. **Has OSHA issued guidance on additional controls for Medium Exposure Risk jobs?**

   Yes. OSHA has issued the following guidance:

   (1) Engineering Controls - Install physical barriers, such as clear plastic sneeze guards, where feasible.

   (2) Administrative Controls:
   - **(a)** Consider offering face masks to ill employees and customers to contain respiratory secretions until they are able leave the workplace (i.e., for medical evaluation/care or to return home). In the event of a shortage of masks, a reusable face shield that can be decontaminated may be an acceptable method of protecting against droplet transmission.
   - **(b)** Keep customers informed about symptoms of COVID-19 and ask sick customers to minimize contact with workers until healthy again, such as by posting signs about COVID-19 in stores where sick customers may visit (e.g., pharmacies) or including COVID-19 information in automated messages sent when prescriptions are ready for pick up.
   - **(c)** Where appropriate, limit customers' and the public's access to the worksite, or restrict access to only certain workplace areas.
   - **(d)** Consider strategies to minimize face-to-face contact (e.g., drive through windows, phone-based communication, telework).
   - **(e)** Communicate the availability of medical screening or other worker health resources (e.g., on-site nurse; telemedicine services).

   (3) Personal Protective Equipment:
   - **(a)** When selecting PPE, consider factors such as function, fit, decontamination ability, disposal, and cost. Sometimes, when PPE will have to be used repeatedly for a long period of time, a more expensive and durable type of PPE may be less expensive overall than disposable PPE. Each employer should select the combination of PPE that protects workers specific to their workplace.

(b) Workers with medium exposure risk may need to wear some combination of gloves, a gown, a face mask, and/or a face shield or goggles. PPE ensembles for workers in the medium exposure risk category will vary by work task, the results of the employer's hazard assessment, and the types of exposures workers have on the job.

(c) In rare situations that would require workers in this risk category to use respirators, see the PPE section beginning on page 14 of OSHA's booklet – Guidance on Preparing Workplaces for COVID-19, which provides more details about respirators.

7. Has OSHA issued guidance on additional controls for High and Very High Exposure Risk jobs?

Yes. OSHA has issued the following guidance:

(1) Engineering Controls:

(a) Ensure appropriate air-handling systems are installed and maintained in healthcare facilities.

(b) CDC recommends that patients with known or suspected COVID-19 (i.e., person under investigation) should be placed in an airborne infection isolation room (AIIR), if available.

(c) Use isolation rooms when available for performing aerosol-generating procedures on patients with known or suspected COVID-19. For postmortem activities, use autopsy suites or other similar isolation facilities when performing aerosol-generating procedures on the bodies of people who are known to have, or suspected of having, COVID-19 at the time of their death. See the CDC postmortem guidance.

(d) Use special precautions associated with Biosafety Level 3 when handling specimens from known or suspected COVID-19 patients.

(2) Administrative Controls:

(a) If working in a healthcare facility, follow existing guidelines and facility standards of practice for identifying and isolating infected individuals and for protecting workers.

(b) Develop and implement policies that reduce exposure, such as cohorting (i.e., grouping) COVID-19 patients when single rooms are not available.

(c) Post signs requesting patients and family members to immediately report symptoms of respiratory illness on arrival at the healthcare facility and use disposable face masks.

(d) Consider offering enhanced medical monitoring of workers during COVID-19 outbreaks.

(e) Provide all workers with job-specific education and training on preventing transmission of COVID-19, including initial and routine/refresher training.

(f) Ensure that psychological and behavioral support is available to address employee stress.

(3) Safe Work Practices: Provide emergency responders and other essential personnel who may be exposed while working away from fixed facilities with alcohol-based hand rubs containing at least 60% alcohol for decontamination in the field.

(4) Personal Protective Equipment:

- **(a)** Most workers at high or very high exposure risk likely need to wear gloves, a gown, a face shield or goggles, and either a face mask or a respirator, depending on their job tasks and exposure risks.
- **(b)** Those who work closely with (either in contact with or within 6 feet of) patients known to be, or suspected of being infected with COVID-19, should wear respirators.
- **(c)** PPE ensembles may vary, especially for workers in laboratories or morgue/mortuary facilities who may need additional protection against blood, body fluids, chemicals, and other materials to which they may be exposed. Additional PPE may include medical/surgical gowns, fluid-resistant coveralls, aprons, or other disposable or reusable protective clothing. Gowns should be large enough to cover the areas requiring protection.

8. Is OSHA providing interim or temporary guidance on pre-pandemic regulations?

Yes. As the pandemic evolves OSHA has made adjustments to certain regulations that were in effect prior to the pandemic. These changes may be only for specific occupations or industries. Temporary enforcement guidelines currently in effect are:

(1) Healthcare Respiratory Protection Annual Fit-Testing for N95 Filtering Facepieces During the COVID-19 Outbreak (03/14/20)

This memorandum provides temporary enforcement guidance to Compliance Safety and Health Officers for enforcing the Respiratory Protection standard with regard to supply shortages of N95 filtering facepiece respirators due to the COVID-19 outbreak. The Respiratory Protection standard has specific requirements, including a written program, medical evaluation, fit-testing, and training, that employers must follow to ensure workers are provided and are properly using appropriate respiratory protection when necessary to protect their health.

OSHA field offices shall exercise enforcement discretion concerning the annual fit testing requirement, as long as employers:

- **(a)** Make a good-faith effort to comply with the Respiratory Protection standard;
- **(b)** Use only NIOSH-certified respirators;
- **(c)** Implement CDC and OSHA strategies for optimizing the supply of N95 filtering facepiece respirators and prioritizing their use, as discussed above;

(d) Perform initial fit tests for each HCP with the same model, style, and size respirator that the worker will be required to wear for protection against COVID-19;
(e) Inform workers that the employer is temporarily suspending the annual fit testing of N95 filtering facepiece respirators to preserve and prioritize the supply of respirators for use in situations where they are required to be worn;
(f) Explain to workers the importance of performing a user seal check (i.e., a fit check) at each donning to make sure they are getting an adequate seal from their respirator, in accordance with the procedures outlined in the Respiratory Protection standard.
(g) Conduct a fit test if they observe visual changes in the employee's physical condition that could affect respirator fit (e.g., facial scarring, dental changes, cosmetic surgery, or obvious changes in body weight) and explain to workers that, if their face shape has changed since their last fit test, they may no longer be getting a good facial seal with the respirator and, thus, are not being adequately protected; and,
(h) Remind workers that they should inform their supervisor or their respirator program administrator if the integrity and/or fit of their N95 filtering facepiece respirator is compromised.

(2) Enforcement Guidance for Respiratory Protection and the N95 Shortage Due to the Coronavirus Disease 2019 (COVID-19) Pandemic (04/03/20)

This memorandum provides interim guidance to Compliance Safety and Health Officers for enforcing the Respiratory Protection standard, 29 CFR § 1910.134, and certain other health standards, with regard to supply shortages of disposable N95 filtering facepiece respirators. Specifically, it outlines enforcement discretion to permit the extended use and reuse of respirators, as well as the use of respirators that are beyond their manufacturer's recommended shelf life (sometimes referred to as "expired"). This guidance applies in all industries, including workplaces in which:

(1) Healthcare personnel (HCP) are exposed to patients with suspected or confirmed coronavirus disease 2019 (COVID-19) and other sources of SARS-CoV-2 (the virus that causes COVID-19).
(2) Protection of workers exposed to other respiratory hazards is impacted by the shortage resulting from the response to the COVID-19 pandemic. Such workplace respiratory hazards may be covered by one or more substance-specific health standards.

Our previous memorandum, Temporary Enforcement Guidance - Healthcare Respiratory Protection Annual Fit-Testing for N95 Filtering Facepieces During the COVID-19 Outbreak, issued on March 14, 2020, provided temporary guidance for 29 CFR § 1910.134, regarding required annual fit testing of HCP.

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This memorandum provides additional guidance on enforcing OSHA's respirator standard for all workers, including HCP. In light of the essential need for adequate supplies of respirators, this memorandum will take effect immediately and remain in effect until further notice. This guidance is intended to be time-limited to the current public health crisis.

(3) Guidance for Use of Respiratory Protection Equipment Certified under Standards of Other Countries or Jurisdictions During the Coronavirus Disease 2019 (COVID-19) Pandemic (04/03/20)

This memorandum provides interim guidance to Compliance Safety and Health Officers for enforcing the Respiratory Protection standard, 29 CFR § 1910.134, and certain other health standards, with regard to supply shortages of disposable N95 filtering facepiece respirators (FFRs). Specifically, it outlines enforcement discretion to permit the use of FFRs and air-purifying elastomeric respirators that are either:

(1) Certified under certain standards of other countries or jurisdictions, as specified below; or
(2) When equipment certified under standards of other countries or jurisdictions is not available, previously certified under the standards of other countries or jurisdictions but are beyond their manufacturer's recommended shelf life (i.e., expired).

This guidance applies in all industries, including workplaces in which:

(a) Healthcare personnel (HCP) are exposed to patients with suspected or confirmed coronavirus disease 2019 (COVID-19) and other sources of SARS-CoV-2 (the virus that causes COVID-19).
(b) Protection of workers exposed to other respiratory hazards is impacted by the shortage resulting from the response to the COVID-19 pandemic. Such workplace respiratory hazards may be covered by one or more substance-specific health standards.

This memorandum provides additional guidance on enforcing OSHA's Respiratory Protection standard (and other health standards that require respiratory protection) for all workers, including health care providers. In light of the essential need for adequate supplies of respirators, this memorandum will take effect immediately and remain in effect until further notice. This guidance is intended to be time-limited to the current public health crisis.

(4) Expanded Temporary Enforcement Guidance on Respiratory Protection Fit-Testing for N95 Filtering Facepieces in All Industries (04/03/20)

This memorandum expands temporary enforcement guidance provided in OSHA's March 14, 2020, memorandum to Compliance Safety and Health Officers for enforcing annual fit-testing requirements of the Respiratory Protection standard, 29 CFR § 1910.134(f)(2), with regard to supply shortages of N95s or other filtering facepiece respirators (FFRs) due to the coronavirus disease 2019 (COVID-19) pandemic.[1] The March 14 guidance, which applied to healthcare, now applies to all workplaces covered by OSHA where there is required use of respirators. This memorandum will take effect immediately and remain in effect until further notice. This guidance is intended to be time-limited to the current public health crisis. Please frequently check OSHA's webpage at www.osha.gov/coronavirus for updates.

OSHA field offices will exercise enforcement discretion concerning the annual fit-testing requirements, as long as employers have made good-faith efforts to comply with the requirements of the Respiratory Protection standard and to follow the steps outlined in the March 14, 2020 memorandum. Employers should also assess their engineering controls, work practices, and administrative controls on an ongoing basis to identify any changes they can make to decrease the need for N95s or other FFRs. When reassessing these types of controls and practices, employers should, for example, consider whether it is possible to increase the use of wet methods or portable local exhaust systems or to move operations outdoors. In some instances, an employer may also consider taking steps to temporarily suspend certain non-essential operations.

Further, given additional concerns regarding a shortage of fit-testing kits and test solutions (e.g., Bitrex™, isoamyl acetate), employers are further encouraged to take necessary steps to prioritize use of fit-testing equipment to protect employees who must use respirators for high-hazard procedures.

In the absence of quantitative or qualitative fit-testing capabilities required under mandatory Appendix A to 29 CFR § 1910.134 Appendix A, the following additional guidance is provided to assist with decision-making with respect to use of N95s or other FFRs. Most respirator manufacturers produce multiple models that use the same basic head form for size/fit. Manufacturers may have a crosswalk (i.e., a list of their respirators with equivalent fit). Therefore, if a user's respirator model (e.g., model x) is out of stock, employers should consult the manufacturer to see if it recommends a different model (e.g., model y or z) that fits similarly to the model (x) used previously by employees.

(5) Enforcement Guidance on Decontamination of Filtering Facepiece Respirators in Healthcare (04/24/20)

This memorandum provides interim guidance to Compliance Safety and Health Officers for enforcing the Respiratory Protection standard, with regard to the reuse of filtering facepiece respirators that have been decontaminated through

certain methods. This guidance applies in workplaces in which workers need respirators to protect against exposure to infectious agents that could be inhaled into the respiratory system, including during care of patients with suspected or confirmed coronavirus disease 2019 (COVID-19) and other activities that could result in respiratory exposure to SARS-CoV-2 (the virus that causes COVID-19). This guidance is intended to be time-limited to the current public health crisis.

9. **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.

10. **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.

11. **Has OSHA, CMS, CDC, or other government agencies provided any guidance for specific types of occupations?**

    Yes. Various governmental bodies have provided guidance on specific occupations. HUB has reviewed those changes to provide guidance for those industries:

    (1) Agriculture and Farm Safety Plan Guidance;

    (2) Cannabis Agribusiness;

    (3) Construction Safety Plan Guidance;

        (1) Prevention and Control;

    (4) Home Health Agency and Worker Safety;

    (5) Nursing Home and Senior Care Prevention and Control;

    (6) Hospitality Prevention and Control; and,

Specific OSHA Alerts are below:

(1) Manufacturing Workers and Employers (CDC and OSHA);

(2) Healthcare Workers and Employers;

(3) Dentistry Workers and Employers;

(4) Emergency Response Workers and Employers;

(5) Meat and Poultry Processing Workers and Employers (CDC and OSHA);

(6) Retail Workers and Employers in Critical & High Customer-Volume Environments;

(7) Environmental Services Workers and Employers;

(8) Agriculture Workers;

(9) Stockroom and Loading Dock Workers; and

(10) Dental Practitioners.

ii. Record Keeping, Reporting, and Notices

12. 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.

13. Do I need to treat an employee's documented work-related exposure as a medical record?

Yes. OSHA stated that a record concerning an employee's work-related exposure to SARS-CoV-2 is an employee exposure record under 29 CFR § 1910.1020(c)(5). A record of COVID-19 medical test results, medical evaluations, or medical treatment is considered

an employee medical record within the meaning of 29 CFR § 1910.1020(c)(6). Medical records are to be handled in accordance with the procedures set forth at 29 CFR § 1913.10, Rules of Agency Practice and Procedure Concerning OSHA Access to Employee Medical Records.

14. Is there guidance on what constitutes a confirmed case?

Yes. The CDC has stated that a confirmed case of COVID-19 occurs when individuals with at least one respiratory specimen tests positive for the virus that causes COVID-19.

15. Is a COVID-19 case considered an OSHA recordable?

It Depends. On May 19, 2020 the DOL provided the Revised Enforcement Guidance for Recording Cases of Coronavirus Disease 2019 (COVID-19). Under OSHA's recordkeeping requirements, COVID-19 is a recordable illness, and thus employers are responsible for recording cases of COVID-19, if:

(1) The case is a confirmed case of COVID-19, as defined by the Centers for Disease Control and Prevention (CDC);

(2) The case is work-related as defined by 29 CFR § 1904.5; and

(3) The case involves one or more of the general recording criteria set forth in 29 CFR § 1904.7.

Additionally, OSHA is exercising its enforcement discretion in order to provide certainty to employers and workers. Accordingly, until further notice, OSHA will enforce the recordkeeping requirements of 29 CFR 1904 for employee COVID-19 illnesses for all employers according to the guidelines below. Recording a COVID-19 illness does not, of itself, mean that the employer has violated any OSHA standard. And pursuant to existing regulations, employers with 10 or fewer employees and certain employers in low hazard industries have no recording obligations; they need only report work-related COVID-19 illnesses that result in a fatality or an employee's in-patient hospitalization, amputation, or loss of an eye.

Because of the difficulty with determining work-relatedness, OSHA is exercising enforcement discretion to assess employers' efforts in making work-related determinations.

In determining whether an employer has complied with this obligation and made a reasonable determination of work-relatedness, CSHOs should apply the following considerations:

(1) The reasonableness of the employer's investigation into work-relatedness. Employers, especially small employers, should not be expected to undertake extensive medical inquiries, given employee privacy concerns and most employers' lack of expertise in this area.

It is sufficient in most circumstances for the employer, when it learns of an employee's COVID-19 illness, (1) to ask the employee how he believes he contracted the COVID-19 illness; (2) while respecting employee privacy, discuss with the employee his work and out-of-work activities that may have led to the COVID-19 illness; and (3) review the employee's work environment for potential SARS-CoV-2 exposure. The review in (3) should be informed by any other instances of workers in that environment contracting COVID-19 illness.

(2) The evidence available to the employer. The evidence that a COVID-19 illness was work-related should be considered based on the information reasonably available to the employer at the time it made its work-relatedness determination. If the employer later learns more information related to an employee's COVID-19 illness, then that information should be taken into account as well in determining whether an employer made a reasonable work-relatedness determination.

(3) The evidence that a COVID-19 illness was contracted at work. CSHOs should take into account all reasonably available evidence, in the manner described above, to determine whether an employer has complied with its recording obligation. This cannot be reduced to a ready formula, but certain types of evidence may weigh in favor of or against work-relatedness. For instance:

(1) COVID-19 illnesses are likely work-related when several cases develop among workers who work closely together and there is no alternative explanation.
(2) An employee's COVID-19 illness is likely work-related if it is contracted shortly after lengthy, close exposure to a particular customer or coworker who has a confirmed case of COVID-19 and there is no alternative explanation.
(3) An employee's COVID-19 illness is likely work-related if his job duties include having frequent, close exposure to the general public in a locality with ongoing community transmission and there is no alternative explanation.
(4) An employee's COVID-19 illness is likely not work-related if she is the only worker to contract COVID-19 in her vicinity and her job duties do not include having frequent contact with the general public, regardless of the rate of community spread.
(5) An employee's COVID-19 illness is likely not work-related if he, outside the workplace, closely and frequently associates with someone (e.g., a family member, significant other, or close friend) who (1) has COVID-19; (2) is not a coworker, and (3) exposes the employee during the period in which the individual is likely infectious.

If, after the reasonable and good faith inquiry described above, the employer cannot determine whether it is more likely than not that exposure in the workplace played a causal

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role with respect to a particular case of COVID-19, the employer does not need to record that COVID-19 illness. In all events, it is important as a matter of worker health and safety, as well as public health, for an employer to examine COVID-19 cases among workers and respond appropriately to protect workers, regardless of whether a case is ultimately determined to be work-related.

16. 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.

17. 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. Impacts of COVID-19 on Business Insurance Coverages

i. Impacts of COVID-19 on Workers' Compensation Insurance Coverages

18. If my employee informs me he/she is positive for COVID-19, should I 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.

19. 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. Some of the factors that will be reviewed to determine compensability will be was the disease contracted during course of employment and/or was it contracted due to conditions peculiar to the work?

20. Has the government mandated coverage for workers' compensation?

It Depends. Coverage is specifically aligned with state and jurisdictional guidelines. Certain states (WA, CO, MI) have asked carriers to provide coverage in the quarantine stage for health care and first responder workers. At this time, Washington State is the only state to have done so given their unique WC program. The application of this coverage by the respective state governments evolve daily. To that end, Workers' Compensation laws will not address COVID-19 directly (unless a state has taken specific steps to address the question of coverage for employees unable to work due to the virus). Each state will have their own response to the crisis.

21. 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.

22. 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.

23. If me or my employee files a claim 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.

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.

24. What should I be thinking of or documenting when I file a Coronavirus Insurance claim?

(1) Was the worker exposed to someone with COVID-19 and how?

(2) When did the symptoms occur?

(3) Did they contract in the course and scope of employment?

(4) Provide employee documents as you typically would when filing a claim.

ii. Impacts of COVID-19 on Business Interruption Insurance Coverages

25. 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.

26. 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. Business interruption coverage historically requires a degree of damage to the insured's property. At this time, the carriers have not recognized that contamination constitutes damage to the insured's covered property. As business interruption coverage requires some damage to the insured's property, supply chain and similar business losses may not be covered.
It should be noted that each state's respective Department of Insurance may issues directives, such as California which stated "California law requires that all of these claims must be forwarded and reported to the carrier."

27. If I file a claim 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.

Business Interruption policies will be reviewed upon the following:

(1) Policy language, endorsements, and exclusions will be reviewed against any orders from the government that may alter or impact those endorsements and/or exclusions.
(2) 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.

28. What should I be thinking of or documenting when I file a Coronavirus Insurance claim?

(1) Compile all financial and cleanup data and supporting documents as it relates to your business.
(2) Steps taken to continue in business despite the lack of supplies should also be recorded, for submissions to the carrier or government agency. This includes additional costs of using substitute supplier or a cost of changing operations to continue in business, including modifications in process or materials used or change in business plan.

iii. Impacts of COVID-19 on Cyber Insurance Coverages

29. 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.

30. What should I be thinking of or documenting when I file a Coronavirus Insurance claim?

(1) Retain all related and relevant e-mails and communications; and
(2) Compile all financial data and documentation related to the claim.

iv. Impacts of COVID-19 on Event Insurance Coverages

31. 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. If the event was due to take place in a country subject to travel bans or limits on public gatherings timely filing with the carrier is essential.

v. Impacts of COVID-19 on Directors' and Officers' Insurance Coverages

32. 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.

Shareholders may sue corporate officers for economic loss resulting from inadequate response to coronavirus. Most D&O policies exclude bodily injury and may also exclude virus related claims. Check these policies for pollution, bacteria or virus exclusions.

vi. Impacts of COVID-19 on General Liability Insurance Coverages

33. Will my company be liable for contamination negligence claims?

It Depends. Third-party liability claims for bodily injury are being filed against policyholders for failure to mitigate or warn others of risk of contamination. These claims should also be submitted to the insurance carrier, even though many general liability policies have an exclusion for bacteria, viruses or the coronavirus.

vii. COVID-19 General Administrative Claims Guidance

34. What should I be thinking of or documenting when I file a Coronavirus Insurance claim?

Other Lines: Retain all documentation for costs/expenses incurred, damages alleged by any party (e.g., emails, text messages, etc.), and any contracts you may have entered into during the pandemic.

35. 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.

Other Lines: there is minimal information with respect to all other lines of coverage at this time; however, it is recommended that you maintain in contact with your carrier and broker to determine any changes in coverage or your state's department of insurance guidance.

III. Employee Paid Compensation Rules

(includes updated DOL FLSA FAQ)

36. Can my employees "volunteer" to help out without pay?

Generally, No. In general, covered, nonexempt workers working for private, for-profit employers have to be paid at least the minimum wage and cannot volunteer their services. Check with DOL for the rules governing the circumstances where volunteering in the public and private, non-profit sectors may be allowed.

37. What are an employer's obligations to an employee who is under government-imposed quarantine?

The Wage and Hour Division of the DOL WHD 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.

38. Can an employee be required to perform work outside of the employee's job description?

Yes. The FLSA does not limit the types of work employees age 18 and older may be required to perform. However, there are restrictions on what work employees under the age of 18 can do. This is true whether or not the work asked of the employee is listed in the employee's job description.

39. If individuals volunteer for a public agency, are they entitled to compensation?

Individuals who volunteer their services to a public agency (such as a state, parish, city or county government) in an emergency capacity are not considered employees due compensation under the FLSA if they:

(1) Perform such services for civic, charitable or humanitarian reasons without promise, expectation, or receipt of compensation. The volunteer performing such service may, however, be paid expenses, reasonable benefits or a nominal fee to perform such services; and,
(2) Offer their services freely and without coercion, direct or implied; and,
(3) Are not otherwise employed by the same public agency to perform the same services as those for which they propose to volunteer.

40. If individuals volunteer for a private, not-for-profit organization, are they entitled to compensation?

Individuals who volunteer their services in an emergency relief capacity to private not-for-profit organizations for civic, religious or humanitarian objectives, without contemplation or receipt of compensation, are not considered employees due compensation under the FLSA. However, employees of such organizations may not volunteer to perform on an uncompensated basis the same services they are employed to perform.

Where employers are requested to furnish their services, including their employees, in emergency circumstances under Federal, state or local general police powers, the employer's employees will be considered employees of the government while rendering such services. No hours spent on the disaster relief services are counted as hours worked for the employer under the FLSA.

41. May an employer encourage or require employees to telework (i.e., work from an alternative location such as home) as an infection control strategy?

Yes. An employer may encourage or require employees to telework as an infection-control or prevention strategy, including based on timely information from public health authorities about pandemics, public health emergencies, or other similar conditions. Telework also may be a reasonable accommodation.
Of course, employers must not single out employees either to telework or to continue reporting to the workplace on a basis prohibited by any of the EEO laws.

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

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.

43. In the event an organization bars employees from working from their current place of business and requires them to work at home, will employers have to pay those employees who are unable to work from home?

Under the FLSA, employers generally only have to pay employees for the hours they actually work, whether at home or at the employer's office. However, employers must pay 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 must receive their full salary in any week in which they perform any work, subject to certain very limited exceptions.

44. Are there any special recordkeeping rules we must follow for our teleworking employees?

The FLSA and its implementing regulations do not prevent employers from implementing telework or other flexible work arrangements allowing employees to work from home. Employers would still be required to maintain an accurate record of hours worked for all employees, including those participating in telework or other flexible work arrangements; and to pay no less than the minimum wage for all hours worked and to pay at least one and one-half times the employee's regular rate of pay for all hours worked over 40 in a workweek to non-exempt employees.

Employers are encouraged to work with their employees to establish hours of work for employees who telework and a mechanism for recording each teleworking employee's hours of work.

45. In the event an employer brings on temporary employees from a staffing agency to supplement its workforce due to staffing shortages, is the employer liable if the temporary employees are not paid in accordance with the wage requirements of the FLSA?

Under the FLSA, an employee may be employed by one or more individuals or entities. If one or more of these employers are deemed joint employers, they may both be responsible—and jointly and severally liable—for the employee's required minimum wage and overtime pay. The U.S. Department of Labor recently updated and revised its regulations providing guidance regarding joint employer status under the FLSA. The final rule provides updated guidance for determining joint employer status when an employee performs work for his or her employer that simultaneously benefits another individual or entity. The effective date of the final rule is March 16, 2020.

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.

IV. Ability to Work and Employee Attendance

50. As a best practice, and in advance of having some or all employees return to the workplace, are there ways for an employer to invite employees to request flexibility in work arrangements?

Yes. The ADA and the Rehabilitation Act permit employers to make information available in advance to all employees about who to contact – if they wish – to request accommodation for a disability that they may need upon return to the workplace, even if no date has been announced for their return. If requests are received in advance, the employer may begin the interactive process. An employer may choose to include in such a notice all the CDC-listed medical conditions that may place people at higher risk of serious illness if they contract COVID-19, provide instructions about who to contact, and explain that the employer is willing to consider on a case-by-case basis any requests from employees who have these or other medical conditions.

An employer also may send a general notice to all employees who are designated for returning to the workplace, noting that the employer is willing to consider requests for accommodation or flexibilities on an individualized basis. The employer should specify if the contacts differ depending on the reason for the request – for example, if the office or person to contact is different for employees with disabilities or pregnant workers than for employees whose request is based on age or child-care responsibilities.

Either approach is consistent with the ADEA, the ADA, and the May 29, 2020 CDC guidance that emphasizes the importance of employers providing accommodations or flexibilities to employees who, due to age or certain medical conditions, are at higher risk for severe illness.

Regardless of the approach, however, employers should ensure that whoever receives inquiries knows how to handle them consistent with the different federal employment nondiscrimination laws that may apply, for instance, with respect to accommodations due to a medical condition, a religious belief, or pregnancy.

51. What should an employer do if an employee entering the worksite requests an alternative method of screening due to a medical condition?

This is a request for reasonable accommodation, and an employer should proceed as it would for any other request for accommodation under the ADA or the Rehabilitation Act. If the requested change is easy to provide and inexpensive, the employer might voluntarily choose to make it available to anyone who asks, without going through an interactive process. Alternatively, if the disability is not obvious or already known, an employer may ask the employee for information to establish that the condition is a disability and what specific limitations require an accommodation. If necessary, an employer also may request medical documentation to support the employee's request, and then determine if that accommodation or an alternative effective accommodation can be provided, absent undue hardship.

Similarly, if an employee requested an alternative method of screening as a religious accommodation, the employer should determine if accommodation is available under Title VII.

52. May an employer delay the start date of an applicant who has COVID-19 or symptoms associated with it?

Yes. According to current CDC guidance, an individual who has COVID-19 or symptoms associated with it should not be in the workplace.

53. May an employer withdraw a job offer when it needs the applicant to start immediately but the individual has COVID-19 or symptoms of it?

Yes. Based on current CDC guidance, this individual cannot safely enter the workplace, and therefore the employer may withdraw the job offer.

54. 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.

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

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

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

Yes. Employers may ask employees where they are traveling.

57. 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.

58. 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".

59. 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.

60. ***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 may provide/issue facemasks or may approve employees' supplied cloth face coverings in the event of shortages (DOL FAQ regarding face coverings, face masks, and respirators)

(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.

61. **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.

62. **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.

63. 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.

64. 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.

65. Do I have to allow employees to work from home during COVID-19?

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. (see ADA section in this document regarding accommodations)

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.

66. 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.

67. 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).

V. Employee Relations

i. Americans with Disabilities Act

a. Medical Inquiries and Confidentiality (ADA and GINA)

68. If an employer is hiring, may it screen applicants for symptoms of COVID-19?

Yes. An employer may screen job applicants for symptoms of COVID-19 after making a conditional job offer, as long as it does so for all entering employees in the same type of job. This ADA rule applies whether or not the applicant has a disability.

69. May an employer take an applicant's temperature as part of a post-offer, pre-employment medical exam?

Yes. Any medical exams are permitted after an employer has made a conditional offer of employment. However, employers should be aware that some people with COVID-19 do not have a fever.

70. Can I institute a daily employee temperature check, to be sure 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.

The EEOC has confirmed that if an employer requires all employees to have a daily temperature check before entering the workplace, the employer may maintain a confidential log of the results.

71. *CDC said in its Interim Guidelines that antibody test results "should not be used to make decisions about returning persons to the workplace." In light of this CDC guidance, under the ADA may an employer require antibody testing before permitting employees to re-enter the workplace? (6/17/20)*

***No**. An antibody test constitutes a medical examination under the ADA. In light of CDC's Interim Guidelines that antibody test results "should not be used to make decisions about returning persons to the workplace," an antibody test at this time does not meet the ADA's "job related and consistent with business necessity" standard for medical examinations or inquiries for current employees. Therefore, requiring antibody testing before allowing employees to re-enter the workplace is not allowed under the ADA. Please note that an antibody test is different from a test to determine if someone has an active case of COVID-19 (i.e., a viral test). The EEOC has already stated that COVID-19 viral tests are permissible under the ADA.*

The EEOC will continue to closely monitor CDC's recommendations, and could update this discussion in response to changes in CDC's recommendations.

72. May an employer administer a COVID-19 test (a test to detect the presence of the COVID-19 virus) before permitting employees to enter the workplace?

The ADA requires that any mandatory medical test of employees be "job related and consistent with business necessity." Applying this standard to the current circumstances of the COVID-19 pandemic, employers may take steps to determine if employees entering the workplace have COVID-19 because an individual with the virus will pose a direct threat to the health of others. Therefore, an employer may choose to administer COVID-19 testing to employees before they enter the workplace to determine if they have the virus.

Consistent with the ADA standard, employers should ensure that the tests are accurate and reliable. For example, employers may review guidance from the U.S. Food and Drug Administration about what may or may not be considered safe and accurate testing, as well as guidance from CDC or other public health authorities, and check for

updates. Employers may wish to consider the incidence of false-positives or false-negatives associated with a particular test. Finally, note that accurate testing only reveals if the virus is currently present; a negative test does not mean the employee will not acquire the virus later.

Based on guidance from medical and public health authorities, employers should still require - to the greatest extent possible - that employees observe infection control practices (such as social distancing, regular handwashing, and other measures) in the workplace to prevent transmission of COVID-19.

73. 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.

74. If an employee 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.

75. 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.

76. 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.

The CDC recently updated its guidance regarding the symptoms associated with COVID-19. It should be noted that symptoms may appear 2-14 days after exposure to the virus. People with these symptoms or combinations of symptoms may have COVID-19. People with COVID-19 have had a wide range of symptoms reported – ranging from mild symptoms to severe illness. Symptoms may appear 2-14 days after exposure to the virus. In light of the new guidance, employers may ask the following medical questions:

- Fever or chills
- Cough
- Shortness of breath or difficulty breathing
- Fatigue
- Muscle or body aches
- Headache
- New loss of taste or smell
- Sore throat
- Congestion or runny nose

- Nausea or vomiting
- Diarrhea

This list does not include all possible symptoms. CDC will continue to update this list as it learns more about COVID-19.

77. 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.

78. 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.

79. 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.

80. 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.

b. Reasonable Accommodations

81. What should an employer do if an employee was already receiving a reasonable accommodation under ADA prior to the COVID-19 pandemic and now requests an additional or altered accommodation?

An employee who was already receiving a reasonable accommodation prior to the COVID-19 pandemic may be entitled to an additional or altered accommodation, absent undue hardship. For example, an employee who is teleworking because of the pandemic may need a different type of accommodation than what he uses in the workplace. The employer may discuss with the employee whether the same or a different disability is the basis for this new request and why an additional or altered accommodation is needed.

In discussing accommodation requests, employers and employees can consult the Job Accommodation Network (JAN) for specific questions and resources regarding all accommodations, including COVID-19 specific requests here.

82. 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 the FFCRA section of this document.

In discussing accommodation requests, employers and employees can consult the Job Accommodation Network (JAN) for specific questions and resources regarding all accommodations, including COVID-19 specific requests here.

83. 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.

84. Is an employee entitled to an accommodation under the ADA in order to avoid exposing a family member who is at higher risk of severe illness from COVID-19 due to an underlying medical condition?

No. Although the ADA prohibits discrimination based on association with an individual with a disability, that protection is limited to disparate treatment or harassment. The ADA does not require that an employer accommodate an employee without a disability based on the disability-related needs of a family member or other person with whom she is associated.

For example, an employee without a disability is not entitled under the ADA to telework as an accommodation in order to protect a family member with a disability from potential COVID-19 exposure.

Of course, an employer is free to provide such flexibilities if it chooses to do so. An employer choosing to offer additional flexibilities beyond what the law requires should be careful not to engage in disparate treatment on a protected EEO basis.

85. 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.

86. Should an employer postpone discussing a request for accommodation from an employee with a disability that will not be needed until the business operation returns to normalcy post COVID-19?

No, But. An employer may give higher priority to discussing requests for reasonable accommodations that are needed immediately, but the employer may begin discussing this request now. The employer may be able to attain all the information it needs to make a decision, and if a reasonable accommodation is granted, the employer also may be able to make some arrangements for the accommodation in advance.

87. During the pandemic, if an employee requests an accommodation for a medical condition either at home or in the workplace, may an employer still request information to determine if the condition is a disability?

Yes, But. An employer can only ask questions or request medical documentation to determine whether the employee has a "disability" as defined by ADA if the disability is not obvious or already known.

88. During the pandemic, may an employer still engage in the interactive process and request information from an employee about why an accommodation is needed?

Yes, But. only if the disability is not obvious or already known. An employer may ask questions or request medical documentation to determine whether the employee's disability necessitates an accommodation, either the one he requested or any other. Possible questions the EEOC has outlined for the employer to ask of the employee may include:

(1) how the disability creates a limitation,

(2) how the requested accommodation will effectively address the limitation,

(3) whether another form of accommodation could effectively address the issue, and

(4) how a proposed accommodation will enable the employee to continue performing the "essential functions" of his position (that is, the fundamental job duties).

89. If there is some urgency to providing an accommodation, or the employer has limited time available to discuss the request during the pandemic, may an employer provide a temporary accommodation?

Yes. Given the pandemic, some employers may choose to forgo or shorten the exchange of information between an employer and employee known as the "interactive process" (discussed in D.5 and D.6., above) and grant the request. In addition, when government restrictions change, or are partially or fully lifted, the need for accommodations may also change. This may result in more requests for short-term accommodations. Employers may wish to adapt the interactive process - and devise end dates for the accommodation - to suit changing circumstances based on public health directives.

Whatever the reason for shortening or adapting the interactive process, an employer may also choose to place an end date on the accommodation (for example, either a specific date such as May 30, or when the employee returns to the workplace part- or full-time due to changes in government restrictions limiting the number of people who may congregate). Employers may also opt to provide a requested accommodation on

an interim or trial basis, with an end date, while awaiting receipt of medical documentation. Choosing one of these alternatives may be particularly helpful where the requested accommodation would provide protection that an employee may need because of a pre-existing disability that puts her at greater risk during this pandemic. This could also apply to employees who have disabilities exacerbated by the pandemic. Employees may request an extension that an employer must consider, particularly if current government restrictions are extended or new ones adopted.

90. May an employer ask employees now if they will need reasonable accommodations in the future when they are permitted to return to the workplace?

Yes. Employers may ask employees with disabilities to request accommodations that they believe they may need when the workplace re-opens. Employers may begin the "interactive process" - the discussion between the employer and employee focused on whether the impairment is a disability and the reasons that an accommodation is needed.

91. Are the circumstances of the pandemic relevant to whether a requested accommodation can be denied because it poses an undue hardship?

Yes. An employer does not have to provide a particular reasonable accommodation if it poses an "undue hardship," which means "significant difficulty or expense." In some instances, an accommodation that would not have posed an undue hardship prior to the pandemic may pose one now.

92. What types of undue hardship considerations may be relevant to determine if a requested accommodation poses "significant difficulty" during the COVID-19 pandemic?

An employer may consider whether current circumstances create "significant difficulty" in acquiring or providing certain accommodations, considering the facts of the particular job and workplace. For example, it may be significantly more difficult in this pandemic to conduct a needs assessment or to acquire certain items, and delivery may be impacted, particularly for employees who may be teleworking. Or, it may be significantly more difficult to provide employees with temporary assignments, to remove marginal functions, or to readily hire temporary workers for specialized positions. If a particular accommodation poses an undue hardship, employers and employees should work together to determine if there may be an alternative that could be provided that does not pose such problems.

93. What types of undue hardship considerations may be relevant to determine if a requested accommodation poses "significant expense" during the COVID-19 pandemic?

Prior to the COVID-19 pandemic, most accommodations did not pose a significant expense when considered against an employer's overall budget and resources (always considering the budget/resources of the entire entity and not just its components). But, the sudden loss of some or all of an employer's income stream because of this pandemic

is a relevant consideration. Also relevant is the amount of discretionary funds available at this time - when considering other expenses - and whether there is an expected date that current restrictions on an employer's operations will be lifted (or new restrictions will be added or substituted). These considerations do not mean that an employer can reject any accommodation that costs money; an employer must weigh the cost of an accommodation against its current budget while taking into account constraints created by this pandemic. For example, even under current circumstances, there may be many no-cost or very low-cost accommodations.

ii. Traditional Family and Medical Leave Act (FMLA)

94. If an employee is diagnosed with the virus, can the employee take FMLA 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.

95. 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).

96. 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.

97. 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).

98. 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).

99. 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.

100. 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.

101. 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.

102. 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.

103. 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.

iii. 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.

a. Employer Eligibility

104. 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.

105. What if there are multiple entities within my organization? How does that affect the FFCRA "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.

106. 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.

107. 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.

108. 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.

109. 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.

110. FFCRA indicates that employers of health care providers or emergency responders may elect to exclude such employees from FFCRA. What is a "healthcare provider"?

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.

111. FFCRA indicates that employers of health care providers or emergency responders may elect to exclude such employees from FFCRA. What is an "emergency responder"?

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

112. 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.

113. 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.

114. 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.

b. Employee Eligibility

115. 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.

116. 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.

117. 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.

118. 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:

> 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.

119. 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.

120. 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.

121. 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.

122. Can an employee take paid sick leave or expanded family and medical leave to care for their children because their school is closed for summer vacation?

No. Paid sick leave and emergency family and medical leave are not available for this qualifying reason if the school or child care provider is closed for summer vacation, or any other reason that is not related to COVID-19. However, the employee may be able to take leave if his or her child's care provider during the summer—a camp or other programs in which the employee's child is enrolled—is closed or unavailable for a COVID-19 related reason.

c. Pay Under FFCRA

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

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

124. 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.

125. 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.

126. 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.

127. 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.

128. 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 ($2,000 in aggregate per employee) or $511 per day ($5,110 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).

129. Do FFCRA regulations allow employees 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.

130. What six-month period is used to calculate the regular rate of pay under FFCRA when, for example, an employee takes EPSL, gets better & returns to work, and then at a later time takes EFMLA? Or perhaps the employee takes intermittent leave throughout several months in 2020? In other words, does an employer need to determine and review a new six-month period every time an employee takes leave?

No. An employer should identify the six-month period to calculate an employee's regular rate of pay under the FFCRA based on the first day the employee takes paid sick leave or expanded family and medical leave. That six-month period will be used to calculate all paid sick leave and expanded family and medical leave the employee takes under the FFCRA. If the employee has been employed for less than six months, the employer may compute the average regular rate over the entire period during which the employee was employed.

d. Application of FFCRA

131. Can FFCRA be taken as intermittent leave?

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.

132. Under the Emergency Paid Sick Leave Act (part of the FFCRA), 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.

133. 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."

134. 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.

135. 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.

136. 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.

137. 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.

138. 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.

139. What is considered a "place of care" and what is the definition of "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.

140. 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.

141. 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.

142. 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].

[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.

143. My employees have been teleworking productively since mid-March without any issues. Now, several employees claim they need to take paid sick leave and expanded family and medical leave to care for their children, whose school is closed because of COVID-19, even though these employees have been teleworking with their children at home for four weeks. Can I ask my employees why they are now unable to work or if they have pursued alternative child care arrangements?

Yes, But. You may require that the employee provide the qualifying reason he or she is taking leave, and submit an oral or written statement that the employee is unable to work because of this reason, and provide other documentation outlined in section 826.100 of the Department's rule applying the FFCRA. While you may ask the employee to note any changed circumstances in his or her statement as part of explaining why the employee is unable to work, you should exercise caution in doing so, lest it increase the likelihood that any decision denying leave based on that information is a prohibited act. The fact that your employee has been teleworking despite having his or her children at home does not mean that the employee cannot now take leave to care for his or her children whose schools are closed for a COVID-19 related reason.

For example, your employee may not have been able to care effectively for the children while teleworking or, perhaps, your employee may have made the decision to take paid sick leave or expanded family and medical leave to care for the children so that the employee's spouse, who is not eligible for any type of paid leave, could work or telework. These (and other) reasons are legitimate and do not afford a basis for denying paid sick leave or expanded family and medical leave to care for a child whose school is closed for a COVID-19 related reason.

This does not prohibit you from disciplining an employee who unlawfully takes paid sick leave or expanded family and medical leave based on misrepresentations, including, for example, to care for the employee's children when the employee, in fact, has no children and is not taking care of a child.

e. Notice, Documentation & Recordkeeping Requirements

144. 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.

145. What FFCRA documentation/certification can the employer require of employees for requesting leave under 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.

146. My employee claims to have tiredness or other symptoms of COVID-19 and is taking leave to seek a medical diagnosis. What documentation may I require from the employee to document efforts to obtain a diagnosis? When can it be required?

In order for your employee to take leave under the FFCRA, you may require the employee to identify his or her symptoms and a date for a test or doctor's appointment. You may not, however, require the employee to provide further documentation or similar certification that he or she sought a diagnosis or treatment from a health care provider in order for the employee to use paid sick leave for COVID-19 related symptoms. The minimal documentation required to take this leave is intentional so that employees with COVID-19 symptoms may take leave and slow the spread of COVID-19.

Please note, however, that if an employee were to take unpaid leave under the FMLA, the FMLA's documentation requirements are different and apply. Further, if the employee is concurrently taking another type of paid leave, any documentation requirements relevant to that leave still apply.

147. 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.

148. What FFCRA 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.

f. Tax Credits

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

149. How do I claim the FFCRA 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.

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.

iv. Title VII and other Employment Laws

150. The CDC has explained that individuals age 65 and over are at higher risk for a severe case of COVID-19 if they contract the virus and therefore has encouraged employers to offer maximum flexibilities to this group. Do employees age 65 and over have protections under the federal employment discrimination laws?

The Age Discrimination in Employment Act (ADEA) prohibits employment discrimination against individuals age 40 and older. The ADEA would prohibit a covered employer from involuntarily excluding an individual from the workplace based on his or her being 65 or older, even if the employer acted for benevolent reasons such as protecting the employee due to higher risk of severe illness from COVID-19.

Unlike the ADA, the ADEA does not include a right to reasonable accommodation for older workers due to age. However, employers are free to provide flexibility to workers age 65 and older; the ADEA does not prohibit this, even if it results in younger workers ages 40-64 being treated less favorably based on age in comparison.

Workers age 65 and older also may have medical conditions that bring them under the protection of the ADA as individuals with disabilities. As such, they may request reasonable accommodation for their disability as opposed to their age.

151. If an employer provides telework, modified schedules, or other benefits to employees with school-age children due to school closures or distance learning during the pandemic, are there sex discrimination considerations?

Employers may provide any flexibilities as long as they are not treating employees differently based on sex or other EEO-protected characteristics. For example, under Title VII, female employees cannot be given more favorable treatment than male employees because of a gender-based assumption about who may have caretaking responsibilities for children.

152. Due to the pandemic, may an employer exclude an employee from the workplace involuntarily due to pregnancy?

No. Sex discrimination under Title VII of the Civil Rights Act includes discrimination based on pregnancy. Even if motivated by benevolent concern, an employer is not permitted to single out workers on the basis of pregnancy for adverse employment actions, including involuntary leave, layoff, or furlough.

153. Is there a right to accommodation based on pregnancy during the pandemic?

There are two federal employment discrimination laws that may trigger accommodation for employees based on pregnancy.

First, pregnancy-related medical conditions may themselves be disabilities under the ADA, even though pregnancy itself is not an ADA disability. If an employee makes a request for reasonable accommodation due to a pregnancy-related medical condition, the employer must consider it under the usual ADA rules.

Second, Title VII as amended by the Pregnancy Discrimination Act specifically requires that women affected by pregnancy, childbirth, and related medical conditions be treated the same as others who are similar in their ability or inability to work. This means that a pregnant employee may be entitled to job modifications, including telework, changes to work schedules or assignments, and leave to the extent provided for other employees who are similar in their ability or inability to work. Employers should ensure that supervisors, managers, and human resources personnel know how to handle such requests to avoid disparate treatment in violation of Title VII.

154. 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."

155. 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.

156. How may employers respond to pandemic-related harassment, in particular against employees who are or are perceived to be Asian?

Managers should be alert to demeaning, derogatory, or hostile remarks directed to employees who are or are perceived to be of Chinese or other Asian national origin, including about the coronavirus or its origins.

All employers covered by Title VII should ensure that management understands in advance how to recognize such harassment. Harassment may occur using electronic communication tools – regardless of whether employees are in the workplace, teleworking, or on leave – and also in person between employees at the worksite. Harassment of employees at the worksite may also originate with contractors, customers or clients, or, for example, with patients or their family members at health care facilities, assisted living facilities, and nursing homes. Managers should know their legal obligations and be instructed to quickly identify and resolve potential problems, before they rise to the level of unlawful discrimination.

Employers may choose to send a reminder to the entire workforce noting Title VII's prohibitions on harassment, reminding employees that harassment will not be tolerated, and inviting anyone who experiences or witnesses workplace harassment to report it to management. Employers may remind employees that harassment can result in disciplinary action up to and including termination.

157. An employer learns that an employee who is teleworking due to the pandemic is sending harassing emails to another worker. What actions should the employer take?

The employer should take the same actions it would take if the employee was in the workplace. Employees may not harass other employees through, for example, emails, calls, or platforms for video or chat communication and collaboration.

158. What practical tools are available to employers to reduce and address workplace harassment that may arise as a result of the Coronavirus 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.

159. 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.

160. 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.

161. 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.

162. 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.

163. 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.

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

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

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

Yes. Employers may ask employees where they are traveling.

166. 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.

VI. Employee Benefits

167. 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 includes testing that is conducted in both traditional and non-traditional settings, such as drive-through screening and testing sites. These FAQs confirm that this extends to antibody testing as well.

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.

These FAQs clarify what other items must be covered as part of a visit where a coronavirus test is administered. Other items covered as part of a visit with a health provider can include other tests, such as blood tests or even tests for other ailments, if the provider thinks they are necessary to determine whether a COVID-19 test is appropriate.

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.

168. 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).

169. 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.

170. 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.

171. 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.

These changes should be communicated to employees/participants. Normally, if there's a material change in plan terms mid-year that affect the content of the most recent Summary of Benefits and Coverage ("SBC"), an updated SBC must be distributed at least 60 days before the change can take effect. However, these FAQs state that the federal government will not enforce this deadline against plans that adopt these required changes, or other changes to provide greater coverage for testing or treatment of COVID-19, with less than 60 days' advance notice. However, plans must provide notice as soon as they reasonably can. This relief only applies while the COVID-19 national state of emergency or public health emergency are in effect. Once these have been lifted, the standard rules will apply.

Additionally, the Departments reserve the right to take enforcement action against plans that attempt to offset the cost of COVID-19 testing and treatment by raising the cost sharing, or limiting coverage of, other benefits.

Employers should review their SBC to see if changes are necessary. Even if they are not, employers will want to communicate any changes to their covered employees and dependents as soon as they reasonably can.

172. 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.

173. 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.

Any change in telehealth coverage should be communicated to employees/participants. Normally, if there's a material change in plan terms mid-year that affect the content of the most recent Summary of Benefits and Coverage ("SBC"), an updated SBC must be distributed at least 60 days before the change can take effect. However, these FAQs state that the federal government will not enforce this deadline against plans expanding telehealth for both COVID-19 and other services not related to COVID-19, with less than 60 days' advance notice. However, plans must provide notice as soon as they reasonably can. This relief only applies while the COVID-19 national state of emergency or public health emergency are in effect. Once these have been lifted, the standard rules will apply.

Additionally, the Departments reserve the right to take enforcement action against plans that attempt to offset the cost of COVID-19 testing and treatment by raising the cost sharing, or limiting coverage of, other benefits.
Employers should review their SBC to see if changes are necessary. Even if they are not, employers will want to communicate any changes to their covered employees and dependents as soon as they reasonably can.

174. 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.

175. 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.

i. Leaves of Absence and Health Insurance

176. 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.

177. 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).

178. 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.

ii. Health Insurance Eligibility for Reduced Hours, Furloughs, and Layoffs

179. 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.

180. 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?")

181. 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.

182. 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.

183. Are there any delays for the employer's COBRA Election Notice Requirements?

Yes. The deadline for providing election notices was extended by the Departments of Labor ("DOL") and Treasury/IRS. Generally, the plan administrator must provide the notice within 14 days after being informed of the qualifying event by the employer. The employer must notify the administrator of the qualifying event within 30 days after it occurs. (If the employer is the plan administrator, the two periods are combined.) Under current guidance, any period between March 1, 2020 and sixty (60) days after the end of the National Emergency (the "Outbreak Period") is disregarded in determining the 14-day deadline, but not the 30-day deadline. This means employers will still need to notify their administrators within 30 days after a qualifying event occurs, but the administrators have additional time to send the notices. Note, however, that the Outbreak Period cannot be more than one year.

However, because of the extended deadline for making COBRA elections and payments (described in "Are there any extensions of time for COBRA beneficiaries to make COBRA elections or payments?" below), the Employers will want to work with their COBRA administrators to make sure notices are sent out as soon as they reasonably can be.

184. Are there any extensions of time for COBRA beneficiaries to make COBRA elections or payments?

Yes. Joint regulations issued by the Departments of Labor ("DOL") and Treasury/IRS extended several COBRA deadlines for COBRA beneficiaries. In all cases, any period between March 1, 2020 and sixty (60) days after the end of the National Emergency (the

"Outbreak Period") is disregarded in determining the deadline. Note, however, that the Outbreak Period cannot be more than one year. This applies to the follow deadlines:

(1) The 60-day election deadline;

(2) The 45-day period to submit COBRA premiums, once COBRA coverage is elected;

(3) The 30-day grace period granted to COBRA qualified beneficiary to make monthly COBRA premium payments; and

(4) The date for individuals to notify the plan of qualifying events (such as divorce or disability).

For example, assume a former employee received a COBRA notice on April 1, 2020. That individual has until 60 days after the end of the Outbreak Period to make his or her COBRA election. For employers, this is potentially challenging since the former employee could hold on to the COBRA notice to see if coverage is necessary and then elect it only when needed, which could be months after the notice was sent.

Even more troubling is the premium payment deadline. An example in the joint regulations shows that individuals who have premium payments due during the Outbreak Period have until 30 days after the end of the Outbreak Period to make those payments. For example, assume the Outbreak Period ends on June 29, 2020 and a former employee had COBRA premium payments due in March, April, May and June. These payments would all be due no later than July 29, 2020. This would allow the employee to wait, without coverage being cancelled, until July 29, 2020. If no payments were made by the deadline, coverage could be cancelled retroactively, but in the meantime, the employee must be treated as conditionally covered, pending payment. If the employee only made two months of payments by July 29, 2020, then coverage would need to be provided for March and April, but not the other months. In other words, partial payments are applied to the earliest months first. Employers will need to work with their COBRA administrators, insurance carriers, and third-party administrators to ensure this is being administered properly.

iii. Elections and Changes in Status

185. Is there any relief for cafeteria plan election deadlines?

Yes. Under Notice 2020-29, the IRS is now allowing the more flexibility for election changes during calendar year 2020. Specifically, employees may:

(1) make a new election to enroll in the employer's plan, if the employee initially declined to enroll;

(2) change to a different health coverage option or tier sponsored by the same employer (such as moving to a different plan or changing from single to family coverage);

(3) unenroll from the employer's plan, if the employee attests in writing that the employee is enrolled, or immediately will enroll, in other health coverage not sponsored by the employer (including coverage through a spouse or on an ACA exchange – the IRS notice has a sample attestation);

(4) enroll in, drop, or change the elected amount for a health flexible spending account ("FSA"); and

(5) enroll in, drop, or change the elected amount for a dependent care FSA.

All these changes only apply on a going-forward basis, meaning there are no retroactive changes. However, to the extent employers allowed these elections earlier this year, they can retroactively amend their plan to reflect what they have allowed.

First, employers are not required to allow any of the above changes. Second, employers may put limits on making these changes, such as requiring elections within a certain period of time after they are adopted or only allowing employees to elect more favorable employer coverage rather than any employer coverage. Also, for the health and dependent care FSAs, employers may require that an election cannot be reduced below amounts already reimbursed.

Additionally, in Notice 2020-23, the IRS confirmed that cafeteria plan enrollment elections that would normally have to be made before the beginning of the plan year may instead be made at any point up until July 15, 2020. This only applies for employers with cafeteria plan years that begin between April 1, 2020 and July 15, 2020. However, the IRS guidance is clear that benefits can only be provided after the election becomes effective. This would only apply for employers with cafeteria plan years that begin April 1, 2020 through July 15, 2020.

Finally, the 30-day period to make election changes due to HIPAA special enrollment events (or 60-day period, for certain events) is extended. Specifically, any period between March 1, 2020 and sixty (60) days after the end of the National Emergency (the "Outbreak Period") is disregarded in counting the 30- (or 60-) day period. Therefore, is an employee

had a special enrollment event (such as the birth of a child) that occurs during the Outbreak Period, then he or she would have 30 days after the end of the Outbreak Period to make the election. Additionally, if an employee had a special enrollment event within 30 days (or 60 days, for certain events) before March 1, 2020 (for example, a birth of a child on February 15), the rest of the 30 (or 60) days would be available after the end of the Outbreak Period. Note, however, that the Outbreak Period cannot be more than one year.

186. If an employee's spouse loses his/her job, can the employee elect to drop his/her employer coverage to save money?

No. While the spouse losing his/her job is a change in employment status, any change in the employee's election must be consistent with that change in status. The employee dropping his/her coverage is not consistent with that change in status.

187. Employee's spouse or employee's child who is under 26 was laid off and lost coverage, can the employee add the spouse and/or child who previously was not covered?

Yes. The spouse and/or child lost other coverage as a result of the change in employment. This is a HIPAA special enrollment right that allows the employee to enroll him/herself and any eligible spouses or dependents. This assumes spouses and dependents are eligible for the employer's plan.

iv. ACA Employer Mandate

188. 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.

189. 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.

190. 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.

191. 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.

v. FSAs, HRAs, HSAs, and DCAPs

192. 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. However, employers need to check the terms of their plan to confirm.

193. 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.

194. Can furloughed employees change their health FSA elections?

It Depends. Employers need to review the terms of the plan to determine how it treats these types of situations. If the furlough is an unpaid leave of absence and if employees on unpaid leave are not eligible for the health FSA, then yes, they can change their

elections to drop coverage for the health FSA. They may also be eligible for COBRA if they have not fully spent their accounts.

However, in many cases, plans will allow employees to continue coverage, subject to payment of the contributions. The payment could be after-tax while on furlough or could be paid via catch-up when the employee returns, depending on the terms of the plan and the agreement the employer made with the employee (if any).

On the other hand, if the furlough is fully or partially paid, or if it does not result in them becoming ineligible for the health FSA, they could not change their election.

Employers should make sure contributions are collected in accordance with the plan document.

195. Can employers temporarily suspend health FSAs for furloughed employees?

Generally, No. If furloughed employees are still eligible for the health FSA, and are still being paid, it may create a nondiscrimination issue to exclude them. However, if the furlough is an unpaid leave, employees may cease to be eligible since they are not being paid (see "Can furloughed employees change their health FSA elections?" above for additional information). However, employers should make sure contributions are collected in accordance with the plan document.

196. 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. Note, however, that any election change must be permitted under the terms of the plan.

197. Is there any additional flexibility for allowing election changes?

Yes. Under Notice 2020-29, the IRS is now allowing the more flexibility for election changes during calendar year 2020. Specifically, employees may:

(1) enroll in, drop, or change the elected amount for a health flexible spending account ("FSA"); and

(2) enroll in, drop, or change the elected amount for a dependent care FSA.

These changes only apply on a going-forward basis, meaning there are no retroactive changes. However, to the extent employers allowed these elections earlier this year, they can retroactively amend their plan to reflect what they have allowed.

First, employers are not required to allow any of the above changes. Second, employers may put limits on making these changes, such as requiring elections within a certain period of time after they are adopted or only allowing employees to elect more favorable employer coverage rather than any employer coverage. Also, employers may require that an election cannot be reduced below amounts already reimbursed.

198. Is there any relief for the flexible spending account (FSA) forfeiture deadline?

Yes. Under Notice 2020-29, the IRS is allowing FSAs to reimburse expenses incurred through 2020 under health and dependent care FSAs. This only applies if an FSA had a grace period or plan year that ended in 2020. Therefore, calendar year FSAs with no grace period are not eligible for this relief.

Under this relief, an FSA with a grace period ending in 2020 or with a plan year ending in 2020 may reimburse expenses incurred through the end of 2020. For example, assume an employee is in a calendar year FSA with a grace period had $1,000 unused at the end of 2019. Prior to this guidance, that $1,000 could be used to reimburse expenses incurred through March 15, 2020. Now, it can be used for expenses incurred through December 31, 2020.

Note this change is not required. Additionally, if the health FSA is a general purpose FSA (as in, it is not compatible with a health savings account ("HSA")), then extending this timeframe to incur expenses will make anyone covered under the plan ineligible to contribute to an HSA.

In addition, in Notice 2020-23, the IRS provided some relief. For FSA plan years that would end between April 1, 2020 and July 15, 2020, the plan can delay forfeiting unused amounts until July 15, 2020. It appears this means that expenses can be incurred during this time and reimbursed using funds for the plan year that ended during this period. Note that this only applies to FSAs that have plan years ending from April 1, 2020 through July 15, 2020.

vi. COVID-19 Prescription Drug Implications

199. 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.

200. 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.

vii. Wellness, Disability, Life Insurance, and Other Benefits Issues

201. *Are any other deadlines delayed due to COVID-19 National Disaster?*

Yes. Under various pieces of guidance, the following deadlines have been delayed:

(1) Forms 5500. Forms 5500 that are due between April 1, 2020 and July 15, 2020 may file by July 15, 2020. This includes any Forms 5500 that are subject to the available two-and-a-half-month extension (obtained by filing a Form 5558). This applies to plans that had plan years ending September through November of 2019 (if no extension was requested) or June through August of 2019 (if an extension was requested).

(2) Mandatory Notices. Many notices to employees may also be delayed. Specifically, notices required by the Employee Retirement Income Security Act of 1974 ("ERISA") that are required to be sent to employees and others between March 1, 2020 and 60 days after the end of the national emergency (the "Outbreak Period") may be delayed, but the Outbreak Period may not last more than one year. However, they must be provided as soon as they can. This applies to many of the standard notices and documents that employers provide, such as:

(a) Summaries of Benefits and Coverage
(b) ACA Notice of Marketplace Coverage Options
(c) ACA Grandfathered Status Notice
(d) ACA Patient Protection Disclosures
(e) HIPAA/ACA Wellness Program Notices (but note EEOC Notice is not included)
(f) HIPAA Special Enrollment Rights Notice
(g) Children's Health Insurance Premium Assistance Notice
(h) Women's' Health and Cancer Rights Act Notice
(i) Summary Plan Descriptions / Summaries of Material Modifications
(j) COBRA Initial Notices

(k) Summary Annual Reports

(3) Claims Deadlines. The deadlines for employees to submit and appeal claims are also delayed. Specifically, the period between March 1, 2020 and 60 days after the end of the national emergency, but not more than one year (the "Outbreak Period"), is disregarded in determining the time limit for taking certain actions. This applies to the following deadlines:

(a) filing a claim;
(b) appealing a clam denial;
(c) requesting external review; and
(d) filing information needed to complete/perfect an external review request.

For example, most group health plans give an employee 180 days to appeal a denied claim. If an employee's 180-day period would normally start on April 1, that employee now has 180 days after the end of the Outbreak Period to file that appeal. Similarly, if a plan says that an employee must submit a claim within a year of when the medical service is provided, the plan must add the length of the Outbreak Period to that deadline. For example, if the Outbreak Period is six months, the employee would have a year and a half to submit the claim.

Notably, there are no extensions of the deadlines for the plan to respond. Therefore, if a plan receives an appeal, it still must respond within the deadline specified in the plan documents.

(4) Forms M-1. Forms M-1 (which only apply to multiple employer welfare arrangements, or MEWAs) that are due between April 1, 2020 and July 15, 2020 have until July 15, 2020 to file. MEWAs generally must file their annual reports by March 1. However, MEWAs can ask for a one-time 60-day extension. MEWAs that requested an extension would have had their forms due by April 30. Therefore, those MEWAs that requested an extension would now be able to file up to July 15.

202. 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.

203. 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.

204. 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.

viii. Returning to Work

205. 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.

206. Can I impose a new waiting period on my employees?

It Depends. For employees who terminated employment and are rehired or furloughed without any pay, it will depend on the terms of your plan and whether you are subject to the Affordable Care Act ("ACA") employer mandate. Generally, employers are subject to the ACA employer mandate if they employed more than 50 full-time and full-time equivalent employees in the prior calendar year.

If you are subject to the employer mandate, then you generally can only apply a new waiting period if the employee did not provide, and was not paid for, any hours of service for at least 13 weeks or, for educational institutions only, 26 weeks. (Employers also have the option of using the shorter of 13/26 weeks of the number of weeks the employee worked for the company.) In most cases, the break in employment due to the COVID-19 crisis is likely to be less than 13 or 26 weeks, so most employees could not have a new waiting period applied to them on rehire or return to work. This answer assumes you are using the lookback measurement period rules (which most employers do). Note also that plan terms can be more generous.

If you are not subject to the ACA employer mandate, then the answer will hinge on your plan terms and the ACA waiting period rules. For employees who terminated employment, the regulations say you may impose a new waiting period if it is "reasonable under the circumstances." In other words, the termination of employment must be a legitimate termination of employment.

For employees who are furloughed and return to work, you likely cannot impose another waiting period. The ACA waiting period rules only allow a new waiting period if the employee really terminated employment and a furlough is not a termination.

207. If someone was furloughed while on a waiting period for health coverage, does the furlough count towards satisfying the waiting period?

Generally, yes. The waiting period rules issued under the Affordable Care Act ("ACA") state that any waiting period generally cannot exceed 90 days. A "waiting period" is any period that must pass before coverage can become effective for an eligible employee. Note that an employee on furlough is still considered employed, even if they are not being paid. Therefore, the furlough period would count toward the waiting period. Note that this may not apply to variable hour employees whose hours are being counted to determine if they are full-time under the ACA employer mandate (see subsection "v. ACA Employer Mandate" above).

Additionally, the Health Insurance Portability and Accountability Act of 1996 ("HIPAA") restricts the ability of plans to impose "actively at work" conditions. Specifically, under HIPAA, if the employee is furloughed or otherwise on leave due to a health factor, they would have to become eligible for coverage for on the same date as someone who is employed.

208. After a furloughed employee returns to work, what happens to their health flexible spending account ("FSA") election?

If the employee's contribution election was continued during furlough, then it would continue when they return.

If the employee's contribution were stopped during the furlough (for example, because the furlough was unpaid), the employer will need to confirm how their plan document treats the election when the employee is rehired. For example, if the employer allowed the employee's election to continue during leave, subject to payment of the contributions on return, then the employee's payroll period contributions on return would be increased to recover the missed contributions.

On the other hand, if the employee cancelled his or her election on commencing leave, then he or she may be able to reinstate the election on return. However, again, the employer needs to review the terms of their plan to determine how it treats paid and unpaid leaves and return from those leaves.

209. Can employees change their elections, or make new elections, for pre-tax commuter benefits/qualified transportation fringe and dependent care flexible spending accounts (FSAs) as they return to work?

Yes. For pre-tax commuter benefits/qualified transportation fringe benefits, there are two general timing conditions. First, the election must be for future commuter/transportation benefits. Second, the election must be made before the employee is able to receive the cash compensation that is paying for the benefits. In other words, the election generally must be made before the beginning of a pay period.

For dependent care FSAs, employees may elect to increase their contributions to reflect the cost of dependent care, to the extent it is available. Note this does not apply if their dependent care provider is a relative of the employee, such as a child, sibling, or parent (including in-laws of these three), stepparent, cousin, aunt, uncle, or other person living with the employee.

Note that the above election changes must be permitted by your applicable plan document. You will need to confirm that by reviewing your as well.

210. For fully-insured life and disability plans, what happens upon reinstatement if employees' coverage was not continued?

Most fully-insured life and disability plans will contain an actively-at-work requirement for continued coverage. As a result, you should contact your HUB consultant and/or insurance carrier to determine if the carrier waived those provisions due to the COVID-19 crisis.

If the carriers did not waive those requirements, then the employees will need to satisfy the eligibility criteria under the policy. They may also need to satisfy evidence of insurability requirements and make new elections to pay for the coverage.

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

211. 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.

212. 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.

213. What can 401k 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.

[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.

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

(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.

214. How can retirement 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]

[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.

215. 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.

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.

216. What are the major retirement plan 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;

(5) Expanded DOL author; and,

(6) Ability to postpone filing deadlines.

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

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.

218. What changes impact retirement 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:

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

(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]

(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.

219. 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.

[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.
[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.

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 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.

220. 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.

221. Will there be a DOL deadline extension 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.

222. 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

223. 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.

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

(See also Employee Benefits Section)

i. Unemployment (and a note about PPP)

Includes excerpts from DOL Unemployment FAQ

224. I run a nonprofit organization and am a reimbursing employer under my state's unemployment insurance program. Due to the economic impacts of the COVID-19 pandemic, I am worried that I may be unable to timely reimburse the state for unemployment benefits it provides to my employees. What should I do?

Contact your state unemployment insurance office to learn what options may be available for delaying reimbursement payments. The CARES Act allows states to provide maximum flexibility to reimbursing employers as it relates to timely payments in lieu of contributions and assessment of penalties and interest. The U.S. Department of Labor will soon be issuing guidance on how states should implement this provision.

225. My organization has remained open because it is essential. My employee is not sick, nor is anyone in my employee's household sick. My employee does not have children nor does s/he provide care for someone who cannot care for themselves. My employee has told me that s/he is afraid of getting coronavirus from customers coming to the store and/or from other employees. As a result, my employee has quit and filed for unemployment. Can the employee obtain benefits under the CARES Act?

No. Under the CARES Act, an employee may be eligible for benefits if s/he meets one of the circumstances listed in the Act, but none include the scenario described. On these facts, the employee is not eligible for Pandemic Unemployment Assistance (PUA) because s/he does not meet any of the qualifying circumstances.

There are, however, circumstances under the CARES Act in which specific, credible health concerns could require an individual to quit his or her job and thereby make the individual eligible for PUA. For example, an individual may be eligible for PUA if he or she was diagnosed with COVID-19 by a qualified medical professional, and although the individual no longer has COVID-19, the illness caused health complications that render the individual objectively unable to perform his or her essential job functions, with or without a reasonable accommodation. However, voluntarily deciding to quit a job out of a general concern about exposure to COVID-19 does not make an employee eligible for PUA.

As a general matter, employees are likely to be eligible for PUA due to concerns about exposure to the coronavirus only if the employee has been advised by a healthcare provider to self-quarantine as a result of such concerns. For instance, an individual whose immune system is compromised by virtue of a serious health condition, and who is therefore advised by a healthcare provider to self-quarantine in order to avoid the greater-

than-average health risks that the individual might face if he or she were to become infected by the coronavirus will be eligible for PUA if all other eligibility requirements are met.

226. Our organization will allow its employees to work from home with pay. However, I have certain employees whose children are out of school and the spouse is working. These employees have told me that they need to care for children and therefore, it too difficult to work from home. Under Section 2102(a)(3)(A)(ii)(I)(dd) of the CARES Act, my employee self-certifies that s/he needs his/her kids to be at school in order for him/her to be able to work. Will the employee qualify for PUA?

Maybe. The CARES Act does provide PUA to an individual who is the "primary caregiver" of a child who is at home due to a forced school closure that directly results from the COVID-19 public health emergency. However, to qualify as a primary caregiver, the provision of care to the child must require such ongoing and constant attention that it is not possible for the employee to perform his/her customary work functions at home. For example, if an employer allows an employee to telework and the employee is caring for a more mature child who is able to care for him or herself for much of the day, the employee likely would not qualify for PUA because s/he is still able to work.

In addition, employees should bear in mind that the CARES Act provides PUA only when a child is home because of a school closure that is a direct result of the COVID-19 public health emergency. A school is not closed as a direct result of the COVID-19 public health emergency, for purposes of 2102(a)(3)(A)(ii)(I)(dd), after the date the school year was originally scheduled to end. That means that, once the school year is over, parents should rely on their customary summer arrangements for caring for their children, and will not, absent some other qualifying circumstances, be eligible to receive PUA. If, however, the facility that they rely on to provide summer care for the child is also closed as a direct result of the COVID-19 public health emergency, they may continue to qualify for PUA. Similarly, if there is some other reason under which they qualify for PUA, they will continue to be eligible to receive benefits.

227. We furloughed a number of our employees but have now reopened and asked employees to return to work. Can my employees remain on unemployment?

No. As a general matter, individuals receiving regular unemployment compensation must act upon any referral to suitable employment and must accept any offer of suitable employment. Barring unusual circumstances, a request that a furloughed employee return to his or her job very likely constitutes an offer of suitable employment that the employee must accept.

While eligibility for PUA does not turn on whether an individual is actively seeking work, it does require that the individual be unemployed, partially employed, or unable or unavailable to work due to certain circumstances that are a direct result of COVID-19 or the COVID-19 public health emergency. In the situation outlined here, an employee who had been furloughed because his or her employer has closed the place of employment would potentially be eligible for PUA while the employer remained closed, assuming the closure was a direct result of the COVID-19 public health emergency and other qualifying

conditions are satisfied. However, as soon as the business reopens and the employee is recalled for work, as in the example above, eligibility for PUA would cease unless the individual could identify some other qualifying circumstance outlined in the CARES Act.

228. One of my workers quit because he said he would prefer to receive the unemployment compensation benefits under the CARES Act. Is he eligible for unemployment? If not, what can I do?

No. Typically employees who voluntarily quit would not be eligible for regular unemployment compensation or PUA. Eligibility for regular unemployment compensation varies by state but generally does not include those who voluntarily leave employment. Similarly, to receive PUA, an individual must be ineligible for regular unemployment compensation or extended benefits under state or federal law, or pandemic emergency unemployment compensation, and satisfy one of the eligibility criteria enumerated in the CARES Act, as explained in Unemployment Insurance Program Letter 16-20. There are multiple qualifying circumstances related to COVID-19 that can make an individual eligible for PUA, including if the individual quits his or her job as a direct result of COVID-19. Quitting to access unemployment benefits is not one of them. Individuals who quit their jobs to access higher benefits, and are untruthful in their UI application about their reason for quitting, will be considered to have committed fraud.
If desired, employers can contest unemployment insurance claims through their state unemployment insurance agency's process.

229. What is an offer of suitable employment and how is it connected to unemployment insurance eligibility?

Most state unemployment insurance laws include language defining suitable employment. Typically, suitable employment is connected to the previous job's wage level, type of work, and the claimant's skills.

Refusing an offer of suitable employment (as defined in state law) without good cause will often disqualify individuals from continued eligibility for unemployment compensation.
For example, if an individual's former employer calls the individual back to work after having temporarily laid the individual off for reasons related to COVID-19, the individual would very likely have to accept the offer to return to work, or jeopardize his or her eligibility for unemployment insurance benefits, absent some extenuating circumstance, such as if the individual tested positive for COVID-19. The job an individual held before the spread of COVID-19 will constitute, in the vast majority of cases, suitable employment for purposes of unemployment insurance eligibility.

230. What can an employer do if it believes an unemployment insurance claimant has refused an offer of suitable employment?

Nearly all states have processes for employers to submit documentation that an offer of suitable employment was refused by an unemployment insurance claimant. Please contact your state unemployment insurance agency for additional information.

231. Will a borrower's PPP loan forgiveness amount (pursuant to section 1106 of the CARES Act and SBA's implementing rules and guidance) be reduced if the borrower laid off an employee, offered to rehire the same employee, but the employee declined the offer?

No. As an exercise of the Administrator's and the Secretary's authority under Section 1106(d)(6) of the CARES Act to prescribe regulations granting de minimis exemptions from the Act's limits on loan forgiveness, SBA and Treasury intend to issue an interim final rule excluding laid-off employees whom the borrower offered to rehire (for the same salary/wages and same number of hours) from the CARES Act's loan forgiveness reduction calculation. The interim final rule will specify that, to qualify for this exception, the borrower must have made a good faith, written offer of rehire, and the employee's rejection of that offer must be documented by the borrower. Employees and employers should be aware that employees who reject offers of re-employment may forfeit eligibility for continued unemployment compensation.

ii. COVID-19: Laid Off Employees

232. Are there any specific rules regarding the timing of my laid-off employee's final paycheck?

It Depends. Some states have specific laws regarding final pay. The Department of Labor as assembled some information regarding state final pay rules. You should also check with your state specific labor department as well.

233. 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.

234. Do I have to provide a special business closure or mass layoff notice to employees

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.

235. If I am considering a temporary layoff or furlough, do I need to provide workers with a notice under the WARN Act? (based on the DOL federal WARN Act FAQ)

Yes. A WARN Act notice must be given when there is an employment loss, as defined under the Act. A temporary layoff or furlough that lasts longer than 6 months is considered an employment loss. A temporary layoff or furlough without notice that is initially expected to last six months or less but later is extended beyond 6 months may violate the Act unless:

(1) The extension is due to business circumstances (including unforeseeable changes in price or cost) not reasonably foreseeable at the time of the initial layoff; and

(2) Notice is given when it becomes reasonably foreseeable that the extension is required.

This means that an employer who previously announced and carried out a short-term layoff (6 months or less) and later extends the layoff or furlough beyond 6 months due to business circumstances not reasonably foreseeable at the time of the initial layoff is required to give notice at the time it becomes reasonably foreseeable that the extension is required. A layoff extending beyond 6 months for any other reason is treated as an employment loss from the date the layoff or furlough starts.

The WARN Act is enforced by private legal action in the U.S. District Court for any district in which the violation is alleged to have occurred or in which the employer transacts business. Thus an employer may need to prove that it could not foresee the circumstances if a WARN Act action is brought. Any dispute regarding the interpretation of the WARN Act including its foreseeability will be determined on a case-by-case basis in such a court proceeding. The role of the U.S. Department of Labor is limited to providing guidance and information about the WARN Act; such guidance is not binding on courts and does not replace the advice of an attorney.

236. For permanent layoffs, may I claim an exception to the WARN Act because of COVID-19? If I do, what are my responsibilities?

It Depends. The Department recommends that employers review the "unforeseeable business circumstances" exception to the 60-day notice requirement (contained in the WARN Act at § 3(b)(2)(A), and the WARN regulations at 20 CFR 639.9) set out below:

The "unforeseeable business circumstances" exception… applies to plant closings and mass layoffs caused by business circumstances that were not reasonably foreseeable at the time that 60-day notice would have been required.

(1) An important indicator of a business circumstance that is not reasonably foreseeable is that the circumstance is caused by some sudden, dramatic, and unexpected action or condition outside the employer's control. A principal client's sudden and unexpected termination of a major contract with the employer… and an unanticipated and dramatic major economic downturn might each be considered a business circumstance that is not reasonably foreseeable. A government ordered closing of an employment site that occurs without prior notice also may be an unforeseeable business circumstance.

(2) The test for determining when business circumstances are not reasonably foreseeable focuses on an employer's business judgment. The employer must exercise such commercially reasonable business judgment as would a similarly

situated employer in predicting the demands of its particular market. The employer is not required, however, to accurately predict general economic conditions that also may affect demand for its products or services. When invoking an exception to the WARN Act's 60-day notice requirement, a covered employer is still required to:

(a) Give as much notice as is practicable; and
(b) Include a brief statement of the reason for giving less than 60-days' notice along with the other required elements of a WARN notice.

Applicability of the "unforeseeable business circumstances" exception rests on an employer's particular business circumstances. The WARN Act is enforced by private legal action in the U.S. District Court for any district in which the violation is alleged to have occurred or in which the employer transacts business. Thus an employer may need to prove that it could not foresee the circumstances 60 days in advance if a WARN Act action is brought. Any dispute regarding the interpretation of the WARN Act including its exceptions will be determined on a case-by-case basis in such a court proceeding. The role of the U.S. Department of Labor is limited to providing guidance and information about the WARN Act; such guidance is not binding on courts and does not replace the advice of an attorney.

237. Will the Department of Labor provide me with a letter that I have complied with the WARN Act?

No. the WARN Act is enforced by private legal action in the U.S. District Court for any district in which the violation is alleged to have occurred or in which the employer transacts business. Any dispute regarding the interpretation of the Act including its exceptions is determined on a case-by-case basis in such a court proceeding. The role of the U.S. Department of Labor is limited to providing guidance and information about the WARN Act; such guidance is not binding on courts and does not replace the advice of an attorney. While the Department can provide guidance and information about the WARN Act, it has neither investigative nor enforcement authority under the WARN Act; therefore, it cannot issue advisory opinions on specific cases.

238. 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.

239. 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.

iii. COVID-19: Employee Pay/Hours Reduction

240. 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

241. 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.

242. 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.

243. 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.

iv. COVID-19: Furloughed Employees

244. 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.

245. 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.

246. 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.

v. COVID-19: Other Separation Considerations

247. 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.

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