Frequently Asked Questions

Responding to COVID-19 in the Workplace

March 27, 2020

HUB

Contents

We understand that there is a significant amount of information coming from a variety of directions. 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. All of these questions are regarding all aspects of employee relations. This document does not address any questions regarding business related insurances or coverages (such as business interruption insurance).

This document is updated weekly.

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

Underlined text provides a hyperlink to source references.

I. Health and Safety

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

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

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

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

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

   It Depends. OSHA's recordkeeping rules apply only to injuries or "illnesses." The rule defines an injury or illness as "an abnormal condition or disorder." Illnesses include "both acute and chronic illnesses, such as, but not limited to, a skin disease, respiratory disorder, or poisoning." Despite this broad definition, OSHA has essentially excluded from coverage cases of the common cold or the seasonal flu. OSHA has made a determination that COVID-19 should not be excluded from coverage of the rule – like the common cold or the seasonal flu – and, thus, OSHA is considering it an "illness." However, OSHA has stated that only confirmed cases of COVID-19 should be considered an illness under the rule. Therefore, if an employee simply comes to work with symptoms consistent with COVID-19 (but not a confirmed diagnosis), the recordability analysis would not necessarily be triggered at that time.

4. Is a COVID-19 case considered recordable?

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

A particular illness is work-related under the rule if an event or exposure in the work environment either caused or contributed to the resulting condition or significantly aggravated a pre-existing injury or illness. Work-relatedness is presumed for illnesses that result from events or exposures in the work environment, unless certain exceptions apply. One of those exceptions is that the illness involves signs or symptoms that surface at work but result solely from a non-work-related event or exposure that occurs outside of the work environment. Thus, if an employee develops COVID-19 solely from an exposure outside of the work environment, it would not be work-related, and thus not recordable.

The employer's assessment should consider the work environment itself, the type of work performed, risk of person-to-person transmission given the work environment, and other factors such as community spread. Healthcare work environments, where job activities are more likely to result in person-to-person exposure, would present a more likely scenario of work-relatedness than non-healthcare settings. Because each work environment is different, employers must conduct an individualized assessment when a confirmed case of COVID-19 presents.

5. Should I document recordable illnesses 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. COVID-19 can be a recordable illness if a worker is infected because of performing their work-related duties. However, employers are only responsible for recording cases of COVID-19 if all of the following are met:*

a. *The case is a confirmed case of COVID-19 (see CDC information on persons under investigation and presumptive positive and laboratory-confirmed cases of COVID-19);*
b. *The case is work-related, as defined by 29 CFR 1904.5; and*
c. *The case involves one or more of the general recording criteria set forth in 29 CFR 1904.7 (e.g. medical treatment beyond first-aid, days away from work).*

The instances where COVID-19 cases will meet all of OSHA's requirements for a recordable illness may be limited. The main limiting factor would be in the determination if the case is work-related. This may be easier to determine for employees working in the medical or other similar fields, but in other types of businesses it would potentially be more difficult. It is foreseeable that the latter will occur in only somewhat unique circumstances. In addition, the requirement for confirmation of the COVID-19 illness would also limit the recordability. The CDC is the agency that is currently confirming

presumptive cases. This confirmation would need to occur before the instance would be recordable.

6. Is a COVID-19 case reportable?

It Depends. As with the recordability analysis above, if an employee has a confirmed case of COVID-19 that is considered work-related, an employer would need to report the case to OSHA if it results in a fatality or in-patient hospitalization of one or more employees. It is important to note, however, that the reporting obligation is time-limited. Thus, if a fatality due to COVID-19 occurs after 30 days from the workplace incident leading to the illness, an employer is not required to report it. Similarly, if the in-patient hospitalization occurs after 24 hours from the workplace incident leading to the illness, an employer is not required to report. Given the nature of COVID-19 and the disease progression, this may result in fewer reports to OSHA despite expected hospitalization of cases going forward.

II. Impact of COVID-19 on the Workplace and Employee Attendance

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

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

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

Yes. Employers may ask employees where they are traveling.

9. Can I require an employee who travels to an effected 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.*

III. Ability to Work or Requirement Not to Work

10. 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-making 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.

11. 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.

12. 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.

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

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

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

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

14. 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.

15. 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.

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

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

IV. Pay and Compensation Rules

17. 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.

18. 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.

19. 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.

20. 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.

21. Will workers' compensation cover an employee who can claims that he/she contracted COVID-19 at work?

It Depends. Workers' compensation laws regarding communicable/occupational diseases vary from state to state. Generally, the employee would have to show that they were in a higher rate or more susceptible rate than the general public. This is a very high standard which will be difficult to meet unless, for example, their employer sent them to China or Italy (they have a ban) or are healthcare workers providing care for COVID-19 patients. Employers should submit claims to the workers' compensation carrier and allow the carrier to adjudicate the claim and make the coverage determination.

The U.S. Longshore and Harbor Workers' Compensation Act regulations regarding communicable/occupational diseases are similar in that, subject to the situs/status requirements. To be found compensable, the exposure must be the result of a specific incident and not simply exposure to a general health risk.

V. Medical Inquiries

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

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

However, 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.

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

No. An employee may be entitled to an exemption from a mandatory vaccination requirement based on an ADA disability that prevents him from taking the influenza

vaccine. This would be a reasonable accommodation barring undue hardship (significant difficulty or expense). Similarly, under Title VII of the Civil Rights Act of 1964, once an employer receives notice that an employee's sincerely held religious belief, practice, or observance prevents him from taking the influenza vaccine, the employer must provide a reasonable accommodation unless it would pose an undue hardship as defined by Title VII ("more than de minimis cost" to the operation of the employer's business), which is a lower standard than under the ADA).

24. An employee has tested positive for COVID-19, can we share this with our employees?

It Depends. 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 HIPAA. In that case, the employer (or employees of the employer) who know absolutely cannot share the medical diagnosis or other medical information unless it is facing a true medical emergency where the employee's diagnosis becomes imperative for health and safety reasons or 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.

25. 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 of the employee. In that case, the employer (or employees of the employer) who know absolutely cannot share the medical diagnosis or other medical information unless it is facing a true medical emergency where the employee's diagnosis becomes imperative for health and safety reasons or the employee has given a written HIPAA-compliant authorization to share the information. Healthcare communications between employers and employees are not governed by the HIPAA Privacy Rule, which would not apply if an employee tells an employer they have contracted COVID-19 or are self-isolating because they are displaying symptoms of COVID-19.

VI. Leaves of Absence

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

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

other regular daily activities because of the serious health condition. A serious health condition also requires a regime of treatment or recovery from the serious health condition.

So long as FMLA eligibility requirements are satisfied, employees who are diagnosed with the Coronavirus or are medically quarantined for suspicion of having Coronavirus may be eligible for FMLA since Coronavirus satisfies both the inpatient care and the continuing treatment prongs of the FMLA.

27. 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).*

28. 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.

29. 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 child care 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).*

30. 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).*

31. 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.*

32. 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.

33. 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.

34. 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.

35. 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.

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

PLEASE NOTE: The information presented in this section is as of March 27, 2020. The Department of Labor is constantly providing updated guidance on FFCRA. The information below DOES NOT reflect any changes that may result from the CARES Act.

For the most up-to-date information/guidance, please visit the DOL's Q&A webpage here.

The information presented below is a combination of questions and answers provided by the Department of Labor and questions that HUB has received from its customers.

36. 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.

37. 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, are not considered employees for purposes of the 500-employee threshold.

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

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

family and medical leave must be provided under the Emergency Family and Medical Leave Expansion Act.

In general, two or more entities are separate employers unless they meet the integrated employer test under the Family and Medical Leave Act of 1993 (FMLA). If two entities are an integrated employer under the FMLA, then employees of all entities making up the integrated employer will be counted in determining employer coverage for purposes of expanded family and medical leave under the Emergency Family and Medical Leave Expansion Act.

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

No, But. *Small businesses with fewer than 50 employees may be exempt from FFCRA if the viability of the business would be jeopardized by providing child care-related Emergency Paid Sick Leave and Emergency Family Medical Leave. However, the Department of Labor has yet to issue the criteria and accompanying details associated with applying for this exemption; this information is forthcoming.*

40. Does FFCRA apply to government agencies?

Yes. *The FFCRA applies to public agencies that employ one (1) or more employees. 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. However, federal employees covered by Title II of the Family and Medical Leave Act are covered by Emergency Paid Sick Leave under FFCRA.*

41. 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?

At this time, we do not know for sure. We have not seen anything specifically discussing non-profits.

42. 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 the employer had the employee on its payroll for the 30 calendar days immediately prior to the first day of the employee's leave. 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.

43. 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?

We are awaiting additional guidance on whether employees will have additional leave entitlement under Emergency FMLA after April 1, 2020 if/when the employee had already exhausted FMLA entitlement prior to April 1.

44. 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.*

45. 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? Are employees eligible for FFCRA benefits if they are subject to a state mandated "shelter in place" order?

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

Employer closed place of business/worksite BEFORE April 1, 2020
If the employee stopped working and stopped receiving pay before April 1 because the employer does not have work for the employee, the employee is NOT eligible for FFCRA benefits but may be eligible for unemployment insurance benefits. This is true whether the employer closes the worksite for lack of business or because the employer is required to close pursuant to a Federal, State or local directive. 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.

Employer closes place of business/worksite ON OR AFTER April 1, 2020
If the employee stops working and stops receiving pay after April 1 due to business closure—even if the employee requested leave prior to business closure—the employee is not eligible to receive FFCRA benefits but may be eligible for unemployment insurance benefits. This is true whether the employer closes the worksite for lack of business or because the employer is required to close pursuant to a Federal, State or local directive. 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.
If the employer later reopens business/worksite and employees resume work thereafter, employees may be eligible for FFCRA benefits if he/she experiences a FFCRA-qualifying event.

Employer closes place of business/working WHILE employee is on FFCRA leave
If the employer closes while an employee is on FFCRA leave, the employee must pay for any Emergency Paid Sick Leave or Emergency FMLA up to the date of business closure. As of the date of closure, the employee is no longer entitled to FFCRA benefits but may

be eligible for unemployment insurance benefits. This is true whether the employer closes the worksite for lack of business or because the employer is required to close pursuant to a Federal, State or local directive. 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.

If employer's place of business stays open but furloughs an employee ON OR AFTER April 1, 2020

If an employee is furloughed because the employer does not have enough work or business for the employee, the employee is not eligible for FFCRA benefits. The employee may be eligible for unemployment insurance benefits. 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.

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

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

47. If an employee's scheduled work hours are reduced, can the employee receive FFCRA benefits for the time not worked?

***No**. 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. To clarify, if an employee is unable to work their normal full schedule because of a FFCRA-qualifying reason, then the employee is eligible for FFCRA benefits. The amount of FFCRA benefits is then computed based on the employee's work schedule before it was reduced.*

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

***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.

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

49. 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.*

50. Can FFCRA be taken intermittently?

This answer is dependent on whether the employee is teleworking or working at his/her usual worksite.

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.

Employees working at his/her usual worksite (and not teleworking)
An employee who is not teleworking and instead working and his/her usual worksite ***cannot*** *take* ***Emergency Paid Sick Leave*** *intermittently and instead must take Emergency Paid Sick Leave in full-day increments. Once beginning to take Emergency Paid Sick Leave, 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.*** *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.*

*By contract, 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.*

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.

51. What documentation/certification can the employer require of employees for FFCRA? What records do I need to keep?

Employees are required to provide appropriate documentation for their Emergency FMLA or Emergency Paid Sick Leave.

Emergency Paid Sick Leave
Employees are required to provide appropriate documentation in support of the reason for the leave including:

a) *Employee's name*
b) *Qualifying reason for requesting leave*
c) *Statement that the employee is unable to work or telework for the noted qualifying reason*
d) *Date(s) for which leave is requested*
e) *In the case of quarantine or isolation, identify the source of any quarantine or isolation order, or the name of the health care provider who advised the employee to self-quarantine (example, the documentation may be a copy of the Federal, State or local quarantine/isolation order related to COVID-19 or written documentation by a health care provider advising the employee to self-quarantine due to COVID-19-related concerns)*

Emergency FMLA
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. This documentation could be a notice that has been posted on a government, school or day care website, or published in a newspaper, or an email from

an employee or official of the school, place of care, or child care provider.

This documentation is also required if the employee is seeking Emergency Paid Sick Leave for the same reason.

Of note, employees seeking a leave of absence for "normal" FMLA-qualifying reasons are still subject to all existing certification requirements under the FMLA.

Recordkeeping
If you intend to claim a tax credit for payments made to employees under FFCRA, the employer should retain all documentation provided by employees for their FFCRA-related leaves. Employers should consult Internal Revenue Service (IRS) applicable forms, instructions and information for the procedures that must be followed to claim a tax credit, including any needed substantiation to be retained to support the credit. This recordkeeping applies to both Emergency FMLA and Emergency Paid Sick Leave.

52. 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.*

53. 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.*

54. 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 <u>total</u> 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 you stop experiencing an Emergency Paid Sick Leave qualifying event, you will also cease to use your Emergency Paid Sick Leave. If you have any Emergency Paid Sick Leave remaining, you may use it at a later time for a qualifying reason before December 31, 2020 when FFCRA sunsets.

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

We are awaiting additional guidance on this matter.

56. *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.

57. *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 or $511 per day (depending on the FFCRA reason).*

58. *Are employees allowed to use employer-provided leave entitlements/paid time off concurrently with FFCRA benefits for the same hours?*

No. *An employee must choose either FFCRA leave or the employer-provided leave entitlement/paid time off.*

Employers may allow employees to supplement their FFCRA benefits with preexisting employer-provided leave entitlements/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 hour. An employer may not require employees to supplement FFCRA benefits with preexisting employer-provided paid time off—it is the employee's option to supplement when the option is permissible by the employer. That said, an employer does not have to allow employees to supplement their FFCRA benefits.

Of note, if the employer allows employees to supplement FFCRA benefits with employer-provided paid time off, the employer may not claim for tax credits for the supplemental amounts.

59. *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, then this likely will not invoke FFCRA. Furthermore, if the employee is able to telework, then the employee is not eligible for FFCRA.*

60. 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?

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.

61. 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?

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.

62. 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.

VIII. Employee Benefits

63. If I elect to take paid expanded family and medical leave or sick leave, must my employer continue my health coverage? If I remain on leave beyond the maximum period of expanded family and medical leave, do I have a right to keep my health coverage?

If your employer provides group health coverage that you've elected, you are entitled to continued group health coverage during your expanded family and medical leave on the same terms as if you continued to work. If you are enrolled in family coverage, your employer must maintain coverage during your expanded family and medical leave. You generally must continue to make any normal contributions to the cost of your health coverage. See WHD Fact Sheet 28A here.

If you do not return to work at the end of your expanded family and medical leave, check with your employer to determine whether you are eligible to keep your health coverage on the same terms (including contribution rates). If you are no longer eligible, you may be able to continue your coverage under the Consolidated Omnibus Budget Reconciliation Act (COBRA). COBRA, which generally applies to employers with 20 or more employees, allows you and your family to continue the same group health coverage at group rates. Your share of that cost may be higher than what you were paying before but may be lower than what you would pay for private individual health insurance coverage. (If your employer has fewer than 20 employees, you may be eligible to continue your health insurance under State laws that are similar to COBRA. These laws are sometimes referred to as "mini COBRA" and vary from State to State.) Contact the Employee Benefits Security Administration here to learn about health and retirement benefit protections for dislocated workers.

If you elect to take paid sick leave, your employer must continue your 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.

64. Do employer sponsored health plans cover testing for and treatment of COVID-19?

Yes. *Under the Families First Coronavirus Relief Act, all health plans, whether private, governmental or church plans, are required to cover COVID-19 testing without cost sharing. This does not extend to treatment.*

65. Is there cost sharing for these services?

No. Under the Families First Coronavirus Relief Act, all health plans, whether insured, self-insured, private, governmental or church plans, are required to cover screening and COVID-19 testing without cost sharing.

66. 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 without compromising the plan's status as a Qualified High Deductible Health Plan.

67. 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.

68. 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.

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

It Depends. *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.*

A potential problem arises however with HDHPs as current guidance does not allow plans to cover items through telemedicine (other than COVID-19 related testing and treatment) without cost sharing. HDHPs offering telemedicine (other than COVID-19 related testing and treatment) without cost sharing may technically make employees ineligible to make HSA contributions. However, trade groups are in communication with the IRS on this issue.

70. 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.

71. 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:

a. **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.
b. **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.
c. **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).

72. 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.

73. 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:

a. 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.

b. 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.

c. 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.

d. If employee receives benefits under an employer paid or an employee paid (pre-tax) disability insurance program, the hours WILL count as hours worked.

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.

74. 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?**"

75. 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.

47. 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.

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.*

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.*

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.

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.

76. 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:

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

a. 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.

b. 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.
c. 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.

77. 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.

78. 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.

79. 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.

80. 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.

81. 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.

82. 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.

83. 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.

84. 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.

85. 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.

86. 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.

87. Can I delay the deadline for completing wellness requirements due to 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:*

- ***a.*** *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.*
- ***b.*** *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.

88. 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.

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

(See also Employee Benefits Section)

89. 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:*

- ***a.*** *$10.80 per hour for federal contractors;*
- ***b.*** *$7.25 per hour for private sector employers; and,*
- ***c.*** *$2.13 per hour for tipped employees*

90. 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.

91. 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.

92. 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.

93. 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.

94. 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.

95. 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:

a. An entire job function;
b. A particular department; or,
c. 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.

96. 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.

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

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

a. 100 or more employees, excluding part-time employees.
b. 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:

a. A plant closing affects only a temporary facility.
b. A plant closing, or mass layoff occurs because:
- The particular facility, project, or undertaking was completed; and
- Affected employees were hired with the understanding that their employment was limited to that facility, project, or undertaking.
- 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:

a. The union representative of each affected employee (if applicable).
b. Each affected employee not represented by a union.
c. The state dislocated worker unit or office
d. The chief elected official of the unit of local government where the layoff or plant closing will occur
e. 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.

98. 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.*

99. 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:

- ***a.** A lump-sum monetary payment.*
- ***b.** 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.

X. Retirement FAQs – Managing Cash Flow & Helping Participants During COVID-19

100. Has Congress passed new legislation impacting retirement plans?

Not Yet. A bill in the Senate, the CARES Act, includes provisions to raise the maximum amount a participant can take from a plan loan, and provisions to remove the additional 10% excise tax on hardship distributions that meet conditions related to COVID-19.

On March 23, it was reported in BenefitsPro that trade groups are asking Congress to implement additional relief measures, including:

a. Temporary waiver of Required Minimum Distribution (RMD) rules;
b. Extending filing, notification and payment deadlines beyond that already announced by IRS;
c. Relief for defined benefit plans; and
d. Relief from single-employer PBGC premiums.

Please note, as of this writing, none of the changes on this page have been implemented.

101. 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.

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

One of the biggest issues impacting plan sponsors is meeting plan contribution requirements, as businesses are impacted by the response to the pandemic.

In the current business climate, engaging service providers in plan design conversations could be timely and valuable. Among the amendments that plan sponsors could consider implementing include:

a. Reducing or eliminating matching contributions and/or profit-sharing contributions,[1] which could help the employer reduce plan funding requirements; or,
b. Freezing defined benefit (including cash balance) or money purchase plans to limit required contributions.[2]

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

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

a. Determine what is required to reduce employer matching and/or profit-sharing contributions in 401(k) plans; or
b. 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.[3] 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.

103. How can plan sponsors help participants?

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

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

Plan sponsors may wish to take the following actions:

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

[1] 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.
[2] Freezing these types of plans may require advanced notification to participants prior to the change being effective.
[3] As noted in an earlier footnote, some changes may require advanced notice to participants prior to becoming effective.

b. 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;

c. 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;

d. For plan loans, sponsors should understand their role, if any, in making sure plan loans are repaid timely.[4]

104. 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.

105. Next steps?

Given how the fluid the situation with the pandemic has been, it is difficult to be certain. We are expecting IRS and/or DOL to issue guidance relating to retirement plans, and it is possible Congress may act as well. We will continue to monitor developments and update you as we know more. If you have any questions on your retirement plan, reach out to us at hubinternational.com.

Disclaimer

[4] As of this writing (March 24, 2020), Congress is considering legislation regarding distributions from qualified plans.