COVID-19 Compliance Guide & Frequently Asked Questions

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COVID-19 FAQS

Set forth below are various FAQs compiled through legal blogs, internal discussions and corporate resources. These will continue to be updated as laws change or are enacted. Please contact your HNI team should you have further questions, need assistance or want any updates to these FAQs.

NEW LEGISLATION

The Emergency Paid Sick Leave Act (effective April 1, 2020 thru December 31, 2020)

1. Who does this law apply to?

Answer: The Emergency Paid Sick Leave Act (EPSLA) requires employers with fewer than 500 employees and public employers with at least one employee to provide employees with up to two weeks of paid sick leave. Employers of health care providers or emergency responders may elect not to provide this leave to those specific employees. In addition, the Secretary of Labor may exempt small businesses (defined as fewer than 50 employees) if the required leave would jeopardize the viability of their business.

1A. When does the small business exemption apply to exclude a small business from the provisions of the EPSLA and the Emergency Family and Medical Leave Expansion Act (EFMLA)?

Answer: An employer, including a religious or nonprofit organization, with fewer than 50 employees (small business) is exempt from providing (a) paid sick leave due to school or place of care closures or child care provider unavailability for COVID-19 related reasons and (b) expanded family and medical leave due to school or place of care closures or child care provider unavailability for COVID-19 related reasons when doing so would jeopardize the viability of the small business as a going concern. A small business may claim this exemption if an authorized officer of the business has determined that:

A. the provision of paid sick leave or expanded family and medical leave would result in the small business's expenses and financial obligations exceeding available business revenues and cause the small business to cease operating at a minimal capacity;

B. the absence of the employee or employees requesting paid sick leave or expanded family and medical leave would entail a substantial risk to the financial health or operational capabilities of the small business because of their specialized skills, knowledge of the business, or responsibilities; or
C. there are not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services provided by the employee or employees requesting paid sick leave or expanded family and medical leave, and these labor or services are needed for the small business to operate at a minimal capacity.

This means a small business is exempt from mandated paid sick leave or expanded family and medical leave requirements only if the:

D. employer employs fewer than 50 employees;
E. leave is requested because the child's school or place of care is closed, or childcare provider is unavailable, due to COVID-19 related reasons; and
F. an authorized officer of the business has determined that at least one of the three conditions described above is satisfied.

The Department encourages employers and employees to collaborate to reach the best solution for maintaining the business and ensuring employee safety. Please do **NOT** assume you automatically satisfy this exemption or there could be penalties. Please consult an attorney with your fact situation before coming to any resolution as to whether you satisfy one or more of the exemption requirements.

2. Is there a posting requirement?

Answer: Yes, there is an approved sample notice from the Department of Labor (DOL) along with a set of full Q&As on how to post, where to post and when to deliver (as applicable) this notice. For more information on the DOL Q&As please see here: **https://www.dol.gov/agencies/whd/pandemic/ffcra-poster-questions**
and for a copy of the actual poster, please see here:
https://www.dol.gov/sites/dolgov/files/WHD/posters/FFCRA_Poster_WH1422_Federal.pdf

3. When and for whom do covered employers need to provide emergency paid leave?

Answer: All employees (full- or part-time) are immediately eligible to receive

this benefit. Covered employers are required to provide emergency paid leave to an employee who is unable to work or work remotely because:

A. the employee is subject to a federal, state, or local quarantine or isolation order related to COVID-19;
B. the employee has been advised by a health care provider to self-quarantine because of COVID-19;
C. the employee is experiencing symptoms of COVID-19 and is seeking a medical diagnosis;
D. the employee is caring for an individual (includes non-family) subject (or advised) to quarantine or isolation;
E. the employee is caring for a son or daughter whose school or place of care is closed, or childcare provider is unavailable, due to COVID-19 precautions; or
F. the employee is experiencing substantially similar conditions as specified by the Secretary of Health and Human Services, in consultation with the Secretaries of Labor and Treasury.

4. How is sick leave pay calculated?

Answer: Employers are required to provide employees with two weeks of paid sick leave, subject to caps. Full-time employees are to receive 80 hours at their regular rate of pay and part-time employees receive the number of hours that the employee works, on average, over a two- week period. Once the employee returns to work the employer is not required to provide any further emergency paid sick leave.

Payments are capped at $511 a day ($5,110 in total) for dealing with an employee's own illness or quarantine. Employees who are caring for an individual affected by COVID-19 and those whose children's schools have closed receive up to two-thirds of their pay, and that benefit is limited to $200 a day ($2,000 in total).

5. Can short term disability off-set paid sick leave?

Answer: If the reason for paid sick leave under the FFCRA also qualifies for short-term disability and the amount of wages paid under short-term disability is equal to or greater than what the employee is entitled to under the FFCRA, there does not appear to be an issue in allowing the offset. However, keep in mind that employees are entitled to EPSLA benefits immediately so any waiting period or other restriction imposed under a company's short-term disability plan will need to be accounted for.

6. How does this paid sick leave interact with our existing paid leave policy?

Answer: This emergency paid leave is **IN ADDITION** to any paid leave provided by employers. Employers may **NOT** require employees to exhaust their current sick leave, PTO or similar benefit before using this emergency paid sick leave. It is also very important to note that paid leave provided before the law is enacted can **NOT** be credited against the employee's paid leave entitlement.

7. Do employees need a note from a doctor?

Answer: The new law does not say a doctor's note is required. Obtaining a doctor's note may be quite difficult. Health care provider offices and medical facilities are overwhelmed right now and will likely not be able to provide the documentation.

8. What tax benefit flows to employers who make these payments?

Answer: A limited refundable tax credit will be available equal to payments made to employees. Employers can claim up to $511 or $200 for any day of absence for the reasons outlined above, to a maximum of ten days per employee for the year.

An employer or a self-employed individual may offset on a dollar for dollar basis and on a payroll by payroll basis the amount the employer or the self-employed individual has paid to its employees for Emergency Paid Sick Leave and paid FMLA against the employer's contribution for social security pursuant to Sections 3111(a) or 3221(a) of the Tax Code. If the amount of benefits paid exceeds the amount of the employer's social security contribution, the IRS will establish a procedure under which the employer can apply for an expedited refund of those amounts. Here is a list of all of the funding options:

- The FFCRA created the refundable paid sick leave credit and the paid childcare leave credit for eligible employers.
- Eligible employers who pay qualifying emergency sick or emergency childcare leave can retain an amount of the payroll taxes — they would normally pay over to the IRS — equal to the amount of qualifying emergency pay.

- Payroll taxes that can be retained: withheld federal income taxes; employee share of Social Security and Medicare taxes; and employer share of Social Security and Medicare taxes of those employees who received emergency pay.
- If there are insufficient payroll taxes to cover the cost of qualified sick and childcare leave paid to the employees, employers will be able to request an accelerated payment from the IRS.
- The IRS expects to process these requests in two weeks or less.

The guidance also includes these examples:

If an eligible employer paid $5,000 in sick leave and is otherwise required to deposit $8,000 in payroll taxes, including taxes withheld from all its employees, the employer could use up to $5,000 of the $8,000 of taxes it was going to deposit for making qualified leave payments. The employer would only be required under the law to deposit the remaining $3,000 on its next regular deposit date.

If an eligible employer paid $10,000 in sick leave and was required to deposit $8,000 in taxes, the employer could use the entire $8,000 of taxes in order to make qualified leave payments and file a request for an accelerated credit for the remaining $2,000.

Equivalent child-care leave and sick leave credit amounts are available to self-employed individuals under similar circumstances. These credits will be claimed on their income tax return and will reduce estimated tax payments.

Your tax attorney or accountant can provide specific guidance.

9. If my company has over 500 employees and we still want to provide paid leave consistent with the EPSLA, will we qualify for the tax credit?

Answer: No. The FFCRA does not provide definitive guidance on this question. In the context of tax credits, the FFCRA defines “qualified sick leave wages” as wages paid by an employer which are required to be paid by reason of the EPSLA.

Emergency Family and Medical Leave Expansion Act (effective April 1, 2020 thru December 31, 2020)

10. How do I know if my company is impacted by Emergency Family and Medical Leave Expansion Act (EFMLA)?

Answer: The same employers are covered by this law which expands the protections of the Family and Medical Leave Act (FMLA)- employers with fewer than 500 employees and public employers with at least one employee to provide paid benefits in certain situations. Employers of health care providers or emergency responders may elect not to provide this leave to those specific employees. In addition, the DOL may exempt small businesses (defined as fewer than 50 employees) if the required leave would jeopardize the viability of their business.

10A. When does the small business exemption apply to exclude a small business from the provisions of the EPSLA and the EFMLA?

Answer: An employer, including a religious or nonprofit organization, with fewer than 50 employees (small business) is exempt from providing (a) paid sick leave due to school or place of care closures or child care provider unavailability for COVID-19 related reasons and (b) expanded family and medical leave due to school or place of care closures or child care provider unavailability for COVID-19 related reasons when doing so would jeopardize the viability of the small business as a going concern. A small business may claim this exemption if an authorized officer of the business has determined that:

A. the provision of paid sick leave or expanded family and medical leave would result in the small business's expenses and financial obligations exceeding available business revenues and cause the small business to cease operating at a minimal capacity;
B. the absence of the employee or employees requesting paid sick leave or expanded family and medical leave would entail a substantial risk to the financial health or operational capabilities of the small business because of their specialized skills, knowledge of the business, or responsibilities; or
C. there are not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services provided by the employee or employees requesting paid sick leave or expanded family and medical leave, and these labor or services are needed for the small business to operate at a minimal capacity.

This means a small business is exempt from mandated paid sick leave or expanded family and medical leave requirements only if the:

D. employer employs fewer than 50 employees;

E. leave is requested because the child's school or place of care is closed, or childcare provider is unavailable, due to COVID-19 related reasons; and
F. an authorized officer of the business has determined that at least one of the three conditions described above is satisfied.

The Department encourages employers and employees to collaborate to reach the best solution for maintaining the business and ensuring employee safety. Please do **NOT** assume you automatically satisfy this exemption or there could be penalties. Please consult an attorney with your fact situation before coming to any resolution as to whether you satisfy one or more of the exemption requirements.

11. What and when are employees eligible to receive EFMLA?

Answer: Any full-time or part-time employee that has been on the employer's payroll for 30 days prior to taking the leave is eligible. This is a significant departure from the FMLA eligibility requirements.

12. When do covered employers need to provide EFMLA?

Answer: Employees will be entitled to take up to 12 weeks of job-protected leave if an employee is unable to work (office or remotely) due to caring for the employee's son or daughter under the age of 18 because the child's school or place of care has been closed or his or her childcare provider is unavailable due to the public health emergency.

If your employer was covered by the FMLA prior to April 1, 2020, your eligibility for expanded family and medical leave depends on how much leave you have already taken during the 12-month period that your employer uses for FMLA leave. You may take a total of 12 workweeks for FMLA or expanded family and medical leave reasons during a 12-month period. If you have taken some, but not all, 12 workweeks of your leave under FMLA during the current 12-month period determined by your employer, you may take the remaining portion of leave available. If you have already taken 12 workweeks of FMLA leave during this 12-month period, you may not take additional expanded family and medical leave.

13. What pay is available to employees under EFMLA?

Answer: The EFMLA provides for a combination of unpaid and paid leave. The first 10 days of EFMLA may be unpaid which can be replaced with any existing pay benefit (PTO, vacation or sick leave) but an employer may not require an employee to do so. After ten days of unpaid leave, employees are entitled to 12 weeks of job-protected leave of at least two-thirds their usual pay. The cap of

this entitlement is $200 per day ($10,000 in the aggregate). Part-time employees are entitled to be paid based on the average number of hours worked for the six months prior to taking the leave.

14. Do employees need a note from a doctor?

Answer: One is not specifically required so the same answer as in Q&A 6 applies.

15. What legal rights due employees have under EFMLA?

Answer: This is job-protected leave **EXCEPT** that job restoration requirements will apply only to employers with 25 or more employees. This does not apply to smaller employers if the position held by the employee does not exist any longer due to economic conditions or other changes in operating conditions that affect employment and are caused by this health emergency. The employer should make a reasonable effort to restore the employee to an equivalent position and if none currently exists, the employer does have an obligation to contact the employee if an equivalent position becomes available in the next year.

16. What tax benefit flows to employers who make these payments?

Answer: A limited refundable tax credit will be available equal to payments made to employee. Employers can claim up to $200 for each day of qualifying leave up to $10,000 per employee for the year.

An employer or a self-employed individual may offset on a dollar for dollar basis and on a payroll by payroll basis the amount the employer or the self-employed individual has paid to its employees for Emergency Paid Sick Leave and paid FMLA against the employer's contribution for social security pursuant to Sections 3111(a) or 3221(a) of the Tax Code. If the amount of benefits paid exceeds the amount of the employer's social security contribution, the IRS will establish a procedure under which the employer can apply for an expedited refund of those amounts. Here is a list of all of the funding options:

- The FFCRA created the refundable paid sick leave credit and the paid childcare leave credit for eligible employers.
- Eligible employers who pay qualifying emergency sick or emergency childcare leave can retain an amount of the payroll taxes — they would normally pay over to the IRS — equal to the amount of qualifying emergency pay.

- Payroll taxes that can be retained: withheld federal income taxes; employee share of Social Security and Medicare taxes; and employer share of Social Security and Medicare taxes of those employees who received emergency pay.
- If there are insufficient payroll taxes to cover the cost of qualified sick and childcare leave paid to the employees, employers will be able to request an accelerated payment from the IRS.
- The IRS expects to process these requests in two weeks or less.

The guidance also includes these examples:

If an eligible employer paid $5,000 in sick leave and is otherwise required to deposit $8,000 in payroll taxes, including taxes withheld from all its employees, the employer could use up to $5,000 of the $8,000 of taxes it was going to deposit for making qualified leave payments. The employer would only be required under the law to deposit the remaining $3,000 on its next regular deposit date.

If an eligible employer paid $10,000 in sick leave and was required to deposit $8,000 in taxes, the employer could use the entire $8,000 of taxes in order to make qualified leave payments and file a request for an accelerated credit for the remaining $2,000.

Equivalent child-care leave and sick leave credit amounts are available to self-employed individuals under similar circumstances. These credits will be claimed on their income tax return and will reduce estimated tax payments.

Your tax attorney or accountant can provide specific guidance.

17. If my company has over 500 employees and we still want to provide paid leave consistent with the EFMLA, will we qualify for the tax credit?

Answer: No. The FFCRA does not provide definitive guidance on this question. In the context of the payroll credit, the relevant language states that "qualified family leave wages," means wages and compensation paid by an employer which are required to be paid by reason of the EFMLA.

18. What is the difference under the EFMLA and the EPSLA as it relates to leave due to the need to care for an employee's son or daughter because his or her school has closed or their childcare is unavailable?

Answer: There is one notable difference between these two leaves. Leave under the EFMLA references a public health emergency as the reason for the school closure, or unavailability of childcare, while leave under the EPSLA states that leave is permitted if the school is closed, or the childcare is unavailable due to COVID-19 precautions. What this means is that taking leave under the EPSLA requires a less stringent showing from the employee, as he or she does not need to establish a school closure or childcare unavailability due to declared state of emergency from federal, state, or local authorities.

Under the EFMLA, the employee may take leave if he or she is unable to work (or telework) due to a need for leave to care for the son or daughter under 18 years of age if the school or place or care has been closed, or the childcare provider is unavailable due to a public health emergency. An emergency with respect to COVID-19 declared by a Federal, State, or local authority is a public health emergency.

Under the EPSLA, an employee may take leave if he or she is unable to work (or telework) due to a need for leave because the employee is caring for a son or daughter if the school or place of care has been closed, or the childcare provider is unavailable due to COVID-19 precautions.

19. Can an employee take paid leave under both the EPSLA and the EFMLA?

Answer: Possibly. If the employee is taking leave under EPSLA for a qualifying reason that does not fall under EFMLA and subsequently needs additional leave for a qualifying reason under the EFMLA that does not fall under the EPSLA, it is likely that an employee will be entitled to leave under both provisions of the FFCRA and the leave will not run concurrently.

If the employee takes 80 hours of leave under EPSLA which does not also qualify for EFMLA, and the employee later needs leave that does qualify under the EFMLA, the employee will be entitled up to 12 weeks of EFMLA leave even though he or she already used two weeks of leave under the EPSLA, because EPSLA leave is not a form of FMLA leave that counts against their FMLA entitlement.

20. Does EPSLA run concurrently with EFMLA?

Answer: It could dependent on the fact situation. If the employee is eligible for leave under the EFMLA and the reason for EPSLA also qualifies for leave under the EFMLA the two will probably run concurrently. However, if an employee has

exhausted all EFMLA or does not yet qualify, then the employee would only be eligible to take EPSLA and the leaves would not run concurrently.

NOTICE REQUIREMENTS

21. What notification can I require from an employee seeking to take leave under the EPSLA or EFMLA?

Answer: Neither addresses this question so it is assumed an employer's ability to request documentation will remain the same as with the FMLA. It will be easier to provide documentation of the need for leave under the EFMLA than the EPSLA since the leave must be due to a public health emergency. Employers are encouraged to remain flexible in the event an employee is not able to provide documentation or advising that the company reserves the right to request documentation at a later date. You can go as far as stating that employees may be subject to disciplinary action, up to and including termination, in connection with abuse of the policy.

22. What documents should a company request from their employees in connection with leave the FFCRA?

Answer: Employees who wish to take FFCRA leave should provide their employers with documentation to support that request.

For leave taken under the EPSLA, employers should request documentation evidencing the need for leave in connection with one of the six qualifying reasons. This documentation may include notices in connection with a federal, state, or local quarantine or isolation order; medical records from a healthcare provider; or notifications from a school or child-care provider regarding closures due to COVID-19. Some reasons will be easier to provide documentation for than others:

Leave taken in connection with a quarantine or isolation order, or leave taken in connection with an advisory from a health care provider to self-quarantine, will be easier to document than leave taken because the employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis

Given the chaos and workload of physicians, employers should be flexible. Employers should not deny an employee's right to take leave simply because the employee cannot provide supporting documentation. As an initial step, employers should request that an employee provide an order of quarantine or isolation from his or her local health department. If the health department is unable to provide

an order, the employee should submit documentation from a licensed medical provider that has treated the employee (or the employee's child) attesting that the employee (or their child) qualify for the order.

For leave under the EFMLA, employers may request additional documentation as permitted under the certification rules for regular FMLA requests. This may include notices of closure or unavailability from a child's school, or place of care. Existing certification requirements under the FMLA remain in effect.

23. May I require employees to tell me if they have tested positive COVID-19 or are symptomatic, or if someone in their household has tested positive or is symptomatic?

Answer: Yes. In most circumstances, COVID-19 is not considered to be a disability, and therefore is not subject to the laws preventing certain disability-related employee inquiries. In fact, under the Occupational Safety and Health Act ("OSHA"), employers may be required to prohibit employees who have tested positive for COVID-19 from returning to the workplace to maintain a safe working environment, so a policy requiring employees to inform employers that they have tested positive is prudent.

There are limits under the ADA regarding what you can ask employees about their own health and the health of their household. Where the virus is so contagious and can for some, be deadly, you can require employees to let you know if they or one of their household members test positive or are symptomatic. However, that information should only be shared with those who have a need to know. Employees have privacy rights and therefore you have to be careful how you use that information. We encourage you to contact legal counsel if you believe employees may have been exposed at work.

24. May an employer send an employee home and require they stay away from work if they have tested positive for COVID-19 or live with someone who has tested positive?

Answer: Yes, immediately.

25. May I send someone home if they are symptomatic?

Answer: Many people had colds in February and early March or they had or have the regular flu. Allergies also have many similar symptoms and lead to coughs and sniffles. Questions to consider include: What are the symptoms? How close do they interact with other employees? Did they have the symptoms before the breakout? The important thing is to base your assessment on factual

information. The CDC outlines specific symptoms to watch for and it is important to reference that guidance before making any decisions. Employers can be conservative and send employees home when in doubt. Employers should encourage their employees to stay home when sick.

26. During a pandemic, how much information may an employer request from employees who report feeling ill at work or who call in sick?

Answer: Employers may ask employees if they are experiencing influenza-like symptoms, such as fever or chills and a cough or sore throat. Employee confidentiality must be maintained. Please remember than in the event of a pandemic, the EEOC allows employers more latitude when fact-finding as it relates to employees and their health conditions.

27. May I send someone home if they are at risk (over 65, health issues, etc.)?

Answer: We urge not to do this. Being in the risk group alone likely does not mean that an employee is in danger while at work. It is best not to make broad policy decisions based solely on demographics such as age. If someone has lung issues or a weakened immune system, you might speak to them individually and accommodate them the best you can. It is best to reach agreement with the employee as to what is best for them. This answer applies even when there is a pandemic situation.

28. What obligations does an employer have if it decides to shut down its facility (even temporarily)?

Answer: Under the federal Worker Adjustment Retraining Notification (WARN) Act, employers with 100 or more employees are required to provide 60 days' advance notice of a temporary shutdown if the shutdown will (1) affect 50 or more employees at a single site of employment and (2) result in at least a 50 percent reduction in hours of work of individual employees during the month of the shutdown.

Sixty days' notice is not required if the shutdown is a result of a "natural disaster" or "unforeseeable business circumstances." It is not clear whether the "natural disaster" or "unforeseeable business circumstances" exceptions will apply to the coronavirus pandemic. As such, employers should consult with an attorney experienced in the WARN Act to guide them when making such decisions. Even if it is determined these exceptions do apply, notice of a shut-down must be communicated as soon as practicable.

Employers also should consult their applicable state laws – many of which have “mini-WARN Acts” that apply to smaller employers and contain more rigorous notice requirements.

BENEFIT PLANS

29. Is an employer health plan required to provide testing for and treatment of COVID-19 without a deductible or at a reduced cost?

Answer: Yes. Health plans are now required to waive copays and other out-of-pocket expenses for COVID-19 testing to make sure cost does not impede public health efforts to control the spread of the virus.

Employers sponsoring insured health plan coverage will want to coordinate with their insurer to provide appropriate information to employees, including, where applicable, information about using telehealth services.

30. Can an employer amend its high deductible health plan ("HDHP") to allow testing for and treatment of COVID-19 without a deductible or with a deductible below the current required minimums?

Answer: Yes. On March 11, 2020, the IRS issued Notice 2020-15 making clear that until further notice all medical care services received and items purchased associated with testing for and treatment of COVID-19 that are provided by a health plan without a deductible, or with a deductible below the minimum annual deductible otherwise required for an HDHP will be disregarded for purposes of determining the status of the plan as an HDHP.

31. Can employers allow changes to employee elections under their Code section 125 cafeteria plans to reflect changes in circumstances due to COVID-19?

Answer: Treasury Regulations Section 1.125-4 describe the situations under which employees may revoke or change elections made prior to the beginning of the plan year under a Code Section 125 cafeteria plan. The types of changes that may create the ability to revoke elections include a change in the employment status of the employee (or the employee's spouse or dependents) or the offering of a special election period under the plan by the employer. The change in the election has to be consistent with the change in status, which could include situations where, as a consequence of COVID-19, the employee (or his/her spouse or dependents) have a reduction in work hours such that eligibility for or cost of coverage changes.

For changes in employment status that involve a reduction of hours, a "reduction of hours" event may allow certain election changes even if benefit eligibility is not affected (e.g., because the employee is locked into full-time status during a stability period and remains eligible for health coverage). Here, the employee would be allowed to make a mid-year election change to drop medical coverage.

Similarly, if the employee must pay a greater portion of the premium as a result of the reduction in hours (e.g., a change from full-time to part-time status requires the employee to contribute a greater amount towards the cost of coverage), then the cost-change rules should permit the employee to make an election change to a lower-cost medical option. In lieu of selecting a lower-cost option, the employee may choose to revoke coverage.

While a reduction in hours will provide for some election change opportunities for medical coverage, such opportunities for Health FSA coverage are rarer. In general, a reduction in hours that does not affect the employee's eligibility will not provide an opportunity for a mid-year election change under the Health FSA. Conversely, participants should be permitted to make election changes to DCAP coverage where the cost of dependent care increases or decreases mid-year, or where the need for dependent care increases or decreases, which may be the natural result of a reduction in hours.

Employees who are absent from work due to their own illness or to care for a family member may be eligible for Family and Medical Leave Act (FMLA) leave. During an unpaid FMLA leave, an employee must be permitted to revoke their health coverage, including coverage under a health flexible spending account (health FSA), or to continue coverage but discontinue payment of the employee's share of the premium costs under the health plan, or discontinue FSA contributions during the unpaid FMLA leave. Generally, employees may be permitted to pay their premium share upon returning to work, during the leave using after-tax dollars, or to "pre-pay" before taking leave. Employers should review their plan documents to determine which options are provided, and whether employees who discontinue health FSA coverage during an FMLA leave may resume coverage upon returning to work at the original contribution level, or at a pro-rata level such that the employee's payroll deductions are not increased for the remainder of the year.

32. Can employees receive a loan or hardship distribution from their 401(k) or other defined-contribution retirement plans on account of expenses related to COViD-19?

Answer: The IRS has not issued specific guidance about retirement plan loans or hardship distributions related to COVID-19. Hardship distributions from a

401(k) plan, if permitted under the plan, can be made only if necessary, to satisfy an immediate and heavy financial need. For plans incorporating the IRS "safe harbor" events that are deemed to be made on account of an immediate and heavy financial need, a hardship distribution is allowed for expenses for (or necessary to obtain) medical care (as defined in Internal Revenue Code section 213(d)), if the recipient of the medical care is the participant, or a spouse, dependent or a named beneficiary under the 401(k) plan.

Employees who participate in a 457(b) plan may qualify for an "unforeseen emergency" distribution, if permitted under the plan, in the case of a severe financial hardship of the participant or beneficiary resulting from an illness, including the need to pay for medical expenses. A distribution for an unforeseen emergency may be made only to the extent the emergency cannot be relieved through reimbursement or compensation from insurance or otherwise, or by liquidation of the participant's assets, unless the liquidation of assets would itself cause severe financial hardship.

401(k) and other defined-contribution retirement plans that permit participant loans generally do not limit the purpose for which a loan can be taken, although there may be restrictions on the number of loans available from the plan at any one time, and the amount of any loan, the repayment period, and other loan terms must comply with IRS rules for participant loans from retirement plans.

Under the Taxpayer Certainty and Disaster Tax Relief Act of 2019, a plan participant could receive a qualified disaster distribution of up to $100,000 penalty-free if the President declares the COVID-19 situation a major disaster under section 401 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act and the participant's principal place of abode is located in the qualified disaster area and has sustained an economic loss by reason of such qualified disaster. The President declared the COVID-19 situation a national disaster on March 13, 2020.

33. Can an employer establish catastrophic leave-sharing or disaster leave-sharing programs to allow employees to assist one another with COVID-19 situations?

Answer: The rules for the two types of leave-sharing programs differ. The IRS has provided guidance under Notice 2006-59 as to the way in which a *disaster leave-sharing program* must be operated. That Notice provides guidance on the federal tax consequences of certain leave-sharing plans that permit employees to deposit leave in an employer-sponsored leave bank for use by other employees who have been adversely affected by a major disaster. A

major disaster is defined as (a) a major disaster as declared by the President under § 401 of the Stafford Act, 42 U.S.C. § 5170, that warrants individual assistance or individual and public assistance from the federal government under that Act, or (b) a major disaster or emergency as declared by the President pursuant to 5 U.S.C. § 6391, in the case of employees described in that statute. As of March 13, President Trump signed an emergency declaration with respect to the COVID-19 circumstances. Employers can now set up a program under the rules established under Notice 2006-59, and the leave deposited can only be used for this particular disaster.

With respect to an employer-sponsored *catastrophic leave-sharing program*, the IRS provided guidance under Revenue Ruling 90-29 that would permit the recipient and not the donor to be taxed when a program allows donated leave to be used only for medical emergencies. The catastrophic leave-sharing program must meet three requirements: (1) employees requesting the additional leave are required to submit a written application describing the medical emergency to the employer; (2) after the application is approved and the employee exhausts all of his or her paid leave, the employee is eligible to receive paid leave (at his or her normal rate of compensation) donated by other employees; and (3) the program restricts the amount of leave that can be donated and contains rules regarding how the leave will be granted to leave recipients. The IRS considers a "medical emergency" making the recipient eligible for leave donations to be a medical condition of the employee (or family member of the employee) that would require the prolonged absence of the employee from work and would result in a substantial loss of income to the employee because the employee would have exhausted all paid leave available (not considering leave that might be available under the leave-sharing program). In a 2007 Private Letter Ruling, No. 200720017, the IRS approved of a leave-sharing plan that defined a medical emergency as a major illness or other medical condition (e.g., heart attack, cancer, etc.) that requires a prolonged absence from work, including intermittent absences that are related to the same illness or condition. While not all cases of COVID-19 will meet this criterion, it is clear that for significant illness this type of program could provide an opportunity for co-workers to assist those who may exhaust their leave balances for their own or a family member's illness from COVID-19.

EXCLUDING EMPLOYEES FROM THE WORKPLACE

34. May I tell someone that they have to self-quarantine if they traveled recently or have been exposed to someone who tested positive?

Answer: Yes. In fact, if an employee has traveled to an area with "widespread sustained transmission," as defined by the CDC, the CDC recommends that the

employer send that employee home, regardless of whether the purpose of travel was for personal or business reasons.

A more **cautious** answer is that requiring a self-quarantine "might" be a technical violation of the ADA as it might be viewed as treating the employee differently based on a perceived disability. It is easier to justify if the employee recently traveled to a country or zone identified by the CDC as a danger zone. Given the serious threat of the virus, many employers are being aggressive and making an employee self-quarantine, usually also making sure the employee is paid while being out of work and working from home as much as possible. It would be very difficult to not pay the employee when you are imposing standards beyond what the CDC is recommending.

35. When an employee returns from travel during a pandemic, must an employer wait until the employee develops influenza symptoms to ask questions about exposure to pandemic influenza during the trip?

Answer: No.

36. May an employer encourage employees to telework (i.e., work from an alternative location such as home) as an infection-control strategy during a pandemic?

Answer: Yes.

37. If we learn that one of our employees has come into close contact with someone who has been infected with COVID-19, can we send that employee home?

Answer: Yes. CDC guidelines recommends that an employer exclude an employee from the workplace if that employee has come into "close contact" with someone who has been infected with COVID-19. "Close contact" includes (but is not limited to) living in the same household as an infected person, sitting within 6 feet of an infected person, or being in a relationship with an infected person.

38. If we close our offices to work from home, do we need to pay for people's internet and cell phone usage?

Answer: It is probably a good idea to have a policy providing a credit for internet and phone access. Many states have an expense reimbursement law and those laws vary widely in scope. The FLSA has no such requirement provided that the

expenses incurred by the employee do not cause the employee to dip below the minimum wage.

CONCERNS ABOUT EMPLOYEE ATTENDANCE

39. Do I have to allow an employee to work from home if the employee does not want to come to work because they are worried about being exposed to the virus?

Answer: Employees generally do not normally have a right to refuse work. However, the answer can depend on the employee's personal health circumstances. Employees may have the right to refuse to do a job if they believe in good faith that they are exposed to imminent danger. "Good faith" means that even if an imminent danger is not found to exist, the worker had reasonable grounds to believer that it did exist.

It is generally recommended that you not make an employee come to work if they are afraid to be there, especially if they are considered at-risk. An employer can explore whether a temporary change in the role can be accommodate for a temporary period of time. But on the flip side, if everyone else is at work and there are no reported incidents, you have no legal obligation to accommodate that employee's request. Discipline may be in order because if you grant one accommodation, you have to grant all accommodations of this type.

40. Can we discipline non-affected employees who refuse to come into the office for fear of being exposed to COVID-19?

Answer: Maybe. Under OSHA, an employee may refuse a work assignment that involves a "risk of death or serious physical harm." However, whether a reasonable employee would determine a particular situation to be an "unsafe work environment" will depend upon the circumstances of the workplace. Given that COVID-19 is a new virus and public health officials are still learning about how the virus is transmitted, it may be difficult for an employer to prove that an employee's concern about exposure is unreasonable. Accordingly, employers should consult with counsel before taking an adverse action against an employee who refuses to come into work.

However, employers need to be aware of the laws of the states in which they and their employees are located. Some states that require employers providing mandatory paid sick leave may allow employees to use such time without having to provide documentary support establishing the leave was necessary.

41. During a pandemic, may an employer ask an employee why he or she has been absent from work if the employer suspects it is for a medical reason?

Answer: Yes.

42. Schools have been closed and our employees need to be at home to watch their kids. Do we need to permit that?

Answer: Legally, employers do not need to allow employees to stay at home with their kids who are not sick. That aside, we are advising employers to work with employees to find a balance so that they can make sure their kids are safe during this time and it is imperative to keep in mind that many daycare and childcare facilities are also closed so there is no one to take care of the children. An example might be that the spouses alternate staying home with the kids. No employee should be disciplined or fired for choosing to stay home with their kids at this time.

CONFIDENTIALITY CONCERNS & REPORTING REQUIREMENTS

43. Can we inform our employees of confirmed or suspected COVID-19 cases in the workplace?

Answer: In most circumstances, yes. The CDC has issued guidance suggesting that employers inform employees who may have come into close contact with employees who have confirmed or suspected COVID-19 infections. However, employers should strive to inform these employees that they may have come into contact with COVID-19, while not disclosing the identity of the infected employee and otherwise maintaining the confidentiality of that employee, to avoid violating federal and state confidentiality requirements. We strongly recommend obtaining a written authorization from the infected employee before disclosing identifiable information about the employee's health to other employees.

44. Do we have an obligation to report a suspected or confirmed case of COVID-19 to the CDC?

Answer: No. Employers do not have an obligation to report a suspected or confirmed case of COVID-19 to the CDC. The employee's health care provider has an obligation to report all confirmed cases of COVID-19 to the CDC.

45. How should I handle employee medical information?

Answer: You need to follow the basic HIPAA guidelines. If an employer receives confidential medical information about an employee, the employer should take all reasonable steps to protect the privacy and medical information of the employee. In general, employers are required to maintain all information about employee illnesses as a confidential medical record. If employers have hardcopy or electronic copies of employee medical files, those files should be kept separate from the employee's other personnel records, and access to the medical records should be limited. These files should be kept in a secure, locked filing cabinet or a password-protected electronic file.

VACATION/PTO/SICK TIME/LEAVES OF ABSENCE

46. Do we have to pay employees who stay home from work because of the virus?

Answer: Employer's may follow their existing PTO / vacation / sick leave policies. We recommend that employees should be allowed to take their sick time / PTO and vacation time. Employers ALSO have the right to modify these policies on a short-term basis. Also, please see the discussions in these FAQs on the Emergency Paid Sick Leave Act (EPSLA) and the Emergency Family and Medical Leave Expansion Action (EFMLA).

47. Once an employee's PTO is used up, can the time away from work be unpaid?

Answer: The answer for non-exempt employees is yes assuming the employee is not doing any work. The answer is more complicated with regard to exempt employees. The answer depends on why the employee is out of work and whether the employee will be performing any work. If you are thinking about having exempt employees stay out of work and not get paid, first consult with legal counsel. Also, please see the discussions in these FAQs on the Emergency Paid Sick Leave Act (EPSLA) and the Emergency Family and Medical Leave Expansion Action (EFMLA).

48. We are thinking about paying our employees additional sick leave. If we send people home, can we require they use their PTO first before we pay them any additional sick leave?

Answer: First, please see the discussions in these FAQs on the Emergency Paid Sick Leave Act (EPSLA) and the Emergency Family and Medical Leave

Expansion Action (EFMLA) since these new laws already provides for additional leave.

In the event those new laws don't apply to your business, follow your current policy. There is currently no law requiring you to pay additional sick leave to your employees who fall ill due to COVID-19. If you decide to pay additional sick leave, you must do so in a way that does not discriminate based on any protected characteristics. The problem with requiring people to first use their PTO is that the people who took vacations will end up getting more time off compared to the people who did not. So those who decided to work will essentially lose their PTO. While it may be unfair, unless there is a discriminatory intent or effect, it is probably legal barring further legislation.

49. I have an employee whose kids are home from school. The employee is trading child-care duties with their spouse and needs to stay home 2-3 days per week. They cannot work from home. Do I need to pay them for the full week?

Answer: First, please see the discussions in these FAQs on the Emergency Paid Sick Leave Act (EPSLA) and the Emergency Family and Medical Leave Expansion Action (EFMLA).

In the event these new laws do not apply to your business, you do not need to pay employees for the time they are not working. There is some additional pending legislation that may entitle employees to unemployment benefits if they are forced to stay home with children as a result of school closures.

If the employee is exempt and works part of the week you must pay them for the entire week. If the employee is non-exempt, you only have to pay them for the actual time worked.

50. If we close our offices to work from home, do we need to pay wages to people who do not have computers and cell phones?

Answer: Please see the discussions in these FAQs on the Emergency Paid Sick Leave Act (EPSLA) and the Emergency Family and Medical Leave Expansion Action (EFMLA).

If those new laws do not apply to your business, you do not need to pay employees who cannot work because they cannot access your company's systems. However, do not forget the requirements for paying exempt employees who do any amount of work during the day.

51. Can we require employees who stay home because of suspected or confirmed COVID-19 cases to use their vacation or sick time?

Answer: First, please see the discussions in these FAQs on the Emergency Paid Sick Leave Act (EPSLA) and the Emergency Family and Medical Leave Expansion Action (EFMLA).

If these new laws do not apply to your business, there is no federal law preventing an employer from requiring that employees to who stay home (and are not working remotely) to use their paid vacation or sick time while out of work. However, some state laws prohibit an employer from requiring an employee who is kept out of work involuntarily to use their paid time off while out of work. Additionally, employers must be consistent with their written paid time off (PTO) policies and applicable collective bargaining agreements, if any. Moreover, even if requiring use of sick time is permitted by its written policies, employers should be aware that imposing this obligation upon employees may incentivize employees who have tested positive for or are experiencing symptoms of COVID-19 to report to work, potentially increasing spread of the virus in the workforce.

52. Can we require employees to cancel scheduled vacations and to come into work?

Answer: Generally, yes. There are no laws preventing employers from cancelling or rescheduling vacations previously granted to employees. Most employer vacation policies expressly grant the employer to exercise such discretion if business needs dictate the cancellation or rescheduling of vacations. However, employers will want to check their vacation policies and, if applicable, collective bargaining agreements with labor unions to confirm that nothing contained therein impedes the employer's ability to require employees to cancel or reschedule vacations. Employers should consult with counsel if they are subject to a policy or agreement.

While these are the general rules, employers should consult with counsel concerning their pay obligations. These general rules can be affected by individual employment agreements, collective bargaining agreements, and workplace policies. Employers should also be aware that failing to pay employees for their time away from work may incentivize employees who have tested positive for COVID-19 or are experiencing symptoms of COVID-19 to report to work, potentially increasing the spread of the virus in the workforce.

53. Is a COVID-19-related absence covered by the Family and Medical Leave Act ("FMLA")?

Answer: Possibly. Under the FMLA, a covered "serious health condition" is one in which an employee does not report for work for three consecutive work days and either (1) visits their medical care provider twice within a specified period of time, or (2) visits their medical care provider once and is subject to "continuing treatment," which includes use of prescription medications. If an employee experiencing a COVID-19 related absence (including tending to family members) satisfies the FMLA's definition of "serious health condition," that absence may be protected by the FMLA, which requires up to 12 weeks of unpaid, job-protected leave. If you have taken some, but not all, 12 workweeks of your leave under FMLA during the current 12-month period determined by your employer, you may take the remaining portion of leave available. If you have already taken 12 workweeks of FMLA leave during this 12-month period, you may not take additional expanded family and medical leave.

Also please see the EFMLA FAQ discussion at the beginning of these FAQs.

EMPLOYER LIABILITY

54. What records should a company keep in connection with leave taken under the FFCRA?

Answer: Retain copies of all documents provided by employees demonstrating the reason for leave and follow these suggestions:

A. the FFCRA does not specify a required length of time for document retention so maintaining documents for at least three (3) years in line with record retention requirements for other wage related records would likely be acceptable;
B. maintain adequate documentation regarding an employee's leave that will enable the employer to track when an employee has exhausted his or her paid leave under the FFCRA, or state or local laws;
C. maintain adequate documentation regarding an employee's leave that will enable the employer to track when an employee has exhausted the employee's accrued vacation or sick time;
D. retain sufficient documentation that will permit the employer to claim a tax credit in connection with paid leave taken under the FFCRA;
E. familiarize yourself with the forms required by the IRS in order to claim a tax credit.

Taking additional recordkeeping steps now will ease the return to work of the workforce as well as the application for any tax credits that may be available. In the event an employer's actions are subsequently challenged, or a claim is made that proper leave or pay was not provided, employers will have documentation in place to fall back on, which will mitigate the exposure of potentially costly claims.

55. Can we be held liable if one of our employees becomes infected with COVID-19 within the scope of their employment?

Answer: Such liability is possible, but unlikely. While the law varies state by state, an employee who becomes infected with COVID-19 while acting within the scope of his or her employment would generally be entitled to worker's compensation (covered by insurance), which would preclude other recovery from the employer. If no such worker's compensation bar exists, an employer could be held liable to an employee who becomes infected with COVID-19 under a negligence cause of action, but such liability would generally require a showing that the employee contracted COVID-19 in the workplace and that the employer was aware of the risk of COVID-19 exposure but did not take action to stop the virus's spread, which would be difficult to prove.

56. During a pandemic, may an employer take its employees' temperatures to determine whether they have a fever?

Answer: Yes. However, it has not been recommended to do so.

57. When there is not a pandemic, can employers take employee temperatures at work?

Answer: It depends on your location. In general, measuring an employee's body temperature is considered a medical examination. These examinations are permitted only if they are job-related and consistent with business necessity. This means employers generally can require a medical test only if there is objective evidence that (1) an employee's ability to perform essential job functions will be impaired by a medical condition or (2) an employee will pose a direct threat due to a medical condition. As this is evolving continually, we recommend that you consult with counsel before instituting a temperature-taking policy. Regardless of whether you check employee temperatures, if an employer observes objective evidence that an employee is sick, simply send the employee home.

58. Can we make thermometers available to employees for them to voluntarily take their temperature?

Answer: Yes, provided it is purely voluntary and employers should not record employee temperatures. Employers should also provide sufficient tools to make sure thermometers are properly sanitized to lower the risk of passing infection to other employees.

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

Answer: Yes.

60. 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?

Answer: Yes. But be prepared to provide accommodations, if needed, *e.g.*, non-latex gloves.

61. May an employer require all of its employees to take the influenza vaccine regardless of their medical conditions or their religious beliefs during a pandemic?

Answer: No, but you can encourage your employees to get vaccinated.

62. During a pandemic, must an employer continue to provide reasonable accommodations for employees with known disabilities that are unrelated to the pandemic, barring undue hardship?

Answer: Yes.

UNION ISSUES

63. The union representing our employees is pressuring us to adopt new practices and benefits to address the COVID-19 outbreak. What are our obligations?

Answer: It depends on the status of the employer's relationship with the union. If the union and the employer are still in the process of negotiating a collective bargaining agreement, the employer has an obligation to negotiate with union in good faith over the union's proposals. If such negotiations have been completed and a final collective bargaining agreement is in place, the

employer's obligations will be determined by the terms of the agreement. It is common for agreements to have health and safety provisions that obligate employers to take steps to ensure the health and safety of bargaining unit employees, so some action may be required. Employers should contact their counsel upon receipt of any such demand from a union.

64. What should an employer consider if union employees refuse to come to work because of fear of exposure to the coronavirus?

Answer: Union and nonunion employees who refuse to work because of safety concerns in the workplace could be deemed to be engaging in concerted activity protected under the National Labor Relations Act (NLRA) so long as they have a "good faith" belief that their health and safety are at risk – even if they are mistaken. The NLRA prohibits employers from retaliating against employees who engage in protected concerted activity.

LAYOFFS AND WORKPLACE CLOSURES

65. What is a furlough? If we decide to furlough our employees, what are our obligations to employees and are they eligible for benefits under either the EPSLA or EFMLA?

Answer: A furlough is an employer-implemented mandatory leave of absence from work, typically without pay. Furloughs are permitted by law. For non-exempt employees, so long as the employee is not working, there is no wage payment obligation. With respect to exempt employees, an employer will be required to pay an exempt employee his or her full salary for the week if the employee performs any work during the work week. Therefore, furloughs for exempt employees must commence with the start of a work week, and care should be taken to ensure that such employees perform no work during the furlough (e.g., no checking email, no returning calls, etc.).

The FFCRA does not address furloughs but it can be presumed that if an employee is on leave without pay and thus not working, he or she will not be entitled to paid leave under the FFCRA.

Under the EPSLA, paid sick leave is defined as leave provided by an employer for use during an absence from employment for a COVID-19 reason. As such, where the employee is already furloughed or laid off, their absence is not due to COVID-19 but to the furlough.

Similarly, under the EFMLEA, it is presumed that the same analysis would apply- since the employee is already furloughed or laid off, their absence is not due to a need related to a public health emergency.

WORK FROM HOME

66. If we close our office, can we require our employees to work from home?

Answer: Generally, yes. If employees can fulfill their work obligations from home, employers can require those employees to work from home. But employees must be paid for all time worked. This is simple for exempt employees, who are paid the same salary for the week regardless of how much time they work. For non-exempt employees, employers should require employees to record and report all time worked from home to ensure that the employers can ensure that employees are paid accurately.

67. Do we have to provide employees with ergonomic workstations at home?

Answer: Maybe for those with known health issues or work restrictions but there is no legal obligation. It would not be required for other employees.

NEW HIRES/JOB APPLICANTS

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

Answer: Yes. An employer may screen job applicants for symptoms of COVID-19 after making a conditional job offer, as long as it does so for all entering employees in the same type of job. An employer may screen job applicants for symptoms of COVID-19 after making a conditional job offer, as long as it does so for all entering employees in the same type of job. This ADA rule allowing post-offer (but not pre-offer) medical inquiries and exams applies to all applicants, whether or not the applicant has a disability.

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

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

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

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

CDC has issued guidance applicable to all workplaces generally, but also has issued more specific guidance for particular types of workplaces (e.g. health care employees). Guidance from public health authorities is likely to change as the COVID-19 pandemic evolves. Therefore, employers should continue to follow the most current information on maintaining workplace safety. The ADA does not interfere with employers following recommendations of the CDC or public health authorities, and employers should feel free to do so.

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

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

TEMPORARY EMPLOYEES

72. Are temporary W-2 employees regarded as employees entitled to paid leave under the FFCRA?

Answer: Yes. It is presumed that a temporary employee will be entitled to paid leave under the EPSLA immediately, as well as under the EFMLA, so long as they have been employed for at least thirty (30) days. The FFCRA only distinguishes between full-time and part-time employees with regards to the amount of pay an employee may be entitled to. In addition, the DOL guidance notes that temporary employees should be included in determining the 500 employee threshold under the FFCRA.