COVID-19 Compliance Guide & Frequently Asked Questions

Last updated: April 6, 2020

COVID-19 FAQS

Set forth below are various FAQs (104 thus far) 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.

GENERAL FAMILIES FIRST CORONAVIRUS RESPONSE ACT (FFCRA) PROVISIONS (effective April 1, 2020 thru December 31, 2020).

1. What does the FFCRA address?

Answer: The FFCRA includes both the Emergency Paid Sick Leave Act (EPSLA) and the Emergency Family and Medical Leave Expansion Act (EFMLA) effective as of April 1, 2020 through December 31, 2020.

2. Will the DOL begin enforcing FFCRA immediately?

Answer: The DOL will not bring enforcement actions against any public or private employer for violations of the Act occurring within 30 days of the enactment of FFCRA, i.e., March 18 through April 17, 2020, provided that the employer has made reasonable, good faith efforts to comply with the Act. If the employer violates the Act willfully, fails to provide a written commitment to future compliance with the Act, or fails to remedy a violation upon notification by the Department, the Department reserves its right to exercise its enforcement authority during this period. After April 17, 2020, this limited stay of enforcement will be lifted, and the Department will fully enforce violations of the Act, as appropriate and consistent with the law.

Please remember that the FFCRA's paid leave provisions are effective April 1, 2020. Private sector and public employers must comply with the provisions on the effective date even though the Department has a limited stay of enforcement until April 17, 2020. Once the Department fully enforces the Act, it will retroactively enforce violations back until the effective date of April 1, 2020, if employers have not remedied the violations.

3. 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.

4. 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.

5. As an employee, may I use my employer's preexisting leave entitlements and my FFCRA paid sick leave and expanded family and medical leave concurrently for the same hours?

Answer: During the first two weeks of unpaid expanded family and medical leave, you may not simultaneously take paid sick leave under the EPSLA and preexisting paid leave, unless your employer agrees to allow you to supplement the amount you receive from paid sick leave with your preexisting paid leave, up to your normal earnings. After the first two workweeks (usually 10 workdays) of expanded family and medical leave under the EFMLA, however, you may elect—or be required by your employer—to take your remaining expanded family and medical leave at the same time as any existing paid leave that, under your employer's policies, would be available to you in that circumstance. This would likely include personal leave or paid time off, but not medical or sick leave if you are not ill.

If you are required to take your existing leave concurrently with your remaining expanded family and medical leave, your employer must pay you the full amount to which you are entitled under your existing paid leave policy for the period of leave taken. If you exhaust your preexisting paid leave and still are entitled to additional expanded family and medical leave, your employer must pay you at least 2/3 of your pay for subsequent periods of expanded family and medical leave taken, up to $200 per workday and $10,000 in the aggregate, for expanded family and medical leave.

6. 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.

7. If an employer reduces scheduled work hours, can an employee use FFCRA leave benefits to supplement reduced hours?

Answer: No. If an employer reduces work hours due to lack of work, an employee may not use EPSL or PHEL to compensate for the reduction in hours. However, the employee may use EPSL or PHEL if a COVID-19 qualifying reason prevents the employee from working a full schedule.

8. May I take paid sick leave or expanded family and medical leave under the FFCRA if I am on an employer-approved leave of absence?

Answer: It depends on whether your leave of absence is voluntary or mandatory. If your leave of absence is voluntary, you may end your leave of absence and

begin taking paid sick leave or expanded family and medical leave under the FFCRA if a qualifying reason prevents you from being able to work (or telework). However, you may not take paid sick leave or expanded family and medical leave under the FFCRA if your leave of absence is mandatory. This is because it is the mandatory leave of absence—and not a qualifying reason for leave—that prevents you from being able to work (or telework).

In the instance of a mandatory leave of absence, you may be eligible for unemployment insurance benefits. You should contact your State workforce agency or State unemployment insurance office for specific questions about your eligibility.

9. May I take paid sick leave or expanded family and medical leave if I am receiving workers' compensation or temporary disability benefits through an employer or state-provided plan?

Answer: No, unless you were able to return to light duty before taking leave. If you receive workers' compensation or temporary disability benefits because you are unable to work, you may not take paid sick leave or expanded family and medical leave. However, if you were able to return to light duty and a qualifying reason prevents you from working, you may take paid sick leave or expanded family and medical leave, as the situation warrants.

10. May I take paid sick leave or expanded family and medical leave to care for my child who is 18 years old or older?

Answer: It depends. Under the FFCRA, paid sick leave and expanded family and medical leave include leave to care for one (or more) of your children when his or her school or place of care is closed or childcare provider is unavailable, due to COVID-19 related reasons. This leave may only be taken to care for your non-disabled child if he or she is under the age of 18. If your child is 18 years of age or older with a disability and cannot care for him or herself due to that disability, you may take paid sick leave and expanded family and medical leave to care for him or her if his or her school or place of care is closed or his or her child care provider is unavailable, due to COVID-19 related reasons, and you are unable to work or telework as a result.

In addition, paid sick leave is available to care for an individual who is subject to a Federal, State, or local 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. If you have a need to care for your child age 18 or older who needs care for these circumstances, you may take paid sick leave if you are

unable to work or telework as a result of providing care. But in no event may your total paid sick leave exceed two weeks.

11. What is a "place of care" and who is a childcare provider?

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

A "childcare provider" is someone who cares for your child. This includes individuals paid to provide childcare, like nannies, au pairs, and babysitters. It also includes individuals who provide childcare at no cost and without a license on a regular basis, for example, grandparents, aunts, uncles, or neighbors.

12. Can more than one guardian take paid sick leave or expanded family and medical leave simultaneously to care for my child whose school or place of care is closed, or childcare provider is unavailable, due to COVID-19 related reasons?

Answer: You may take paid sick leave or expanded family and medical leave to care for your child only when you need to, and actually are, caring for your child if you are unable to work or telework as a result of providing care. Generally, you do not need to take such leave if a co-parent, co-guardian, or your usual childcare provider is available to provide the care your child needs.

EMERGENCY PAID SICK LEAVE ACT

13. Who does the EPSLA apply to?

Answer: The 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.

Employees include full-time, part-time, temporary and staffing employees. Regardless of how you classify or count internal or staffed workers, you must provide paid sick leave and expanded family and medical leave to workers

who are your “employees” for purposes of the Emergency Paid Sick Leave Act and the Emergency Family and Medical Leave Expansion Act.

13A. 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.

14. 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**

15. 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) who is subject to a federal, state or local (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.

15A. What satisfies paid sick leave based on a "substantially similar condition" specified by the U.S. Department of Health and Human Services?

Answer: The U.S. Department of Health and Human Services (HHS) has

not yet identified any "substantially similar condition" that would allow an employee to take paid sick leave. If HHS does identify any such condition, the Department of Labor will issue guidance explaining when you may take paid sick leave on the basis of a "substantially similar condition."

15B. How do I know if I can receive paid sick leave for a Federal, State, or local quarantine or isolation order related to COVID-19?

Answer: For purposes of the FFCRA, a Federal, State, or local quarantine or isolation order includes quarantine or isolation orders, as well as shelter-in-place or stay-at-home orders, issued by any Federal, State, or local government authority that cause you to be unable to work (or to telework) even though your employer has work that you could perform but for the order. You may not take paid sick leave for this qualifying reason if your employer does not have work for you as a result of a shelter-in-place or a stay-at-home order.

15C. When am I eligible for paid sick leave to self-quarantine?

Answer: You are eligible for paid sick leave if a health care provider directs or advises you to stay home or otherwise quarantine yourself because the health care provider believes that you may have COVID-19 or are particularly vulnerable to COVID-19, and quarantining yourself based upon that advice prevents you from working (or teleworking).

15D. I decide to quarantine myself for two weeks due to symptoms, but I do not seek a medical diagnosis, can I get paid for those two weeks under the FFCRA?

Answer: Generally, no. If you become ill with COVID-19 symptoms, you may take paid sick leave under the FFCRA only to seek a medical diagnosis or if a health care provider otherwise advises you to self-quarantine. If you test positive for the virus associated with COVID-19 or are advised by a health care provider to self-quarantine, you may continue to take paid sick leave. You may not take paid sick leave under the FFCRA if you unilaterally decide to self-quarantine for an illness without medical advice, even if you have COVID-19 symptoms. Note that you may not take paid sick leave under the FFCRA if you become ill with an illness not related to COVID-19. Depending on your employer's expectations and your condition, however, you may be able to telework during your period of quarantine.

16. May I take paid sick leave to care for a child other than my child?

Answer: It depends. The paid sick leave that is provided under the FFCRA to care for one (or more) of your children when their place of care is closed (or child care provider is unavailable), due to COVID-19 related reasons, may only be taken to care for your own "son or daughter."

However, paid sick leave is also available to care for an individual who is subject to a Federal, State, or local 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. If you have a need to care for a child who meets these criteria, you may take paid sick leave if you are unable to work or telework as a result of providing care. But in no event may your total paid sick leave exceed two weeks.

16A. When am I eligible for paid sick leave to care for someone who is subject to a quarantine or isolation order?

Answer: You may take paid sick leave to care for an individual who, as a result of being subject to a quarantine or isolation order, is unable to care for him or herself and depends on you for care and if providing care prevents you from working and from teleworking.

Furthermore, you may only take paid sick leave to care for an individual who genuinely needs your care. Such an individual includes an immediate family member or someone who regularly resides in your home. You may also take paid sick leave to care for someone if your relationship creates an expectation that you would care for the person in a quarantine or self-quarantine situation, and that individual depends on you for care during the quarantine or self-quarantine.

You may **not** take paid sick leave to care for someone with whom you have no relationship. Nor can you take paid sick leave to care for someone who does not expect or depend on your care during his or her quarantine or self-quarantine due to COVID-19.

16B. When am I eligible for paid sick leave to care for someone who is self-quarantining?

Answer: You may take paid sick leave to care for a self-quarantining individual if a health care provider has advised that individual to stay home or otherwise quarantine him or herself because he or she may have COVID-19 or is particularly vulnerable to COVID-19 and provision of care to that individual prevents you from working (or teleworking).

17. 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).

18. 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.

19. 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. But if you and your employee agree, your employee may use preexisting leave entitlements to supplement the amount he or she receives from paid sick leave, up to the employee's normal earnings. Note, however, that you are not entitled to a tax credit for any paid sick leave that is not required to be paid or exceeds the limits set forth under the EPSLA. You are free to amend your own policies to the extent consistent with applicable law.

20. 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.

21. 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. You may pay your employees in excess of FFCRA requirements. But you cannot claim, and will not receive tax credit for, those amounts in excess of the FFCRA's statutory limits.

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. Also, a very detailed IRS explanation was recently published here:

https://www.irs.gov/newsroom/covid-19-related-tax-credits-for-required-paid-leave-provided-by-small-and-midsize-businesses-faqs

22. What records do I need to keep when my employee takes paid sick leave or expanded family and medical leave?

Answer: Private sector employers that provide paid sick leave and expanded family and medical leave required by the FFCRA are eligible for reimbursement of the costs of that leave through refundable tax credits. If you intend to claim a tax credit under the FFCRA for your payment of the sick leave or expanded family and medical leave wages, you should retain appropriate documentation in your records. You should consult 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. You are not required to provide leave if materials sufficient to support the applicable tax credit have not been provided.

If one of your employees takes expanded family and medical leave to care for his or her child whose school or place of care is closed, or child care provider is unavailable, due to COVID-19, you may also require your employee to provide you with any additional documentation in support of such leave, to the extent permitted under the certification rules for conventional FMLA leave requests. For example, this could include 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 childcare provider.

23. 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

24. How do I know if my company is impacted by 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.

Employees include full-time, part-time, temporary and staffing employees. Regardless of how you classify or count internal or staffed workers, you must provide paid sick leave and expanded family and medical leave to workers who are your "employees" for purposes of the Emergency Paid Sick Leave Act and the Emergency Family and Medical Leave Expansion Act.

24A. 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.

25. 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.

26. 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.

26A. My child's school or place of care has moved to online instruction or to another model in which children are expected or required to complete assignments at home. Is it "closed"?

Answer: Yes. If the physical location where your child received instruction or care is now closed, the school or place of care is "closed" for purposes of paid sick leave and expanded family and medical leave. This is true even if some or all instruction is being provided online or whether, through another format such as "distance learning," your child is still expected or required to complete assignments.

27. May I take expanded family and medical leave to care for a child other than my child?

Answer: No. Expanded family and medical leave is only available to care for your own "son or daughter."

28. 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.

29. If I am an employer, may I require my employee to take paid leave he or she may have under my existing paid leave policy concurrently with expanded family and medical leave under the EFMLEA?

Answer: Yes. After the first two workweeks (usually 10 workdays) of expanded family and medical leave under the EFMLA, you may require that your employee take concurrently for the same hours expanded family and medical leave and existing leave that, under your policies, would be available to the employee in that circumstance. This would likely include personal leave or paid time off, but not medical or sick leave if your employee (or a covered family member) is not ill.

If you do so, you must pay your employee the full amount to which he or she is entitled under your existing paid leave policy for the period of leave taken. You must pay your employee at least 2/3 of his or her pay for subsequent periods of expanded family and medical leave taken, up to $200 per workday and $10,000 in the aggregate, for expanded family and medical leave. If your employee exhausts all preexisting paid vacation, personal, medical, or sick leave, you would need to pay your employee at least 2/3 of his or her pay for subsequent periods of expanded family and medical leave taken, up to $200 per day and $10,000 in the aggregate. You are free to amend your own policies to the extent consistent with applicable law.

30. Do employees need a note from a doctor?

Answer: One is not specifically required so the same answer as in Q&A 20 applies.

31. 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.

32. 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. You may pay your employees in excess of FFCRA requirements. But you cannot claim, and will not receive tax credit for, those amounts in excess of the FFCRA's statutory limits.

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. Also, a very detailed IRS explanation was recently published here:

https://www.irs.gov/newsroom/covid-19-related-tax-credits-for-required-paid-leave-provided-by-small-and-midsize-businesses-faqs

33. What records do I need to keep when my employee takes paid sick leave or expanded family and medical leave?

Answer: Private sector employers that provide paid sick leave and expanded family and medical leave required by the FFCRA are eligible for reimbursement of the costs of that leave through refundable tax credits. If you intend to claim a tax credit under the FFCRA for your payment of the sick leave or expanded family and medical leave wages, you should retain appropriate documentation in your records. You should consult 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. You are not required to provide leave if materials sufficient to support the applicable tax credit have not been provided.

If one of your employees takes expanded family and medical leave to care for his or her child whose school or place of care is closed, or child care provider is unavailable, due to COVID-19, you may also require your employee to provide you with any additional documentation in support of such leave, to the extent permitted under the certification rules for conventional FMLA leave requests. For example, this could include 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 childcare provider.

34. 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.

NOTICE REQUIREMENTS

35. 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.

36. 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.

37. 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.

38. 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.

39. 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.

40. 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.

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

Answer: No. 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. Also, the Age Discrimination in Employment Act prohibits discrimination against those who are 40 or older.

42. 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.

43. What if an employee refuses to answer COVID-19 related questions by the employer?

Answer: The ADA allows employers to bar an employee's physical presence in the workplace if he or she poses a threat to others. Employers should ask for the reason behind the employee's refusal and reassure the employee if the employee is hesitant to provide this information.

BENEFIT PLANS

44. 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.

45. 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.

46. 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.

47. 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: 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.

The Coronavirus Aid, Relief, and Economic Security (CARES Act) provides two optional provisions. First, a plan could be amended to allow for special withdrawals related to COVID-19, of up to $100,000, without the standard 10% early distribution penalty, repayable to the plan within 3-years, and with taxation spread over 3 years. Second, a plan could be amended to offer enhanced loans to those affected by COVID-19 up to the lesser of $100,000 or the full vested balance, for an extended term.

48. 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

49. 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.

50. 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.

51. 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.

52. 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.

53. 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

54. 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.

55. 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.

56. 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.

57. 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.

HIPAA CONFIDENTIALITY CONCERNS & REPORTING REQUIREMENTS

58. 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.

When the group health plan has information about a COVID-19 diagnosis, HIPAA allows the plan to disclose protected health information (PHI) to persons at risk of contracting or spreading COVID-19 if otherwise authorized by law, without the individual's authorization, during the period in which there is a public health emergency. The "minimum necessary" standard noted above still applies. If this type of disclosure is not otherwise required by law, an alternative would be to encourage the affected individual to voluntarily share the information with others who may have been exposed to the virus. Note that in this case, since the PHI originated with the group health plan, any communication with the employee should be from the group health plan and not from the employer.

However, the group health plan should not disclose the identity of the compromised employee. As noted by the CDC "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 ADA."

Another option is for the group health plan to make a disclosure to the CDC or a similar state or local authority (to the extent permitted, as discussed above), and let the public health officials determine whether to contact other individuals who may have been exposed (such as coworkers).

59. 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.

In addition, PHI may be disclosed to a public health authority, such as CDC or a state or local health department that is authorized by law to collect or receive

such information for the purpose of preventing or controlling disease, injury or disability.

As a reminder, HIPAA limits disclosures to the minimum necessary to the purpose. When a public health authority such as CDC requests information on COVID-19 for the purpose of infectious disease reporting, the group health plan can rely on the government's representations (if the reliance is reasonable) that the request meets the minimum necessary standard to meet the authority's public health purpose.

60. 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.

61. How are employers supposed to keep medical information of employees confidential while teleworking?

Answer: The ADA requires that medical information be stored separately away from other personnel files and employee information. A supervisor who receives this information while teleworking should follow normal company procedures to store this information. If they cannot follow the procedures for whatever reason, they should make every effort to safeguard the information from disclosure.

VACATION/PTO/SICK TIME/LEAVES OF ABSENCE

62. 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).

63. 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.

64. 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.

65. 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.

66. 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.

67. 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.

68. 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.

69. 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

70. 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.

71. 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.

72. 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. However, employers should be aware that some people with COVID-19 do not have a fever, while some people with a fever do not have COVID-19.

73. 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.

74. 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.

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

Answer: Yes.

76. 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.

77. 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.

78. 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

79. 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.

80. 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

81. 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.

82. May an employer decide to layoff or furlough a pregnant employee who does not have COVID-19 or symptoms solely based on the CDC guidance that pregnant women are more likely to experience severe symptoms and should be monitored?

Answer: No, because pregnant employees are protected under the Pregnancy Discrimination Act of Title VII.

WORK FROM HOME

83. 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.

84. 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.

BUSINESS CLOSURES

85. If my employer closed my worksite before April 1, 2020 (the effective date of the FFCRA), can I still get paid sick leave or expanded family and medical leave?

Answer: No. If, prior to the FFCRA's effective date, your employer sent you home and stops paying you because it does not have work for you to do, you will not get paid sick leave or expanded family and medical leave but you may be eligible for unemployment insurance benefits. This is true whether your employer closes your worksite for lack of business or because it is required to close pursuant to a Federal, State, or local directive. You should contact your State workforce agency or State unemployment insurance office for specific questions about your eligibility.

86. If my employer closes my worksite on or after April 1, 2020 (the effective date of the FFCRA), but before I go out on leave, can I still get paid sick leave and/or expanded family and medical leave?

Answer: No. If your employer closes after the FFCRA's effective date (even if you requested leave prior to the closure), you will not get paid sick leave or expanded family and medical leave but you may be eligible for unemployment insurance benefits. This is true whether your employer closes your worksite for lack of business or because it was required to close pursuant to a Federal, State or local directive. You should contact your State workforce agency or State unemployment insurance office for specific questions about your eligibility.

87. If my employer closes my worksite while I am on paid sick leave or expanded family and medical leave, what happens?

Answer: If your employer closes while you are on paid sick leave or expanded family and medical leave, your employer must pay for any paid sick leave or expanded family and medical leave you used before the employer closed. As of the date your employer closes your worksite, you are no longer entitled to paid sick leave or expanded family and medical leave, but you may be eligible for

unemployment insurance benefits. This is true whether your employer closes your worksite for lack of business or because the employer was required to close pursuant to a Federal, State or local directive. You should contact your State workforce agency or State unemployment insurance office for specific questions about your eligibility.

NEW HIRES/JOB APPLICANTS/I-9s

88. 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.

89. 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.

90. 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.

91. 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.

92. Many states are extending the expiration date of state IDs and/or driver's licenses. How should the extension be documented in Section 2?

Answer: If the employee's state ID or driver's license expired on or after March 1, 2020, and the document expiration date has been extended by their state due to COVID-19, then it is acceptable as a List B document for Form I-9. Enter the document's expiration date in Section 2 and enter "COVID-19 EXT" in the Additional Information field. Employers may also attach a copy of the state motor vehicle department's webpage or other notice indicating that their documents have been extended. In cases where DMWs have not extended the validity of licenses and IDs, and the employee is unable to present any other unexpired List A or List B document with a photograph, the person will be unable to work.

94. What are the temporary changes announced by the Department of Homeland Security related to the Form I-9 requirements?

Answer: There are several exceptions being offered:

- Employers with employees taking physical proximity precautions due to COVID-19 will not be required to review the employee's identity and employment authorization documents in the employee's presence until normal operations resume. Employers, however, are required to inspect Section 2 documents remotely and obtain, inspect and retain copies of the documents within three business days.
- Employers who wish to utilize themselves of this new option must prepare written documentation of their remote onboarding and telework policy for each employee.
- Once normal operations resume, all employees onboarded using remote verification must report to their employer within three business days for an in-person verification and present their employment eligibility documentation. Once the physical inspection takes place, employers should enter "COVID-19" as the reason for the physical inspection delay in Section 2's "Additional Information" field.
- Employers with employees still physically present at a work location may not avail themselves of this provision. There are no exceptions currently available for such employers.

- Employers not eligible for the exception, however, may have some options available to them. Recent updates to Form I-9 allow an employer to designate a representative to review new hires' documents. Such representatives can be a law firm, a vendor, a notary, or a local employee. Employers choosing this route, however, should exercise caution when representing a third-party to ensure the representative is well-versed in Form I-9 compliance.
- Applicable employers may implement these provisions for a period of 60 days from the notice's date or within three business days after the termination of the National Emergency, whichever comes first.

TEMPORARY/SEASONAL EMPLOYEES

94. 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.

95. As an employer, how much do I pay a seasonal employee with an irregular schedule for each day of paid sick leave or expanded family and medical leave that he or she takes?

Answer: You may calculate the daily amount you must pay a seasonal employee with an irregular schedule by taking the following steps.

First, you should calculate how many hours of leave your seasonal employee is entitled to take each day. Because your employee works an irregular schedule, this is equal to the average number of hours each day that he or she was scheduled to work over the period of employment, up to the last six months.

Second, you should calculate the seasonal employee's regular hourly rate of pay. This is calculated by adding up all wages paid over the period of employment, up to the last six months, and then dividing that sum by the number of hours actually worked over the same period.

Third, you multiply the daily hours of leave (first calculation) by your employee's regular hourly rate of pay (second calculation) to compute the base daily paid leave amount.

Fourth, you should determine the actual daily paid leave amount, which depends on the type of paid leave taken and the reason for such paid leave.

You must pay your seasonal employee the full base daily paid leave amount, up to $511 per day and $5,110 in total, if the employee is taking paid sick leave for any of the following reasons:

- Your employee is subject to a Federal, State, or local quarantine or isolation order related to COVID-19;
- Your employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19; or
- Your employee is experiencing symptoms of COVID-19 and is seeking a medical diagnosis.

You must pay your seasonal employee 2/3 of the base daily paid leave amount, up to $200 per day and $2,000 in total, if your employee is taking paid sick leave for any of the following reasons:

- Your employee is caring for an individual who either is subject to a quarantine or isolation order related to COVID-19 or who has been advised by a health care provider to self-quarantine due to concerns related to COVID-19;
- Your employee is caring for his or her child whose school or place of care is closed, or childcare provider is unavailable, due to COVID-19 related reasons; or
- Your employee is experiencing any other substantially similar condition, as determined by the Secretary of Health and Human Services.

You must pay your seasonal employee 2/3 of the base daily paid leave amount, up to $200 per day and $10,000 in total, if the employee is taking expanded family and medical leave to care for the employee's child whose school or place of care is closed, or child care provider is unavailable, due to COVID-19-related reasons. Please note that if your seasonal employees are not scheduled to work, for example, because it is the off-season, then you do not have to provide paid sick leave or expanded family and medical leave.