Employer's Guide

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Introduction

Employers are rightfully concerned about what they should be doing to respond to the continued spread of COVID-19. As we all deal with disruptions to our daily routines, employers need to keep in mind the applicable employment laws when deciding how to respond.

How employers respond to the coronavirus outbreak may implicate several areas of employment law, including occupational health and safety regulations, antidiscrimination laws, immigration regulations, employee leave laws, and employee privacy.

The coronavirus outbreak presents major challenges for employers as they plan how to keep employees safe and business on track. Because there are so many issues to consider, we've created the *Employer's Guide to COVID-19* to help you understand how various employment laws are implicated and provide best practices and other valuable resources.

Families First Coronavirus Response Act

In response to the coronavirus pandemic, Congress passed the Families First Coronavirus Response Act (FFCRA), and President Donald Trump signed it into law on March 18, 2020. The FFCRA provided various forms of relief, including paid sick leave and expanded Family and Medical Leave Act (FMLA) leave for certain employees, free COVID-19 testing, expanded food assistance and unemployment benefits, and employment protections for healthcare workers.

The FFCRA expired on December 31, 2020. However, on March 11, 2021, President Joe Biden signed the American Rescue Plan Act (ARPA), which does not mandate that employers provide COVID-19-related leave but does continue to provide a tax credit to employers covered by the FFCRA (the tax credit reimburses employers for the cost of providing FFCRA leave).

More details on APRA, also called the COVID-19 Stimulus Package or American Rescue Plan, are provided in a subsequent chapter. This chapter details leave obligations under the FFCRA. Again, while employers are no longer mandated to provide the leave, employers who choose to do so must comply with the FFCRA framework.

Significantly, under the FFCRA, the Emergency Paid Sick Leave Act (EPSLA) required employers with fewer than 500 employees to provide paid sick leave and expanded family leave for their employees. Eligible employees can take up to 2 weeks of EPSL for certain coronavirus-related reasons. The amount of pay they'll receive, up to a certain maximum per day, depends on the reason they take the leave (for a personal health situation or to care for others). Employers with 500 or more employees were not subject to those requirements.

In addition to the paid sick leave obligations, under the FFCRA, the Emergency Family and Medical Leave Expansion Act (EFMLEA) amended the Family and Medical Leave Act (FMLA) to require that employers with fewer than 500 workers provide up to 12 weeks of family and medical leave for employees who are unable to work or telecommute because they must care for a child whose school or place of care has been closed or whose childcare provider is unavailable because of a coronavirus emergency. Employees also can take up to 12 weeks of EFML, but only if they are unable to work because they need to care for a son or daughter whose school or daycare provider is closed or unavailable.

The first 10 days (2 weeks) of EFML are unpaid, but employees may substitute EPSL (at two-thirds pay) or accrued PTO during that time. For the remaining 10 weeks, pay is based on two-thirds of employees' regular rate, up to $200 per day.

Emergency paid sick leave

Under the FFCRA, employers with fewer than 500 employees are required to provide paid sick leave to any employee who:

- Is subject to a coronavirus quarantine or isolation order or has been advised by a healthcare provider to self-quarantine because of coronavirus concerns;
- Experiences symptoms of the coronavirus and seeks a medical diagnosis;
- Must provide care for a family member who is self-isolating because of a coronavirus diagnosis, experiences symptoms of the coronavirus and needs to obtain a medical diagnosis or care, or self-quarantines because of exposure to or symptoms of the virus; ***or***
- Must care for a child whose school or place of care is closed, or whose childcare provider is unavailable, because of the pandemic.

Both full-time and part-time employees are eligible for paid leave under the FFCRA. Full-time employees are entitled to up to 80 hours of sick leave, and part-time workers are entitled to leave equal to the average number of hours they work over a 2-week period.

One of the confusing aspects of the new law is that the amount of pay employers are required to provide under the FFCRA depends on the reason for employees' leave. Employees taking leave because they are sick or self-quarantined must be paid at their regular pay rate, up to $511 per day and a total of $5,110. Employees taking leave to care for a family member must be paid at two-thirds their regular rate, with a cap of $200 per day and a total of $2,000.

Notably, the sick leave required under the FFCRA must be provided in addition to any paid leave already provided by the employer. An employer cannot require a worker to use any other available paid leave before using the sick leave required under the Act.

Finally, employers will be required to post a new notice containing information about the FFCRA's emergency sick leave provisions. The U.S. Department of Labor (DOL) will create a model notice before the end of March.

Under the EPSLA, employers that don't provide the required paid sick leave are considered to have failed to pay minimum wages in violation of the federal Fair Labor Standards Act (FLSA). They're subject to the enforcement proceedings described in the FLSA. In addition, the EPSLA provides employees with protection from adverse actions taken by employers:

- Employers may not discharge, discipline, or otherwise discriminate against an employee who takes paid sick leave under the EPSLA.
- They also may not retaliate against an employee who files a complaint under (or relating to) the EPSLA, institutes any proceeding under the Act, or testifies in any such proceeding.

Employers violating the prohibitions are considered to have breached the FLSA and will be subject to the penalties described in the Act. The EPSLA also authorizes the government to investigate and gather data to ensure compliance with the Act in the same manner as authorized by the FLSA.

Emergency expansion of FMLA leave

To be eligible for EFMLA leave under the FFCRA, employees must have been employed for at least 30 days.

Under this provision of the new law, the first 10 days of leave may be unpaid, although a worker may choose to use accrued vacation days or other available medical leave, sick leave, or Paid Time Off (PTO). After the initial 10 days, workers on FMLA leave must be paid at two-thirds their regular rate. The paid leave is capped at $200 per day and $10,000 in total.

In most cases, the expanded FMLA leave under the FFCRA is job-protected, and an employer must reinstate an employee to the same or an equivalent position upon his return to work. However, the law provides an exception for employers with fewer than 25 employees if (1) the employee's job no longer exists because of economic conditions or other changes in the employer's operations caused by the coronavirus pandemic and (2) the employer makes reasonable efforts to restore the employee to an equivalent position.

Retaliation protections in new emergency statutes

The EFMLEA provides a new basis on which an eligible employee can take FMLA leave, i.e., to care for a son or daughter whose school or caregiver is closed or unavailable because of the COVID-19 pandemic. The FMLA, which has been in effect for decades, contains provisions against retaliation and interference that will exist alongside the new EFMLEA provisions and presumably apply to employees exercising EFMLEA rights just as they currently apply to the use of traditional FMLA.

Similarly, the EPSLA includes antiretaliation and antidiscrimination provisions. The EPSLA applies to "any private entity or individual" who is engaged in interstate commerce and has "fewer than 500 employees." The Act includes provisions making it unlawful for an employer to (1) retaliate against an employee who takes leave under the EPSLA or (2) otherwise violate its terms.

Specifically, the EPSLA's antiretaliation provision protects employees against discharge, discipline, or any form of discrimination for (1) taking leave under the statute or (2) filing any complaint, instituting a proceeding, or causing a proceeding to be instituted—in each case relating to the EPSLA—or testifying or preparing to testify in any such proceeding.

Furthermore, the EPSLA incorporates enforcement provisions from the FLSA (the federal wage and hour law) to address EPSLA violations. In doing so, the EPSLA provides that an employer's violation of its standards will be treated as a failure "to pay minimum wages in violation of section 6 of the [FLSA] of 1938" and that liquidated damages and attorneys' fees are recoverable on claims filed against employers that violate the EPSLA.

While discussing retaliation, it's important to note that state governments are expanding protections for employees under new legislation that either amends existing employment laws or creates new statutes benefiting workers. The good news is that the amended/new laws will likely apply the same standards (burdens of proof) for retaliation claims.

Employer tax credits

The FFCRA creates a series of refundable tax credits for employers that provide paid emergency sick leave or paid FMLA leave to their employees. Specifically, an employer will be entitled to a refundable tax credit equal to 100 percent of the qualified sick or family leave wages required by the Act. The tax credits will be allowed against the employer's portion of Social Security taxes; however, if the credit exceeds the employer's total Social Security taxes for all employees for any calendar quarter, the excess credit will be refundable to the employer.

The plight of tax-exempt institutions—i.e., most of America's charitable and cultural organizations—is unrecognized by the new law.

Potential exemptions

Importantly, under the FFCRA, the secretary of the DOL is authorized to issue regulations exempting (1) certain healthcare providers and emergency responders and (2) small businesses with fewer than 50 employees from the new paid leave benefits "when the imposition of such requirements would jeopardize the viability of the business as a going concern." It remains to be seen if that exception creates a loophole that subverts the aim of the FFCRA. It's also likely that the exception and other exceptions will be displaced by subsequent acts of Congress.

Smaller employers

The FFCRA covers private employers with fewer than 500 employees but might allow smaller employers to deny leave if providing it would "jeopardize the viability of the business as a going concern." How can you invoke that exemption?

The exemption is available only if the employee would need either EPSL or EFML to care for a son or daughter whose school or daycare has been closed because of COVID-19. The exemption isn't available if the employee takes EPSL for other coronavirus-related reasons (e.g., to manage their own illness, care for a child who has COVID-19 symptoms, or take leave because of an isolation order).

To determine whether your business is under the 500-person threshold, you must count all full- and part-time employees as well as those on leave and all common employees of joint or integrated employers.

Employers don't need to apply for the exemption or send any materials to the DOL. But if you deny leave to an employee on the grounds that her absence would jeopardize the business, you must document the facts and circumstances that meet the following criteria:

- The leave would cause your company's expenses and financial obligations to exceed available revenue and cause you to cease operating at a minimal capacity;
- The employee's absence would pose a substantial risk to your company's financial health or operational capacity because of her specialized skills, knowledge of the business, or responsibilities; *or*
- You wouldn't have other workers who are able, willing, qualified, and available to perform the labor or services you provide, which are needed for you to operate at a minimal capacity.

A small employer might not be able to exempt itself entirely from offering EFML. Instead, it can use the exemption only to deny leave to otherwise eligible employees whose absence would cause its expenses and financial obligations to exceed available business revenue, pose a substantial risk, or prevent it from operating at minimum capacity. By setting the criteria, the DOL attempted to extend the leave benefits as broadly as practicable without significantly increasing the likelihood that a small employer would go out of business.

Healthcare providers

Under the FFCRA, you may exclude certain "healthcare providers" from taking EPSL or EFML. The DOL adopted a broader definition of the term than is used in other parts of the FMLA to ensure critical health services are available during the pandemic:

> [The definition of healthcare provider is] anyone employed at any doctor's office, hospital, health care center, clinic, post-secondary educational institution offering health care instruction, medical school, local health department or agency, nursing facility, retirement facility, nursing home, home health care provider, any facility that performs laboratory or medical testing, pharmacy, or any similar institution, Employer, or entity. This includes any permanent or temporary institution, facility, location, or site where medical services are provided that are similar to such institutions.

The definition also includes employees of an entity that contracts with any of the above institutions or provides medical services, produces medical products, or is otherwise involved in the making of coronavirus-related medical equipment, tests, drugs, vaccines, diagnostic vehicles, or treatments. Also, "the highest official of a State" can add to the list.

Emergency responders

To combat the COVID-19 pandemic, the FFCRA allows employees to take leave to care for their families, but not at "the

expense of fully staffing the necessary functions of society, including [those] of emergency responders." For that reason, the DOL interprets "emergency responder" broadly, meaning you may deny leave to employees who meet the following description:

> *[A]nyone necessary for the provision of transport, care, healthcare, comfort and nutrition of such patients, or others needed for the response to COVID-19. This includes but is not limited to military or national guard, law enforcement officers, correctional institution personnel, fire fighters, emergency medical services personnel, physicians, nurses, public health personnel, emergency medical technicians, paramedics, emergency management personnel, 911 operators, child welfare workers and service providers, public works personnel, and persons with skills or training in operating specialized equipment or other skills needed to provide aid in a declared emergency, as well as individuals who work for such facilities employing these individuals and whose work is necessary to maintain the operation of the facility.*

Again, the "highest official of a State or territory" can expand the list to add others as "emergency responders" who are necessary to combat COVID-19.

The DOL encourages employers to be "judicious" when asserting the healthcare provider and emergency responder exemptions, keeping in mind the goal is to minimize the spread of COVID-19.

DOL guidance on FFCRA

On March 24, 2020, the DOL issued an initial and informal set of "Questions and Answers" (Q&As) to assist employers in complying with the recently enacted FFCRA. Below is a short summary of a few of the answers provided.

Most notably, the Q&A guidance announced that the leave provisions become effective *April 1*—not April 2 as originally expected—and expire on December 31.

500-employee threshold

The Q&As also attempt to provide direction on how and/or when the number of employees should be measured. In this regard, the DOL states:

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

As such, an employer is covered if, at the time the leave is to be taken, the business employs fewer than 500 employees. Theoretically, this could present a challenge for employers whose headcounts fluctuate above and below 500 during the period employees are seeking leave under the statute.

Businesses with fewer than 50 employees

The FFCRA provides that businesses with fewer than 50 employees may be able to obtain an exemption when offering leave benefits would jeopardize the viability of the business. Unfortunately, the Q&As don't offer any further information about the exemption, other than to say employers should document why the standard applies to them. The DOL indicates detailed regulations will be forthcoming.

Part-time employees

Under the law, part-time employees are entitled to leave for their average number of work hours in a 2-week period. To determine this number, the DOL's guidance requires you to calculate hours of leave based on the number of hours the employees are normally scheduled to work.

If the normal hours scheduled are unknown, or if a part-time employee's schedule varies, the DOL's guidance allows you to use a 6-month average to calculate the average daily hours. If this calculation cannot be made because she hasn't been employed for at least 6 months, the agency instructs you to use the number of hours you agreed she would work upon hiring.

Finally, if there is no such agreement, you may calculate the appropriate number of hours of leave based on the average hours per day the employee was scheduled to work over the entire term of employment.

Retroactivity

The Q&A guidance solidifies that the benefits provided under the FFCRA are not retroactive. Moreover, it also makes clear that paid leave provided before the April 1 effective date shouldn't be counted toward an employee's FFCRA paid sick leave entitlement.

Leave related to school closures

Another common question regards the overlap between the EFMLEA and the EPSLA, which are both parts of the FFCRA. The DOL has opined that if the employees' leave involves caring for a child when the child's school or place of care is closed, then they are entitled to "both types of leave, but only for a total of twelve weeks of paid leave."

The DOL indicated employees may use the EPSLA for the first 10 workdays, which are otherwise unpaid under the EFMLEA. After the first 10 workdays have elapsed, they are entitled to 10 weeks under the EFMLEA.

The full Q&A can be found at *https://www.dol.gov/agencies/whd/pandemic/ffcra-questions*.

FFCRA poster

The DOL has issued an "Employee Rights" poster or notice for the paid sick leave and expanded family and medical leave components of the FFCRA. The poster can be found at *https://www.dol.gov/sites/dolgov/files/WHD/posters/FFCRA_Poster_WH1422_Non-Federal.pdf*.

Summer camp closures trigger FFCRA benefits

The closure of a child's summer camp or other enrichment program may entitle an employee to paid family leave benefits under the FFCRA, according to new guidance released by the DOL on June 26. The agency's field assistance bulletin (FAB) 2020-4 now treats a child's "summer camp, summer enrichment program, or other summer program" like his school or care provider for EFMLEA purposes.

To be eligible for the tax credit under the FFCRA, the employer must collect certain information from the employee claiming the benefit. Nothing in the FAB 2020-4 changes the proof needed to claim the EFMLEA benefits. For example, the employee would have to provide the following:

- Name and age of the child;
- Statement that no other "suitable person" is available to provide care for the child;
- Name of a specific summer camp or program that is now closed or unavailable because of COVID-19; *and*

- Statement that (1) "this summer camp or program" was one to which the employee applied or the child was enrolled before it closed, or (2) the child participated in the camp or program in previous summers and was eligible to attend again.

FAB 2020-4 cautions "an employee generally could not take FFCRA leave to care for his or her child based on the closing of a day care center that the child has never attended, unless there were some indication that the child would have attended had the day care center not closed in response to COVID-19." In that regard, however, FAB 2020-4 notes "there may be other circumstances that show an employee's child's enrollment or planned enrollment in a camp or program."

To get the tax credit, you should continue to use some form of an application for EFMLEA benefits and collect the proof required by the FFCRA.

What are employers to do? Judge tosses parts of DOL regs covering FFCRA leave

On August 3, 2020, a New York district court judge struck down portions of the DOL final rule implementing the FFCRA. The case was filed by the state of New York under the Administrative Procedure Act, which governs the process by which federal agencies develop and issue regulations. Rejecting the DOL's bid to dismiss the claims, the district court vacated (or tossed out) four separate provisions of the final rule on the grounds they exceeded the agency's authority under the statute. How the decision will affect employers outside New York is uncertain.

First, in a move that will greatly expand access to leave under the FFCRA, the court vacated the work availability requirements of the EPSLA and the EFMLEA As a reminder, the EPSLA grants leave to employees who are "unable to work (or telework)" due to a need for leave because of six COVID-19-related criteria. The EFMLEA similarly grants leave to employees who are "unable to work (or telework) due to a need for leave to care for the son or daughter under 18 years of age of such employee if the school or place of care has been closed, or the child care provider of such son or daughter is unavailable, due to a public health emergency."

The DOL's final rule takes the position that when work isn't available, leave under some of the qualifying circumstances for EPSLA leave (and the sole circumstance for EFMLEA leave) also is unavailable. The court concluded the "work availability" requirement was unreasoned and "patently deficient."

Second, the court threw out the final rule's broad, sweeping definition of "healthcare provider," finding it improperly "hinges entirely on the identity of the employer, in that it applies to anyone employed at or by certain classes of employers, rather than the skills, role, duties, or capabilities of a class of employees." The court concluded the DOL's definition should have focused on the capability of particular employees to furnish healthcare services and not simply that their work is "remotely related to someone else's provision of healthcare services."

Third, while the court rejected most aspects of the state's challenge to the intermittent leave provisions, it nonetheless found the employer consent requirement for such leave was unreasonable. Under the FFCRA, intermittent leave is permitted only for circumstances that don't logically correlate to a higher risk of infection. Even for those circumstances, however, the DOL's final rule demands that employer consent be obtained. The court found no justification for the prerequisite in the context of the qualifying conditions, "which concededly do not implicate the same public-health considerations" as those presenting a higher risk of infection, and it vacated the requirement.

Fourth and finally, the court found the final rule's requirement that employees taking FFCRA leave submit documentation supporting the leave before its commencement to be at odds with the Act's language, which instead requires employees to provide as much notice as practicable and/or follow "reasonable notice procedures." The court vacated the temporal aspect of the documentation requirement— i.e., the rule that documentation be provided before taking leave—but upheld the provision's substance.

DOL responds

On September 11, the DOL responded to the federal judge's ruling against regulations related to a COVID-19 relief act with revisions that in some ways reaffirm the DOL's original position.

In issuing the revised regulations implementing paid leave requirements under the FFCRA, the DOL said it was clarifying workers' rights and employers' responsibilities.

Narrower 'healthcare provider' definition. The DOL had interpreted the healthcare provider exemption as applying broadly to employees working at any healthcare facility, even those not responsible for patient care, such as food service workers and janitorial staff. The district court found that interpretation was overbroad.

Instead of the nature of the employer, the new definition focuses on the specific employee role. In addition to emergency responders, it exempts all healthcare providers who are authorized to sign FMLA leave certifications as well as those who "provide diagnostic, preventive, treatment services, or other patient care services" or whose work is integrated with and necessary to providing such services. Examples of exempt roles under the revised rule include:

- A laboratory technician who processes medical test results that will be used in diagnoses and treatment;
- A nurse who counsels patients on diabetes prevention or stress management; and
- An aide who helps bathe, dress, and feed a patient who is incapable of such self-care.

Employees in roles not directly affecting the provision of healthcare services (such as IT professionals, accounting and billing personnel, and HR staff) aren't exempt from the FFCRA's provisions even if they work for healthcare operations.

Relaxed documentation timing requirement. The DOL's original rule required employees to provide documentation before taking leave. The new rule allows them to provide the documentation "as soon as practicable." For expanded family and medical leave to care for a child during a school or daycare closure, advance notice is still required when the need for the leave is foreseeable.

Employer agreement still required for intermittent leave. The DOL didn't change its position that employers may decline to allow paid intermittent FFCRA leave. Instead, it expanded its analysis to address the court's ruling. The revised rule notes that unlike with the FMLA, Congress didn't address intermittent leave in the FFCRA. Rather, it empowered the DOL to regulate implementation of the relief statute.

Accordingly, the DOL updated its posted FAQs (frequently asked questions) on FFCRA interpretation and application to explain:

- Teleworkers may take paid sick leave on an intermittent basis if the employer agrees; but
- On-site workers may take such leave for most reasons only in full-day increments and must take the leave continuously until the time is exhausted or the employee no longer has a qualifying reason for using it.
- After all, the FFCRA's intent is to support workers financially in staying home to prevent spreading the virus.

Intermittent use of paid leave for childcare because of school or daycare closure is allowed, subject to employer agreement, because its purpose is different from preventing COVID-19 spread. The guidance distinguishes, however, between a situation where (1) a school closure is for a full week but the employee wishes to take only three days to care for the child, with someone else providing care on the remaining days, and (2) the school is closed only on the three days a week when the employee is requesting leave.

The former situation is intermittent leave, requiring employer agreement, because the employee is asking for time off during only part of a single period of a qualifying reason for leave. The latter isn't considered intermittent because each day of closure is a separate reason for leave.

'Work available' requirement reaffirmed. Workers are eligible for leave only when the employer has work available for them, the DOL reaffirmed in its revised rule. Accordingly, employees who are on layoff status remain ineligible for FFCRA benefits. That's significant if you relied on the original rule to deny leave to workers who weren't scheduled to work when they had otherwise-qualifying reasons for taking the leave.

To address the district court ruling, the new rule provides a detailed analysis of the statutory language and relevant precedent, plus discussion of congressional intent and the statutory purpose, that support the DOL's conclusion: In order for a qualifying situation to entitle an individual to paid leave benefits, it must have been the "but for" cause of the absence from work.

Scope and effect of new rule. The DOL also addressed a point left unclear after the federal court decision, which was whether the ruling was effective nationwide or only within the district where it was issued. The agency's position is that the ruling applies nationwide but has been effectively addressed with the update.

To the extent the DOL has changed its rules for interpreting and applying the FFCRA's provisions, employers are faced with the decision of whether to try to grant paid leave benefits retroactively (to the extent the necessary information is available) to employees who would have qualified under the new rules. They would include, for example, support services staff (janitorial, food services, etc.) in healthcare facilities.

Good-faith reliance on the existing DOL guidance may provide a sound defense to any claim for retroactive benefits, but you may wish to consult counsel for more specific guidance.

When and how employers can require notice of FFCRA paid leave during pandemic

You may be wondering if, when, and how you can require employees to provide notice and documentation when they're taking paid leave under the FFCRA. Thanks to a recent revision to the DOL's "final rule" on paid leave under the Act, the answer has been clarified.

You can require documentation of an employee's leave only as soon as it's practicable, rather than before the leave. Notice, on the other hand, can be required in advance, but only for foreseeable expanded family and medical leave. If you are dealing with paid sick leave or unforeseeable family and medical leave, neither notice nor documentation can be required in advance.

Documentation vs. notice

The DOL's original *final* rule would have allowed employers to require their employees to provide documentation *before* taking either paid sick leave or expanded family and medical leave. After a New York federal district court struck down certain parts of that rule, the DOL updated it, and a new final rule went into effect on September 16, 2020.

Notably, you can no longer require employees to provide documentation of their leave before it happens. Now, you can require the documentation only "as soon as practicable," which in most cases will be "when the employee provides notice" of the leave. But what kind of documentation can you require? And when is notice required?

How to prove it

The documentation's purpose is to prove the FFCRA actually covers the employee's leave. The DOL says the required information can include the employee's name, the dates for the leave, the qualifying reason, and either an oral or a written statement that the employee is unable to work.

As mentioned above, you can't require employees to provide the information before taking sick leave, but only as soon as is practicable. So, what does that mean?

Notice and differences in leave

Under the FFCRA, employers can't require notice in advance when their employees need to take paid sick leave. For paid sick leave, the notice can be required only after the first workday for which an employee takes the leave.

When it comes to expanded family and medical leave, however, the rules are different. For that leave, you can require advance notice from your employees, but only if the leave is foreseeable.

The DOL clarified the "foreseeability" of expanded family and medical leave with an example: Suppose an employee learns Monday morning that a child's school will be closing on Tuesday because of COVID-19 issues. In such an instance, "the employee must notify his or her employer as soon as practicable (likely on Monday at work)." According to the agency, that situation is foreseeable leave.

If the employee learns about the closure on Tuesday after reporting for work, however, he can start the leave without notice but still must give notice as soon as is practicable. Of course, the leave would be considered unforeseeable.

Employees entitled to FFCRA paid leave, but only when work is available

An increased number of employees will likely be absent from work for coronavirus-related reasons during the winter months. Here is some information to help you manage the leaves.

After the New York federal court decision, the DOL revised Section 826.20 in response to the ruling to "reaffirm and provide additional explanation for the requirement that employees may take FFCRA leave only if work would otherwise be available to them." Revised Section 826.20 became effective September 16, 2020. According to the agency:

In the FFCRA context, if there is no work for an individual to perform due to circumstances other than a qualifying reason for leave—perhaps the employer closed the worksite (temporarily or permanently)—that qualifying reason could not be a but-for cause of the employee's inability to work. Instead, the individual would have no work from which to take leave. The Department thus reaffirms that an employee may take paid sick leave or expanded family and medical leave only to the extent that any qualifying reason is a but-for cause of his or her inability to work.

Impact on affected employees seeking paid leave

Why does this matter? Under the revised regulation, an employee wouldn't be entitled to paid leave under the FFCRA if his employer is forced to close the workplace for one or more days because of inclement weather. In that situation, he wouldn't have been able to work, regardless of any COVID-19-related reason.

Similarly, an employee may not be entitled to FFCRA paid leave during any days when a facility is closed in observance of any upcoming holiday. If the employer's policy provides holiday pay to its employees on those days, however, it must consider whether the benefits would be available to an individual who is out on FFCRA leave. If the policy allows for persons out on various types of leave—e.g., FMLA leave—to receive holiday pay, individuals on FFCRA paid sick leave also may be entitled to such earnings, although they wouldn't count against the FFCRA entitlement.

Implications for COBRA administration

COBRA administration depends on notices being sent within specified time periods measured around the occurrence of a qualifying event.

In general, an employer has 30 days to notify a plan administrator of a qualifying event that is a termination of, or reduction of hours in, employment or an employee's death. Qualified beneficiaries have 60 days to notify a plan administrator of other qualifying events, such as a divorce or legal separation or a dependent child ceasing to be a dependent child under the plan terms.

The plan administrator then has 14 days to send the COBRA election notice to qualified beneficiaries. Plan administrators generally are not required to ensure actual receipt of the COBRA election notice—simply mailing that notice to the last known address is deemed sufficient.

Group health plans must give qualified beneficiaries the right to elect COBRA coverage during a defined election period. That period begins on the date the coverage terminates due to a qualifying event (such as termination of employment, reduction in hours, divorce, death, etc.) and continues at least until 60 days after the later of the date (1) the coverage terminated *or* (2) the COBRA election notice was provided to the qualified beneficiary.

If a qualified beneficiary elects COBRA coverage, he or she generally will be required to pay a premium. Again, time periods are key. The initial premium payment is due 45 days after the election is made. This initial payment covers the cost of the first month of COBRA coverage. Subsequent premium payments are typically due on the first day of the coverage month, subject to a 30-day grace period.

Equitable tolling

Although COBRA and its underlying regulations are generally specific about the timing of elections, the regulations do provide that an election on behalf of a qualified beneficiary who is incapacitated or dies "can be made by the legal representative of the qualified beneficiary or the qualified beneficiary's estate."

Implicit in this rule is the notion that the relevant election period should be tolled (or held in abeyance) in the proper case in order for a legal representative to be appointed. Courts that considered equitable tolling principles have applied them to the 60-day election period and premium payment periods described above.

Importantly, equitable tolling does not create a new COBRA election period or premium payment period. Instead, it merely pauses those periods until an individual, or an authorized representative, can make an election or a payment.

The concept of equitable tolling arguably could be expanded to include coronavirus situations. For example, suppose a qualified beneficiary is (1) hospitalized in an isolated hospital unit during a COBRA election or premium payment period *or* (2) under a mandatory quarantine period after a return to the United States from international travel.

If the qualified beneficiary is so confined that COBRA elections or premium payments cannot be made, perhaps equitable tolling would apply to extend the election or premium payment period until the individual is released from confinement. It might appear inequitable to require a qualified beneficiary to act based on a COBRA notice sent to the home address when the individual cannot access the home due to a coronavirus confinement.

In another example, it could appear to be inequitable to terminate group health coverage when a qualified beneficiary may need it most (for example, when the individual is confined in a hospital with the coronavirus) solely because the premium payment is late due while the patient is quarantined in the hospital. In these cases, plan administrators could (though are not required to) allow for additional time to make COBRA elections and premium payments.

Agency guidance

By way of analogy, in cases of past severe disasters, such as hurricane activity, the Departments of Labor and the Treasury have issued guidance requiring flexibility in applying COBRA timing requirements.

For example, with Hurricane Katrina, the agencies issued regulations requiring that COBRA notice mailing and election periods be tolled between August 29, 2005, and February 28, 2006. For Hurricanes Harvey, Irma, and Maria, the agencies issued informal guidance stating that regarding deadlines for making COBRA elections:

The guiding principle for plans must be to act reasonably, prudently and in the interest of the workers and their families who rely on their health plans for their physical and economic well-being [and] plan fiduciaries should make reasonable accommodations … to minimize the possibility of individuals losing benefits because of the failure to comply with pre-established timeframes.

It is possible that the agencies will issue similar guidance for coronavirus situations or other types of emergency pandemics or exigencies.

Other COBRA considerations

The technical COBRA rules are based on the assumption of otherwise normal circumstances—employees being hired or fired or going out on a leave of absence; dependent children getting older; divorced spouses seeking continuation coverage; etc. The rules do not anticipate how to apply COBRA at the same time as a widescale pandemic when there are sudden changes in employment and health coverage needs.

In these emergency situations, plan administrators need to think through the issues and come up with some administrable fixes. Below are some key steps that plan administrators could consider as they attempt to address the issues raised by the recent coronavirus pandemic.

1. **Consider not immediately terminating coverage due to the failure to meet a deadline.** In the COBRA context, affected qualified beneficiaries likely have elected COBRA coverage because they need it. This need likely will be heightened when someone infected by the coronavirus is out of work and eligible for COBRA coverage. Infected qualified beneficiaries who are quarantined may have no access to the plan administrator, and communication may be spotty at best. Under these circumstances, it would be prudent for plan administrators to first assess the situation and develop a strategy before following COBRA's technical timing requirements.
2. **Pass through health plan coverage changes.** Some employers are implementing changes to their group health plans to help address the needs of people potentially infected with the coronavirus. One basic example is that some plans are covering the cost of coronavirus testing without any cost sharing or payment by participants. Any plan coverage changes need to be passed through to similarly situated COBRA-qualified beneficiaries.
3. **Understand who is affected by the disaster.** Plan administrators must, of course, identify the group of qualified beneficiaries that is potentially impacted by the coronavirus situation and eligible for any plan relief.
4. **Consider giving affected individuals more time to respond to notices or elect/pay for coverage.** Based on the tolling principles described above, plan administrators could consider extending the COBRA election and premium payment time frames for those qualified beneficiaries affected by the coronavirus.
5. **Consider subsidizing the cost of coverage.** In some situations, employees who are out with coronavirus illnesses are treated as on a leave of absence. In those situations, employers looking to help with health coverage could consid-

er alternatives to standard COBRA coverage. For example, an employer might subsidize the cost of COBRA coverage for a certain period of time. Or, an employer might provide a voluntary limited extension of group health plan coverage on top of COBRA coverage. When the employer decides to offer this additional coverage, it should review any insurance or stop-loss insurance coverage to ensure that the insurer is "on board" with the decision to extend COBRA coverage beyond the normal period.

6. **Decide whether the temporary period of extended coverage will count toward the COBRA coverage period.** Building off item 5, if an employer provides a period of extended coverage after what is otherwise a qualifying event, it could have the plan address that extended coverage in one of two ways: The alternative coverage is either added to the COBRA coverage *or* counted toward satisfying COBRA's maximum period. Either approach can be accommodated as long as appropriate planning, communication, and documentation are done.

7. **Decide when the coronavirus exception is over, and communicate it to affected individuals.** Providing reasonable relief to affected individuals is legally permissible and often the right thing to do. However, the relief does not last indefinitely and does not apply to all participants regardless of the circumstances. Once a plan administrator has determined the limits of the relief (that is, how long it will last and to whom it will apply), the limits should be communicated to plan participants and qualified beneficiaries. Although plan documentation might have to be amended to contemplate decisions that are made, the more critical step is often to communicate the decision to affected individuals so they can make appropriate coverage decisions.

8. **Communicate coverage status to benefit providers and insurers.** Separate from communicating the rules to affected individuals, administrators also need to communicate with benefit providers and insurers. As mentioned above, employers or plan administrators should coordinate with insurers and stop-loss carriers so they are on notice about and in agreement with any proposed relief. Additionally, benefit providers and insurers will need to know if the COBRA election period has been extended for individuals impacted by the coronavirus situation so they can properly communicate to qualified beneficiaries when claims are submitted. COBRA rules require that plan administrators explain the coverage status of individuals who are eligible to elect COBRA and have not yet done so when a claim occurs. Essentially, the administrator must explain that the individual has a period (the COBRA period) within which to elect COBRA coverage and, if coverage is elected and paid for, that it will be retroactive.

9. **Anticipate open enrollment problems.** If the coronavirus (or other pandemic situation) extends into an open enrollment period, employers and plan administrators may have difficulty explaining how the COBRA election period interacts with open enrollment. Plan administrators should carefully draft open enrollment materials to explain how any relief provided to victims of the coronavirus might impact a COBRA election decision.

10. **Bring the plan into documentary compliance.** Under the Employee Retirement Income Security Act (ERISA), benefits plans must be operated in accordance with the terms of the plan document. To the extent that any special coronavirus-related changes vary from the plan document terms, employers and plan administrators will need to ensure the plans are eventually amended to reflect the temporary relief provided in connection with the pandemic. This type of amendment might be included as a separate appendix or "add on" document.

Employers and plan administrators often have little time to prepare for sudden emergency situations, like the coronavirus situation. By considering the steps outlined above, employers and plan administrators might have a better road map to work with in

implementing and administering COBRA coverage changes.

In addition to extending the FFCRA tax credit, APRA includes new subsidies for COBRA coverage. These changes are discussed in the ***American Rescue Plan Act*** *chapter.*

Unemployment insurance

The Coronavirus Aid, Relief, and Economic Security Act (CARES Act)—a sweeping, third-wave relief package assembled in response to the COVID-19 pandemic—became law on March 27, 2020. A central piece of the CARES Act expanded existing unemployment insurance programs, making far more individuals eligible and providing greater benefits than existing programs. The unemployment compensation system is a cooperative state and federal program, administered jointly by the DOL and each individual state. In granting expanded jobless benefits, the CARES Act takes the shared structure into account and authorizes the states to provide the additional benefits.

The CARES Act expanded the list of people who qualify to receive unemployment insurance benefits, the amount an individual may be eligible to receive, and the length of time the relief can be provided. This expansion of benefits eligibility was retroactive to losses commencing on or after January 27, 2020, and originally continued until December 31, 2020, with a maximum duration of Pandemic Unemployment Assistance (PUA) benefits of 39 weeks. Subsequent laws extended these programs until September 2021 which is covered in the **American Rescue Plan Act** section.

CARES Act expands on existing unemployment insurance programs

Section 2102 of the CARES Act extends benefits to workers who wouldn't otherwise be eligible for unemployment compensation or extended benefits through regular state or federal programs in the event they become unemployed, partially unemployed, or unable to work for one of the reasons discussed below, including self-employed workers, independent contractors, workers without long-enough work histories to qualify for state benefits, and those seeking part-time employment.

Workers must have experienced a job loss or reduced hours through no fault of their own, not be able to telework, and be able and available to work (as defined under existing state law) but for the fact that a specific COVID-19-related reason has caused them to be unable to work, including any of the following:

- The worker or a member of her household has been diagnosed with COVID-19.
- The worker is providing care for a family or household member who has been diagnosed with COVID-19.
- The worker is caring for a child (or other person for whom the worker has primary caregiving responsibilities) whose school or care facility is closed because of the virus.
- A healthcare provider has advised the worker to self-quarantine because of COVID-19 concerns.
- The worker's scheduled commencement of employment has been delayed or canceled because of the virus.
- The worker has become the primary breadwinner after the head of household died because of COVID-19.
- The individual's place of employment is closed because of the virus.

The DOL has clarified that the COVID-19-related reasons that may cause a worker to be unable to work may include:

- The worker can't reach the place of employment because a quarantine was imposed as a direct result of the COVID-19 outbreak.
- The worker is unable to reach the workplace because a healthcare provider advised him to self-quarantine because of coronavirus concerns.
- The worker must quit as a direct result of COVID-19.

Workers who qualify for unemployment benefits (including under an existing state program or the PUA's expanded eligibility) will receive an increase by a flat amount of $600 weekly. The extra $600 is available to eligible workers regardless of their prior earnings or benefit level under the state program. For lower-wage employees, the added $600 may cause their total unemployment insurance benefit to be greater than their normal weekly wage from the employer.

Some employers have expressed concern about employees being unwilling to return to work. An individual receiving benefits, however, must remain available to return to work and, if recalled, can be disqualified from receiving future benefits—unless she has a COVID-19-related reason for not returning. Further, the CARES Act contains an antifraud provision, which provides for denial of future eligibility and criminal prosecution if an individual obtains benefits fraudulently.

Is the $600 benefit prorated for individuals who qualify for unemployment insurance benefits based on reduced earnings? According to the DOL, the CARES Act doesn't include a provision for prorating the $600, so anyone qualifying for the jobless benefits would receive the full amount.

The CARES Act provides up to 13 weeks of unemployment benefits for individuals who have exhausted all rights to regular unemployment compensation and are able to work, available for work, and actively seeking work. States must offer flexibility for individuals to demonstrate they're meeting the "actively seeking work" requirement—for example, allowing benefits if individuals are unable to conduct a search because of COVID-19.

Short-time compensation (or shared work) programs

The CARES Act promotes the use of short-time compensation (STC) arrangements, often referred to as workshare or shared work arrangements. The goal is to avert layoffs, encouraging employers to retain employees on reduced hours as a means of avoiding layoffs. Workers whose hours are reduced become eligible for partial unemployment insurance benefits.

Many states have preexisting STC programs, including Arizona, Arkansas, California, Colorado, Connecticut, Florida, Illinois, Iowa, Kansas, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, New Hampshire, New Jersey, New York, Ohio, Oregon, Pennsylvania, Rhode Island, Texas, Vermont, Washington, and Wisconsin.

Under the Act, the federal government will reimburse a state for the total STC benefit costs, up to a maximum of 26 weeks for each participant. For states without an existing program, it will reimburse one-half of the STC benefit costs, up to a maximum of 26 weeks for each participant. Partial jobless benefits paid to employees participating in an STC program will be supplemented with the additional $600 benefit (through July 31).

Exclusions

Normally, unemployment insurance benefits paid to a former employee are charged against the employer's account and, for a taxpaying employer, are taken into account when its tax rate is set. State laws may identify situations, however, when the benefits aren't charged to the employer's account—such as when they're fully funded by the federal government (which is the case for most enhanced benefits under the CARES Act).

You should review the exclusions under your state laws to determine what costs your company may bear—either directly as a reimbursing employer or indirectly through an increased experience tax rating. Many states are saying they'll try to minimize the charges to employer accounts arising from COVID-19 factors.

DOL Guidance

The DOL has issued a series of Unemployment Insurance Program Letters (UIPLs)—*15-20*, *16-20*, and *17-20*—providing guidance to states in disbursing Federal Pandemic Unemployment Compensation (FPUC), PUA, and Pandemic Emergency

Unemployment Compensation (PEUC), respectively. The FPUC, PUA, and PEUC programs, along with other CARES Act provisions applicable to unemployment insurance, were summarized by the DOL in *UIPL 14-20*.

Regarding all of these programs, the DOL makes the point that quitting a job without good cause to obtain unemployment benefits would be considered fraud and that states should be enforcing their antifraud provisions in this context.

Federal Pandemic Unemployment Compensation

The FPUC program allows states to provide an additional $600 weekly benefit to individuals who are collecting regular unemployment compensation. PUA, meanwhile, provides up to 39 weeks of benefits to qualifying individuals who are otherwise able to work and available for work within the meaning of applicable state law, except that they are unemployed, partially unemployed, or unable or unavailable to work for COVID-19-related reasons, as defined in the CARES Act.

FPUC benefit payments under CARES Act Section 2104 are fully federally funded and may begin as soon as the week after the execution of a signed agreement between the state and the DOL. Such agreements had been signed for all states by March 28. States may not charge employers for any FPUC benefits paid so as to affect the employer's experience rating, the DOL noted.

As states begin providing this payment, eligible individuals will receive retroactive payments back to their date of eligibility or the signing of the state agreement, whichever came later.

"The $600 weekly unemployment compensation boost included in the CARES Act will provide valuable support to American workers and their families during this challenging time," said DOL Secretary Eugene Scalia in a statement. "The Department will continue to provide guidance and support to the States so they can administer the important new benefits under the CARES Act while guarding against fraud and abuse in their Unemployment Insurance systems."

UIPL 15-20 also includes guidance to states about protecting unemployment insurance program integrity, as the CARES Act provisions are designed to operate in tandem with the fundamental eligibility requirements of the federal-state unemployment insurance program. The DOL is working with states receiving funding under the act to provide unemployment benefits only to those who are entitled to them.

Pandemic Unemployment Assistance

The PUA program assists individuals who don't qualify for regular unemployment compensation and are unable to continue working as a result of the coronavirus, including self-employed workers, independent contractors, and gig workers. PUA also is available to individuals who have exhausted all rights to such benefits under state or federal law. Covered individuals also include self-employed individuals, those seeking part-time employment, and individuals lacking sufficient work history.

Depending on state law, covered individuals may also include clergy and those working for religious organizations who are not covered by regular unemployment compensation. PUA is generally not payable to individuals who can telework with pay or are receiving paid sick leave or other paid leave benefits, the DOL noted in UIPL 16-20. However, individuals receiving such paid leave for less than their customary workweek may still be eligible for PUA.

The PUA weekly benefits amount (WBA) is equal to the WBA authorized under state unemployment compensation law where the individual was employed. For individuals without enough reported wages to establish a WBA, it will be calculated according to the process set out by federal law for Disaster Unemployment Assistance.

Pandemic Emergency Unemployment Compensation

The CARES act also authorized PEUC, which offers up to 13 weeks of additional benefits to those who have exhausted benefits under regular unemployment compensation or other programs.

States must offer flexibility in meeting PEUC eligibility requirements related to "actively seeking work" if an applicant's ability to do so is impacted by COVID-19. This program covers individuals who have exhausted all rights to regular unemployment compensation under state or federal law and who remain able to work, available for work, and actively seeking work.

However, states must offer flexibility in meeting the "actively seeking work" requirement if an individual cannot search for work because of COVID-19—for example, due to illness, quarantine, or movement restriction. A state may not change its regular computation method so as to reduce the average WBA or the number of weeks of benefits payable (i.e., maximum benefit entitlement).

According to the DOL, individuals qualified to receive the federally funded benefits for up to 13 weeks under the PEUC program are those who:

- Have exhausted all rights to regular compensation under state or federal law with respect to a benefit year that ended on or after July 1, 2019;
- Have no rights to regular compensation with respect to a week under any other state unemployment compensation law or federal unemployment compensation law, or to compensation under any other federal law;
- Aren't receiving compensation with respect to a week under the unemployment compensation law of Canada; *and*
- Are able to work, available to work, and actively seeking work, although the state must offer flexibility on "actively seeking work" when there are COVID-19 impacts and constraints.

Federal agencies intensify focus on CARES Act fraud

After the U.S. Department of Justice (DOJ) charged more than 100 people last year with fraudulently seeking more than $360 million in CARES Act emergency loans and other payments, the federal government has taken additional steps to combat fraud in COVID-19 relief programs. The new efforts include expanding investigations and charging more criminal cases, initiating civil enforcement and forfeiture actions to recoup money for the U.S. Treasury, and hiring dedicated personnel to prosecute CARES Act fraud.

In passing the CARES Act and related legislation in 2020, Congress provided for several different types of emergency pandemic relief to be administered by the Small Business Association (SBA) and other federal agencies. They included the Paycheck Protection Program (PPP), Economic Injury Disaster Loans (EIDLs), PUA, FPUC, and Economic Impact Payments (EIPs).

Of the more than $2 trillion authorized under the CARES Act during 2020, more than $500 billion was allocated to PPP loans. A second round of the loans opened up in January, with applications closing on May 31, 2021. Many of the loans are forgivable if participants comply with the rules involving the use of the proceeds and related business operations, such as keeping employees on payroll.

The programs are focused on keeping smaller businesses and their employees afloat, and the loan statistics reflect that goal: The average PPP loan size has been just under $60,000, and more than 90% of the loans have been for $150,000 or less. Similarly, the average EIDL size has been a little over $50,000.

Like most fraud charges, the allegations in the COVID-19 relief fraud cases involve two different types of conduct: fraudulent representations in applying for the funding and fraudulent use of the proceeds. The types of representations at issue include (1) eligibility for relief, (2) falsified business, employee, and tax records, and (3) false certifications about criminal records and other issues.

Most of the fraudulent uses in the already-filed cases have involved funds diverted for personal expenses, but at least one matter alleges a Utah resident used the loan proceeds for business expenses that differed from those he included in the loan application. In another case, prosecutors lodged fraud charges against several parties even after they repaid the loans and withdrew other applications.

Investigative and media scrutiny of the COVID-19 relief programs has led to a dramatic expansion in the understanding of the probable scope of the fraud. On March 25, the House Select Subcommittee on the Coronavirus Crisis issued a memo finding around $84 billion in potential fraud from the PPP and the EIDL programs combined.

In addition, more than 1.3 million EIDL fraud referrals (some 700,000 of which involved identify theft) have been made to the SBA's Inspector General's Office. The office also has received nearly 150,000 hotline complaints related to potential PPP or EIDL fraud, an increase of almost 20,000% over previous years. And during May to October 2020 alone, financial institutions filed more than 41,000 suspicious activity reports related to potential PPP or EIDL fraud.

Here's how the house subcommittee broke out some of the $84 billion in suspected fraud by type:

- Approximately $67.5 billion went to applicants with duplicate e-mail and physical addresses, IP information, and/or bank accounts;
- Some $7.9 billion went to applicants with banking information that was different from the information on their applications;
- Another $3.2 billion or so appears to have involved identity theft;
- Approximately $3.6 billion went to borrowers on the Treasury Department's "Do Not Pay" list; *and*
- Approximately $557 million went to potentially ineligible recipients who registered employer identification numbers (EINs) after the program cutoff date.

The numbers are consistent with earlier reports that the FBI alone had already opened "several hundred" investigations into PPP fraud. More than 30 federal and state agencies are now probing such allegations.

In late March 2021, the DOJ announced it had charged more than 470 individuals with fraud and other crimes connected to the COVID-19 pandemic, including more than 240 people accused of PPP and/or EIDL fraud. The cases represent more than $569 million in attempted fraud from the government and others.

The DOJ also has obtained the first civil settlement related to CARES Act misconduct in a case from the U.S. District for the Eastern District of California. The company and one of its officers agreed to repay all of the PPP funds it received plus $100,000 in damages and penalties. Civil enforcement moving forward will likely involve two of the statutes involved in the California case:

- False Claims Act (FCA), which allows the DOJ to seek damages and penalties for false claims for payment to the federal government; *and*
- Financial Institutions Reform, Recovery, and Enforcement Act (FIRREA), which lets the agency seek civil penalties for violations of certain federal criminal statutes including those involving federally insured financial institutions.

The DOJ also has filed forfeiture and other actions to seize EIDL proceeds resulting from fraudulent CARES Act and other related applications. The efforts (many of which are being managed by the EIDL Fraud Task Force headquartered in the District of Colorado) have already produced seizures of more than $626 million.

Meanwhile, the federal government has expanded other resources to combat CARES Act fraud. The ARPA included $142 million for inspector general offices and other watchdog organizations. After instructing each U.S. attorney's office to appoint a coronavirus fraud coordinator, the DOJ announced it was creating three new prosecutor positions in its fraud section's Market Integrity and Major Fraud Unit.

Marshaling additional resources and strengthening civil enforcement to combat COVID-19-related fraud more effectively increase the stakes for relief program beneficiaries. Failure to follow the SBA's regulations or other program funding rules can result in treble damages and other significant penalties even if the conduct doesn't rise to the level of criminal charges. If your business has received relief funding from government agencies, be sure to work with counsel to establish a strong compliance regime.

American Rescue Plan Act

The APRA contained several key provisions directly affecting employers that continue to provide paid leave voluntarily under the FFCRA. Along with ARPA, the Consolidated Appropriations Act (CCA) revived FPUC and extended PEUC and PUA under the CARES Act.

FFCRA leave

While the FFCRA's mandatory requirement to provide EPSL or EFMLA leave expired on December 31, 2020. In return for providing the leave, employers were eligible for payroll tax credits to offset the cost. In late December 2020, as part of an initial $900 billion stimulus bill, Congress voted to extend the tax credits until March 31, 2021, for employers that continued to offer the paid leave voluntarily. While the ARPA doesn't reinstate the employer mandate to provide the EPSL or the EFMLA leave for qualifying events, it does further extend the tax credits to employers through September 30, 2021.

In addition, the ARPA establishes that the employee limit of 80 hours for paid sick leave will reset on April 1, 2021. The 10-week-per-employee paid family leave limit also reset on April 1, 2021. Employers that voluntarily allow employees to take such additional paid sick leave or paid family leave can still receive a tax credit for any additional leave taken as of April 1, 2021. This means if you continue to offer FFCRA leave, you can claim a payroll tax credit to offset up to 10 days of wages paid as qualified EPSL, even if employees previously exhausted their entitlement to the leave.

The ARPA expands the types of leave available under the FFCRA. Leave can now be taken when an employee is:

- Obtaining a COVID-19 vaccination;
- Suffering or recovering from side effects related to the vaccine; and
- Seeking or awaiting the results of a coronavirus test after (1) the employee has been exposed to the virus or (2) the employer has requested the test.

The ARPA also changes the entitlement to EFMLA pay. Previously, the first two weeks of the leave were unpaid. Under the new legislation, all 12 weeks of the leave can be paid.

Moreover, the EFMLA benefits have been expanded to include all the reasons an employee can take the EPSL. Under the FFCRA's original terms, EFMLA leave was available only for school or childcare issues.

Going forward, if you provide EFMLA leave, it can be used for not only school closures and childcare loss (as in the original FFCRA) but also all the reasons for which EPSL may be granted. This is a tremendous addition because the EFMLA is a 12-week

entitlement and was previously limited to being used only for the school closures or loss of childcare. Unlike with the EPSL, however, EFMLA entitlement won't automatically renew on April 1, 2021.

The changes approved by Congress eliminate the first 10 days of EFMLA leave being unpaid. The credit limit goes up to $12,000 (from $10,000) in the aggregate but retains the daily limit of $200.

Congress also added a nondiscrimination rule invalidating the tax credit if an employer discriminates in favor of highly compensated, full-time, or longer-tenured employees

Unemployment

The ARPA extended until September 2021 both the PUA and PEUC programs, which had been scheduled to expire on March 14. Until that date, the FPUC program will continue to provide an additional $300 weekly benefit to individuals collecting regular unemployment compensation. Certain partially self-employed individuals may continue to get an additional $100 under the optional Mixed Earners Unemployment Compensation benefit established in December by the Consolidated Appropriations Act.

PUA

The maximum number of weeks of PUA benefits was increased from 50 weeks to 79 weeks. The number of weeks available continues to be reduced by any weeks of regular unemployment compensation, including extended benefits, received during the pandemic. Individuals may only collect these additional 29 weeks of benefits for weeks of unemployment ending on or after March 20, 2021.

PEUC

The ARPA increased the PEUC maximum for a benefit year from 24 to 53 times an individual's average weekly benefit amount. If an individual previously exhausted PEUC and began receiving extended benefits under the state program, they must exhaust these extended benefits before being eligible to receive the additional amount of PEUC now available, according to UIPL 14-21 from the DOL.

An individual may not receive both PUA and PEUC for the same week. However, if an individual receiving PUA becomes subject to PEUC due to ARPA, the state may temporarily continue paying them PUA for up to 6 weeks while transitioning them to PEUC.

ARPA also extended the federal financing of states' short-time compensation payments.

State flexibilities

The temporary flexibilities previously granted to states "regarding waiting week, work search, good cause, and experience rating do not change with the enactment of ARPA," the DOL stated. "States continue to have flexibility in applying these provisions on a temporary emergency basis, as needed, to respond to the spread of COVID-19."

ARPA restored, for weeks of unemployment beginning before September 6, full federal matching for states that waive the 1-week waiting period for benefits. States that previously reinstated the waiting week may waive it retroactively to December 31, 2020.

States must individually notify all individuals who are currently receiving PUA, PEUC, FPUC, or MEUC or have exhausted PUA or PEUC, along with anyone else for whom a PUA or PEUC claim was previously established. The notice should address the new provisions of ARPA, including the changes to program dates and the maximum benefit entitlement for PUA or PEUC, as well as the change to program dates for FPUC or MEUC, as appropriate. Individuals who have exhausted PUA and PEUC must be provided instructions on how to reopen their claims.

Under Section 901(1), benefits also are made available for the first week of unemployment in states that don't make benefits immediately available. Also note, beginning in 2020, if the "adjusted gross income of the employee is less than $150,000, the gross income for taxes shall not include . . . unemployment compensation received by the taxpayer (or, in the case of a joint return, received by each spouse) that does not exceed $10,200."

In other words, if you make less than $150,000 a year, $10,200 of the unemployment compensation is nontaxable.

COBRA

The ARPA's rules for a 100% COBRA premium subsidy apply to all group health plans subject to the ERISA, the Internal Revenue Code, or the Public Health Service Act, whether fully or self-insured. Church plans, although not subject to those laws, may nevertheless have to comply with some of the rules detailed below to the extent they're subject to state continuation coverage (or "mini-COBRA") laws.

Most important, the ARPA's COBRA premium subsidy provisions don't apply to health care flexible spending accounts (FSAs), qualified small employer health reimbursement arrangements, or "excepted benefits" coverage.

Under the ARPA, employers must subsidize 100% of COBRA (or mini-COBRA) premiums for certain individuals from April 1 through September 30, 2021. Employers will be able to recoup the costs via a tax credit on their quarterly payroll tax returns.

The AEIs may qualify for the six-month subsidy window in two ways:

- They are entitled to COBRA any time after April 1, 2021, and before September 30, 2021, and they (1) timely elected COBRA continuation coverage and (2) have been paying COBRA premiums per the plan's terms.
- They were entitled to COBRA but (1) failed to elect the continuation coverage or (2) timely elected but dropped the coverage before April 1, 2021 (Group (2) AEIs).

With the above definition, Congress seems focused on helping qualified beneficiaries who lost job-based health coverage because of COVID-19 layoffs and reductions in hours. Covered employees who voluntarily terminated or retired and their covered dependents who are qualified beneficiaries would not be eligible for assistance.

Group (2) AEIs are entitled to a COBRA subsidy if they make an election within a new 60-day period required under the ARPA. Also, while the subsidy cannot apply for periods of coverage prior to April 1, 2021, Group (2) AEIs likely include individuals who had been enjoying "outbreak period" relief under joint agency guidance issued in 2020. A few weeks before the ARPA was enacted, the DOL's Employee Benefits Security Administration (EBSA) issued *EBSA Disaster Relief Notice 2021-01*, explaining how to apply the one-year statutory period under the ERISA for purposes of that relief.

There are two instances when someone who would otherwise qualify as an AEI would not be entitled to the subsidy:

- The person becomes eligible for Medicare or coverage under another group health plan; *or*
- The individual's maximum COBRA coverage period has ended.

For example, the normal maximum COBRA coverage period is 18 months. So, if a covered employee was involuntarily terminated in September 2019 because of a reduction in force, she won't be eligible for the subsidy because her maximum COBRA coverage period ended March 31, 2021 (before the subsidy period beginning April 1). Generally, if a qualified beneficiary became eligible for COBRA on or after November 1, 2019, she may be eligible for the subsidy.

Earlier in the pandemic, the DOL and the IRS issued guidance that extended certain employee benefit plan deadlines, including those for a qualified beneficiary to elect and pay for COBRA. The deadlines were extended until the end of the "Outbreak Period," or the period from March 1, 2020, through 60 days after the end of the declared COVID-19 national emergency. Unfortunately, the national emergency has yet to end, so the Outbreak Period has continued. Thus, COBRA premiums and elections technically aren't yet due in most cases.

To further complicate matters, ERISA and the Internal Revenue Code, under which the earlier guidance was issued, allow only the DOL and the IRS to provide relief for up to one year. Practitioners had begun to question how the one-year limitation would apply in the context of the COVID-19 extension:

- Would the one-year limitation mean the relief would end as of March 1, 2021 (i.e., one year from the beginning of the Outbreak Period)?
- Or would the one-year limitation apply on an individual basis? For example, if a qualified beneficiary became eligible for COBRA in July 2020, would the relief extend to July 2021?

In a *recent notice*, the DOL and the IRS clarified the one-year period should be applied on an individual basis. The rule makes administering employee benefit plan deadlines somewhat difficult moving forward. After all, plan administrators will have to look at each plan participant or beneficiary who had a deadline that expired on or after March 1, 2020, and see when that individual's one-year period ends.

In case administering the one-year rule wasn't enough, the ARPA gives employers and COBRA administrators even more to contend with: a second opportunity to elect COBRA. The ARPA provides that if an assistance-eligible individual (AEI) previously elected COBRA but wasn't enrolled as of April 1, 2021, or previously declined or hasn't elected COBRA, she must be given a second opportunity to elect it for any time during the subsidy period, provided she is within the maximum coverage period.

The requirement ensures qualified beneficiaries can take advantage of what is essentially free COBRA coverage. To that end, the ARPA requires administrators to give certain notices to those and other AEI.

Under the ARPA, plans must modify their election notice packets to ensure individuals are informed about the new subsidies. Specifically, for any individuals who first become eligible for COBRA during the six-month subsidy period, the plan's COBRA election notice must include the following additional information:

- The procedure, including any necessary paperwork, for establishing eligibility for the COBRA subsidy;
- Contact information for the individual responsible for providing additional information about the premium subsidy;
- Description of the Group (2) AEIs special election period described above;
- An explanation that qualified beneficiaries are obligated to notify the plan if they're disqualified from receiving the COBRA subsidy because of eligibility for other group health plan or Medicare coverage;
- Description of the penalty for failure to notify the plan of disqualification; *and*
- An explanation of a qualified beneficiary's right to subsidized COBRA coverage as well as any conditions on eligibility to the subsidy.

Also, if the employer chooses to permit it, the election notice should describe the option to enroll in a different, less expensive coverage option available under the plan. The plan could do so by either (1) amending its standard COBRA election notice for the six-month subsidy period or (2) preparing a separate document or "insert" to be distributed along with the standard COBRA election packet. While plans can draft their own version (provided it satisfies the content requirements), we expect to see model notice language from the DOL sometime in April.

As previously noted, the ARPA also requires the plan to issue an election notice for the Group (2) AEI special election period described above. The notice must be provided by May 31, 2021.

The DOL's Employee Benefits Security Administration (EBSA) issued *clarifying guidance* about the subsidies as well as a *companion notice*. Collectively, the guidance helps to resolve some questions, but not all. The COBRA subsidy guidance included the following models, which employers and plans can use to satisfy their ARPA notice obligations:

- *Model General Notice and COBRA Continuation Coverage Election Notice* for all COBRA qualified beneficiaries with qualifying events occurring from April 1, 2021, through September 30, 2021.
- *Model Notice in Connection with Extended Election Period* to be provided by May 31, 2021, to all AEIs, including those who would be entitled to subsidies had they elected and/or maintained COBRA coverage.
- *Model Alternative Notice* for insured coverage subject to state continuation requirements from April 1, 2021, through September 30, 2021.
- *Model Notice of Expiration of Premium Assistance* for plans to alert AEIs 15-45 days before their subsidies are set to expire.
- *Summary of COBRA Premium Assistance Provisions under the ARPA* for enclosure with the General Notice, Notice in Connection with Extended Election Period, and Model Alternative Notice.

The model notice materials include a form called the *Request for Treatment as an Assistance Eligible Individual*, which must be included in the plan's communications. An employee also can use the form to contact a current or former employer if she thinks she is an AEI who qualifies for subsidies. An employer's receipt of the form isn't a waiver of other notice obligations imposed under either the ARPA specifically or COBRA generally.

The EBSA also published answers to frequently asked questions (FAQs) about the COBRA premium assistance. While the FAQs are directed at potential AEIs, they provide insight into certain open questions flagged in our previous update and also note where some additional guidance may still be needed:

Identifying AEIs. The employees (and their covered dependents) who qualify as AEIs are generally those who were involuntarily terminated or experienced a reduction in hours. The FAQs don't shed much light on the meaning of "involuntary," nor do they instruct on the process of identifying AEIs (including the extent to which employers or plans could rely on an individual's attestation of AEI status, given the "Request for Treatment as an AEI" cited above). It's possible the IRS or the treasury department will issue clarifying guidance.

The FAQs confirm a reduction in an individual's hours need not be "involuntary" for the person to qualify as an AEI (provided he remains an employee at the time the hours are cut) and include the following examples:

- Change in hours of operations;
- Change from full-time to part-time status;
- Taking of a temporary leave of absence; *or*
- Participation in a lawful labor strike.

The FAQs also confirm that, consistent with federal COBRA provisions, an individual terminated for "gross misconduct" cannot qualify as an AEI. There is no uniform definition of "gross misconduct" for federal COBRA purposes, and we would expect employers and plans to apply the concept consistently with past practices.

Special or extended election opportunity for "Group (2) AEIs." Plans must provide a special or extended election opportunity to "Group (2) AEIs," i.e., employees (and their covered dependents) who would have qualified as AEIs had they timely elected COBRA coverage and/or not discontinued it before April 1, 2021.

The FAQs confirm a plan's obligation to provide the special election notice applies only to the Group (2) AEI population. Also, consistent with federal COBRA provisions, dependents of a Group (2) AEI who was covered at the time of the involuntary termination or reduction in hours have an independent election right for the ARPA subsidies, even if they had failed to elect COBRA when it was first made available to them.

The FAQs also confirm that entitlement to a special or extended election opportunity under the ARPA doesn't serve to extend the AEI's COBRA maximum coverage period under the plan, which will continue to be based on the individual's initial qualifying event.

Claiming a credit or refund. The entity responsible for covering COBRA premium costs upfront depends on the type of plan and how the plan is funded. For self-insured plans, the employer is the responsible entity. For fully insured plans, the insurer is the responsible entity. For other plans, the entity to whom the premium is due is the responsible entity.

There are outstanding questions about how this should work in certain scenarios, such as when COBRA is handled by a third-party administrator or when the coverage is provided under a multiple-employer welfare arrangement or association health plan. The IRS has been directed to provide additional guidance on the credit and refund process, which may address some of these questions.

The responsible entity will be eligible to claim a credit against taxes otherwise imposed under Internal Revenue Code Section 3111(b) (commonly referred to as the Medicare tax, generally equal to 1.45% of an employee's wages). The credit is claimed on the responsible entity's quarterly payroll tax filing. If the COBRA premium costs that the responsible entity covered upfront exceed its liability under Code Section 3111(b), it can request an additional refund. The IRS hasn't yet outlined how the refund will be processed, but additional guidance is expected on this point.

With all of the changes, you have much to address with regard to COBRA obligations. Some things you should do to ensure compliance include:

- Begin identifying AEI. First identify individuals who are currently on COBRA coverage because of a reduction in hours or involuntary termination. Next, look at who lost coverage because a reduction in hours or involuntary termination of employment but who rejected, haven't yet elected, or otherwise terminated COBRA coverage.
- Refund any COBRA premiums already paid by AEIs for the subsidy period within 60 days of their payment.
- Update COBRA election notices to describe the premium subsidy. The ARPA required the DOL to issue a new model election notice to capture the required subsidy information. The updated election notices are intended to satisfy the premium subsidy notice requirement for AEIs who become entitled to COBRA during the subsidy period.
- Prepare notices of the premium subsidy and special election period for AEIs who became entitled to COBRA or mini-COBRA coverage before April 1, 2021.Again, the DOL has published a model notice for the purpose. Plan administrators must provide the notices within 60 days of April 1, 2021.
- Prepare notices of expiration of the premium subsidy period. The ARPA requires plan administrators to inform AEIs when the subsidy will expire (between 15 and 45 days before the end of the subsidy period). The DOL will put out model notices for this requirement, too.

- Coordinate with plan insurers or third-party administrators. Among other items, employers will want to clarify who is responsible for providing the required notices and how the COBRA administrator, if applicable, will collect any COBRA administrative fee (normally 2%).
- Review the model notices, and be on the lookout for guidance from the DOL and the IRS.

DCAPs

Only for 2021, the ARPA allows you to amend your dependent care assistance programs (DCAPs) so employees can contribute up to $10,500 for the tax year (or $5,250 for individuals married and filing separately). Previously, the maximum amount an employee could contribute to a DCAP and exclude from gross income was $5,000 per tax year (or $2,500 for individuals married and filing separately).

The change is undoubtedly welcome relief to parents and caregivers who are likely to be returning to work in 2021 and unable to care for (1) kids who may have not yet returned to school or (2) other family members who continue to stay at home and need assistance. It allows employees to pay for more of those increased dependent care costs with pretax dollars.

Employers generally maintain DCAPs as part of their cafeteria plans, which allow employees to contribute pretax dollars to a variety of qualified benefits. The contributions, in turn, reduce the employee's taxable income.

While employees are typically locked into their elections for the entire year, they may be able to increase their DCAP election prospectively under previous IRS guidance released in February 2020, if the plan is so amended. A cafeteria plan that adopts the changes will be deemed to comply with the Code §§ 125 and 129 rules governing cafeteria plans and DCAPs.

You may implement the DCAP changes operationally now, but plans must be retroactively amended no later than the last day of the plan year in which the amendment is effective. In addition, the plan must be operated consistent with the terms of the amendment on its effective date and ending on the date the amendment is adopted.

ACA Subsidy

ARPA also expanded eligibility for Affordable Care Act (ACA) premium subsidies by removing the income-based cap of 400 percent of the federal poverty level, though enrollees with incomes above that threshold must pay 8.5 percent of their household income toward their ACA marketplace coverage. These provisions apply in 2021 and 2022, and special subsidy eligibility rules apply in 2021 to individuals receiving unemployment compensation.

While these ARPA provisions do not affect employers directly, to the extent they make it more likely an employee will enroll in ACA exchange coverage and receive a premium subsidy, they may increase applicable large employers' exposure to employer shared responsibility payments.

Safety concerns and OSHA

Section 11(c) of the Occupational Safety and Health Act (OSH Act) protects employees from discharge or discrimination for the following protected activities: filing a complaint; instituting (or causing to be instituted) any proceeding under or related to the OSH Act; testifying in a proceeding; or exercising "any right afforded by the Act" for themselves or others.

The catchall provision of "any right afforded by the Act" is extremely broad. It has been interpreted to include an employee's raising of a legitimate safety concern in the workplace. Many states have similarly worded statutes.

An employee who is discriminated against or discharged for expressing a concern with a supervisor—or filing a complaint with the Occupational Safety and Health Administration (OSHA) about having to work around others who may have COVID-19—may have a claim against the employer under Section 11(c), depending upon the circumstances. Whether the claim is valid would likely depend, at least in part, on the extent to which the employee's concern with contracting the virus in the workplace is well founded as opposed to a generalized concern.

Your goal should be that any time an employee raises a safety or health concern in the workplace, it can be worked out to the satisfaction of both parties. But some situations aren't so simple, and COVID-19 issues are complicated and quickly evolving.

OSHA has identified four levels of COVID-19 risk for workplaces. This is not law; it is simply the agency's view, but it provides some helpful context:

- High and very high exposure risk: certain healthcare or laboratory workers who perform activities on known or suspected COVID-19 patients and mortuary workers
- Medium exposure risk: those who "require frequent and/or close contact with (see next section for explanation of "close contact") people who may be infected with [COVID-19], but who aren't known or suspected COVID-19 patients"
- Low exposure risk: those who "do not require contact with people known to be, or suspected of being, infected with [COVID-19] nor frequent close contact with (i.e., within 6 feet of) the general public"

The risk categories don't take into account some of the protective measures employers can take to minimize risk, such as providing gloves and respirators and frequently cleaning shared equipment.

While OSHA hasn't made any clear pronouncements on the subject, to minimize the potential for a claim, you should make a good-faith effort to assess the workplace and take steps to minimize the potential presence and spread of COVID-19. If meaningful measures are taken, employees will feel more confident in their work environment.

In addition, if an employee expresses a subjective concern (i.e., not based on objective facts) about contracting the virus and is in a low- or medium-risk job category in which you have already taken good-faith measures to further minimize the risk, the reality may be that the employee's subjective concern is actually a pretext for something else, such as not wanting to work.

On March 11, 2020, OSHA put out *guidance on preparing workplaces for COVID-19*. The guidance makes several recommendations on steps you should immediately take, including:

- Developing an infectious disease preparedness and response plan;
- Preparing to implement basic infection prevention measures;
- Establishing policies and procedures for prompt identification and isolation of sick people, if appropriate; *and*
- Developing, implementing, and communicating about workplace flexibilities and protections.

Although the guidance doesn't have the impact of an OSH Act regulation, employers that fail to comply with OSHA's guidance are at higher risk of receiving a citation for failing to maintain a safe and healthy workplace.

CDC issues guidance on 'close contact'

Since the onset of the COVID-19 pandemic, the Centers for Dissease Control and Prevention (CDC) has informed the public that "close contact" with infected persons poses a high risk of contracting the virus. Previously, the CDC defined close contact as spending at least 15 consecutive minutes within six feet of an infected person. On October 21, however, the agency issued *updated guidelines* defining close contact as being within six feet of an infected person for a cumulative total of at least 15

minutes over a 24-hour period starting from two days before illness onset … until the time the patient is isolated." It isn't dependent on whether either individual was wearing respiratory personal protective equipment (PPE).

The definition applies without regard to whether face masks were used by either the newly infected person or the person(s) with whom the close contact occurred.

The CDC moved to change the definition after a Vermont corrections officer became infected following several brief interactions with six coronavirus-positive inmates. The officer had 22 different, fleeting encounters with infected inmates that lasted a total of only 17 minutes overall—none coming close to the 15 minutes cited in the earlier guidelines.

One expert noted the huge impact the new definition will have on "workplaces, schools and other places where people spend all day together off and on." Another added, "This will mean a big change for public health when it comes to contact tracing and for the public generally in trying to avoid exposure."

Employers and contact tracers must adjust correspondingly because more resources will be required to accurately identify a newly infected individual's multiple brief interactions over a 24-hour period. Moreover, the number of people required to quarantine under the updated guidance is almost certain to increase.

Accordingly, you should anticipate and prepare for the staffing shortages that might result from the CDC's new guidelines. To ensure compliance, you should continue to update your policies, procedures, and record keeping practices.

OSHA issues guidance on cloth face coverings, surgical masks, respirators

Since the COVID-19 pandemic started, employers have struggled to understand the OSHA position on cloth face coverings and surgical masks, specifically whether the agency requires or recommends their use and whether they constitute PPE. The agency has issued frequently asked questions and responses about the equipment. Here's what the agency had to say about cloth face masks, surgical masks, and respirators.

Cloth face masks

OSHA doesn't consider cloth face coverings (whether homemade or commercially produced) to be PPE. They don't protect employees from airborne infectious agents because of their loose fit and lack of seal or adequate filtration. Therefore, employers that require employees to wear them don't have to comply with 29 CFR 1910.132. If an employer recommends or requires surgical masks or respirators to be worn, cloth face coverings aren't an adequate substitute. They may be disposable or reusable with proper washing.

Are you required to provide cloth face coverings to employees? According to OSHA's new guidance, the answer is no. But the answer also states you may choose to require cloth face coverings as part of a control plan designed to reduce COVID-19's hazards.

In fact, OSHA goes on to recommend you encourage employees to wear cloth face coverings at work as a means of source control—that is, to prevent an infected person from inadvertently spreading the coronavirus. So, you have the discretion to allow employees to wear the coverings. The guidance notes wearing them may sometimes create a hazard, such as when an employee wears a mask that contains the virus or has some workplace chemical on it.

Even if employees wear cloth face coverings, the guidance states you should still enforce social-distancing requirements.

Surgical masks

One of the FAQ responses seems to give employers some control in determining the purpose for which they may require surgical masks to be worn. It initially states the surgical masks "are" used to protect workers against splashes and sprays (i.e., droplets) containing potentially infectious materials. Guidance from the CDC indicates one way of transmitting the virus is from respiratory droplets produced when an infected person coughs, sneezes, or talks. Although the OSHA guidance doesn't reference the CDC guidance and isn't clear, OSHA is likely referring to the same kinds of droplets in its guidance.

In that capacity, OSHA says surgical masks are considered PPE. In a footnote, however, the agency notes if the masks are used only for source control and not to protect workers from splashes and sprays, they are not considered PPE. The footnote then states the OSH Act's General Duty Clause requires employers to provide workplaces free of recognized hazards likely to result in death or serious harm, and choosing to ensure the use of surgical masks may be considered a feasible means of source control under the clause.

In a nutshell, even though OSHA's guidance states up front that surgical masks are PPE when used to protect the wearer from splashes and sprays, the footnote indicates it's up to the employer to determine the purpose of their use:

- If the surgical masks are used to protect the wearer, they are PPE.
- If an employer determines they're used only to protect others from being infected by the wearer, they are not PPE but rather an administrative source control.

Because of loose fit and lack of a seal or adequate filtration, surgical masks won't protect the wearer from airborne transmissible infectious agents, according to the guidance.

Filtering facepiece respirators

Respirators are used to protect workers from inhaling small particles, including airborne transmissible or aerosolized infectious agents. When respirators are necessary to protect a worker, the employer must comply with 29 CFR 1910.134, the respiratory protection standard, according to the guidance.

When the employer provides filtering facepiece respirators but their use is voluntary, employees must be given the information found in Appendix D of the respiratory protection standard. There are no other compliance obligations, such as a medical evaluation.

OSHA issues new guidance under Biden

On January 21, 2021, President Joe Biden signed an Executive Order (EO) directing the labor secretary, acting through the OSHA, to issue "revised guidance to employers on workplace safety during the COVID-19 pandemic" and release, if deemed necessary, "emergency temporary standards" by March 15. In response to that EO, on January 29, OSHA issued the new guidance *Protecting Workers: Guidance on Mitigating and Preventing the Spread of COVID-19 in the Workplace.*

The publication:

- describes OSHA's current mandatory safety and health standards;
- provides recommendations to assist employers in creating and maintaining a safe and healthy workplace; *and*
- is supplemented by industry-specific guidance.

The guidance reminds employers they should implement COVID-19 prevention programs and identifies several essential elements in a prevention program, including:

- Identifying a workplace coordinator responsible for administering the program;
- Explaining how COVID-19 spreads, the manner in which employees may be exposed at work, and the precautionary measures instituted;
- Screening for and remove infected or potentially infected employees from the worksite;
- Providing all workers with face coverings appropriate for the work conducted, and mandate their use;
- Making COVID-19 vaccines available "at no cost to all eligible employees";
- Ensuring no distinction exists between workers who are vaccinated and those who are not, meaning, even upon vaccination, all employees must continue to comply with the program (e.g., mask use, social distancing);
- Conducting a hazard assessment;
- Identifying control measures to limit the spread of the virus;
- Adopting policies for employee absences that don't punish workers as a way to encourage potentially infected workers to remain home;
- Ensuring that coronavirus policies and procedures are communicated to both English and non-English speaking workers; *and*
- Implementing protections from retaliation for workers who raise coronavirus-related concerns.

Additionally, the guidance gives employers more information about several important issues, including:

- the need and value of requiring face coverings to suppress viral spread,
- installing physical barriers where social distancing cannot be maintained,
- improving ventilation; *and*
- increasing routine cleaning and disinfection.

The publication also explains when employers should provide PPE to their workers and training on how to properly use that PPE.

The new detailed guidance in tandem with the General Duty Clause should put employers on notice of what is expected of them. Even if OSHA doesn't turn the new guidance into specific mandatory standards, they can still be cited under the General Duty Clause. Beyond being in compliance, since it puts previous guidance about best practices all in one place, the new guidance provides employers with a good opportunity to review their protocols to ensure they are following all the recommended best practices.

In publishing the guidance, OSHA stresses it will periodically update its recommendations as it puts into effect Biden's EO.

OSHA citation sheds light on Biden approach to COVID-19 enforcement

OSHA cited a Missouri automotive manufacturer under the OSH Act General Duty Clause after six employees became ill with the virus and one died as a result of the complications. The citation is informative about OSHA's expectations for employers' adherence to social distancing and mask usage policies in the workplace.

According to OSHA, two employees working less than two feet apart jointly operated a press for hours at a time and tested positive for COVID-19. Neither worker had been wearing a face mask. Ten days later, two more press operators tested positive for the virus, and one of them died.

The OSHA citation alleges the employer failed to implement social distancing practices or enforce the use of face masks at its facility. The employer's response isn't known, but it can contest the findings.

What OSHA's action tells employers

Social distancing. Based on OSHA's allegations, it appears employees were unable to maintain six feet of distance between each other for at least some of their tasks. Although the agency has indicated worksites should be configured to facilitate social distancing whenever possible, certain tasks at fixed workstations can make the goal unfeasible. In those circumstances, however, the agency expects employers to use other infection control practices, such as enforcing mask usage and installing physical barriers.

Mask mandates. OSHA continues to expect strict enforcement of mask mandates in the workplace. Be sure supervisory employees remain vigilant and actively enforce your mask usage policies. It isn't enough to institute the policy, especially if it's rarely enforced, because employees can begin to view the standard as optional. Whenever possible, you should keep records to show you enforced it.

Physical barriers. Although social distancing is the preferred "first line of defense," you can install physical barriers at stations where employees are unable to maintain six feet of separation while working. OSHA's guidance suggests using Plexiglas or flexible strip curtains. In addition, you should take the workstation configuration into consideration when you're installing the barriers:

- If employees are typically in a seated position, install the barrier to block face-to-face pathways at that height.
- If they perform their work in a standing posture, place the barrier at a higher location.
- If they need to pass or transfer items past the physical barrier, the opening should be as small as possible.

Air ventilation. The recent Missouri citation didn't mention air ventilation, but updated OSHA guidance issued by the Biden administration offers some suggestions. In a nutshell, you should improve the air flow at worksites as an additional infection control measure by increasing the ventilation rates, reducing/eliminating recirculation, and improving air filtration.

Complex questions about recording, reporting injuries

The Missouri citation also highlights the complicated decisions facing employers with regard to OSHA's injury recording and reporting requirements during the COVID-19 pandemic. The agency has made clear you must record and/or report all work-related coronavirus infections.

In practice, determining whether a COVID-19 infection originated from either the workplace or community transmission can be complex and require active contact tracing by an HR professional. OSHA suggested in May 2020 guidance that the work-relatedness determination may be more straightforward when (1) several cases develop among employees who work closely together, and (2) there's no alternative explanation for how they contracted the illness. The analysis becomes more complicated, however, if a worker has significant exposure outside the workplace, such as with family members or the public.

Diligently investigate any COVID-19-positive cases among your employees to determine whether the infections were likely work-related. Per OSHA's May 2020 guidance, if you conduct a reasonable and good-faith inquiry and can't determine whether it's more likely than not that the employee contracted the virus in the workplace, you aren't required to record or report the case to the agency.

ADA considerations

Under the Americans with Disabilities Act (ADA), an employer's ability to make disability-related inquiries or require medical examinations is analyzed in three stages:

1. **Preoffer.** At this stage, the ADA prohibits all disability-related inquiries and medical exams, even if they are related to the job.
2. **Postoffer.** At this stage (after an applicant is given a conditional job offer but before starting work), an employer may make disability-related inquiries and conduct medical exams, regardless of whether they are related to the job, as long as it does so for all entering employees in the same job category.
3. **Employment.** After employment begins, an employer may make disability-related inquiries and require medical exams only if they are job-related and consistent with business necessity, which includes circumstances in which an employee poses a direct threat because of a medical condition.

The Equal Employment Opportunity Commission (EEOC) has issued updated guidance for employers considering screening and testing protocols for employees and job applicants. The guidance explains what precautionary measures are now permissible under the ADA. Here are some helpful questions and answers.

To protect the rest of the workforce, how much information may an employer request from an employee who calls in sick during the COVID-19 pandemic?

EEOC: During a pandemic, ADA-covered employers may ask sick employees if they are experiencing symptoms of the virus. For COVID-19, they include fever, chills, cough, shortness of breath, or a sore throat. You must maintain all information about employee illness as a confidential medical record in compliance with the ADA.

When may an ADA-covered employer take the body temperature of employees during the COVID-19 pandemic?

EEOC: Generally, measuring an employee's body temperature is considered a medical exam. Because the CDC and state/local health authorities have acknowledged community spread of COVID-19 and issued attendant precautions, you may measure employees' temperature. Be aware, however, some people with COVID-19 don't have a fever.

Does the ADA allow employers to require employees to stay home if they have symptoms of COVID-19?

EEOC: Yes. The CDC says employees who become ill with COVID-19 symptoms should leave the workplace. The ADA doesn't interfere with employers following the agency's advice. *

When employees return to work, does the ADA allow employers to require doctors' notes certifying their fitness for duty?

EEOC: Yes. The inquiries are permitted either because (1) they wouldn't be disability-related, or (2) if the pandemic were truly severe, they would be justified under the ADA's standards for disability-related inquiries of employees. As a practical matter, however, doctors and other healthcare professionals may be too busy during and immediately after an outbreak to provide fitness-for-duty documentation. Therefore, new approaches may be necessary, such as reliance on local clinics to provide a form, a stamp, or an e-mail to certify that an individual doesn't have the pandemic virus.

***Note:** A good threshold temperature for sending an employee home is 100.4 degrees as the CDC says individuals with body temperatures of 100.4 degrees or higher should isolate themselves from others.

During a pandemic, employers also can:

- Require, based on CDC or other public health recommendations, that employees who recently traveled to certain locations remain home for several days after to be sure they're clear of symptoms before returning to work. The CDC has said COVID-19 symptoms can present between 2 and 14 days after a person comes in contact with the virus.
- Encourage or require employees to telework as an infection-control strategy. Telework also may be a reasonable accommodation.
- Require employees to wear appropriate PPE, such as gloves, to reduce transmission of the virus, provided that any employee who needs an accommodation for such PPE receives the accommodation, absent undue hardship.
- Require newly hired employees to have a postoffer medical exam to determine their health status, provided you implement the same requirement for all employees in the same job category.

Employers *cannot*:

- Require employees to take a COVID-19 vaccine if one becomes available, but the use of any available vaccines can be encouraged.
- Ask employees to disclose if they have a compromised immune system or chronic health condition that may make them more susceptible to the virus before a direct threat (i.e., a pandemic) occurs. Instead, to determine who is most likely to be absent during a pandemic, employers can issue non-disability-related yes-or-no inquiries to employees to determine nonmedical reasons for absences, e.g., those absences related to child care, care for other dependents, and reliance on public transportation.

Navigating ADA obligations for high-risk individuals

As states reopen their economies and allow employees to return to their physical offices, employers need to consider a multitude of issues, including how to comply with employment laws in an entirely new environment. Ultimately, while the COVID-19 challenge is new for employers, the ADA process remains the same. Whether related to the coronavirus pandemic or not, you should be open to accommodation discussions, be fully and sincerely engaged in the ADA process, document disability-related conversations, and ensure any ADA-related employment decisions are thoroughly assessed, carefully scrutinized, and objectively justified.

Begin with interactive dialogue

At the outset, the EEOC's guidance reminds employers of their obligation to engage in a good-faith interactive dialogue with an employee who requests a workplace accommodation because of a medical condition. In the COVID-19 environment, that may take the form of a high-risk employee informing you she needs a work-related change because of an underlying medical condition that makes her more vulnerable to severe illness from the coronavirus. If that happens, you should start a conversation with her to:

- Determine if her condition is a disability under the ADA; and
- Decide if a reasonable accommodation can be provided without undue hardship.

During the process, you may ask questions about and request medical documentation pertaining to the employee's condition and her need for an accommodation.

What if no accommodation is requested?

The EEOC guidance also considers what happens when you know an employee is in a group identified as high risk by the CDC, but the individual doesn't request a workplace accommodation. In such circumstances, you have no obligation to act. The EEOC then very clearly states, however, the ADA does not allow you to exclude an employee—or take any other adverse action—solely because she has a disability the CDC has identified as potentially placing her at higher risk for severe illness if she gets COVID-19, unless her disability poses a direct threat.

An employee's disability poses a direct threat if it creates a significant risk of substantial harm to her health or safety that can't be eliminated or reduced by a reasonable accommodation.

How to analyze direct threat during pandemic

The direct threat analysis is complex and, according to the EEOC, a high standard. It involves an individualized assessment about the specific employee's disability, not the disability in general, and it requires you to consider the duration of the risk, the nature and severity of the potential harm, the likelihood it will occur, and its imminence. Under the direct threat analysis, you will need to consider several factors including:

- The severity of the pandemic in a particular area;
- The employee's own health (for example, is her disability well-controlled?);
- Her particular job duties; and
- The likelihood she will be exposed to the virus at the worksite.

Finally, would a reasonable accommodation help?

If you complete the required analysis and decide an employee's disability poses a direct threat, you'll still need to determine if, absent undue hardship, a reasonable accommodation would allow her to return to work safely and perform the essential job functions. As noted by the EEOC, accommodations might include:

- Additional or enhanced protective gear (e.g., gowns, masks, face shields, gloves);
- Extra or enhanced protective barriers to provide separation between her and others;
- Elimination or substitution of marginal job functions;
- Modification of work schedules to decrease contact with coworkers;
- Change in location so she can do the work with greater social distancing.

You are encouraged to be creative and flexible as you consider possible reasonable accommodations for employees during the pandemic.

ADA and face mask policies: a step-by-step response

Many states and local governments are requiring the use of face masks in public spaces when social distancing isn't feasible. Because of the government orders, businesses have been left in a half-open/half-closed limbo. In that quandary, one of the big questions businesses ask is, "Can we require an employee to wear a face mask?" The simple answer is "yes" but with a more complicated caveat.

Because of the pandemic and state and local government mandates, private businesses have developed their own mask-wearing policies. Because masks have become more prevalent, persons with disabilities have pushed back on businesses requiring masks, stating they cannot wear them because of a disability.

The Americans with Disabilities Act ADA, as amended by the ADA Amendments Act (ADAAA), requires an employer to provide reasonable accommodations to qualified individuals with disabilities who are employees or applicants for employment. As businesses reopen, state and local governments are requiring their residents to wear face masks while in commercial businesses. So, what disabilities make a person unable to wear a mask?

The CDC says a person with trouble breathing or who is unconscious, incapacitated, or otherwise unable to remove their face mask without assistance should not wear a face mask or cloth face covering. The agency also gives examples of persons with disabilities who might be unable to wear a mask:

- Individuals with asthma, chronic obstructive pulmonary disease (COPD), or other respiratory disabilities may be unable to wear a face mask because of difficulty in or impaired breathing;
- People with post-traumatic stress disorder (PTSD), severe anxiety, or claustrophobia;
- Some people with autism who may be sensitive to touch and texture;
- A person with cerebral palsy who may have trouble moving the small muscles in the hands, wrists, or fingers (because of their limited mobility, they may be unable to tie the strings or put the elastic loops of a face mask over their ears); and
- A person who uses mouth control devices such as a sip and puff to operate a wheelchair or assistive technology or uses their mouth or tongue to use assistive ventilators.

These examples are not all-inclusive—there might be other disabilities that make it difficult to wear a mask.

3 steps to take if an employee is unable to wear a mask

Step 1: Determine whether the ADA covers the employer. The ADA covers private employers with 15 or more employees on the payroll for 20 or more calendar workweeks (which don't need to be consecutive) in either the current or preceding calendar year and state government employees. Additionally, most federal government employees are covered under the Rehabilitation Act, the protections of which are mostly the same as under the ADA.

Step 2: Engage in the interactive process. After an employee says she cannot wear a mask, you must begin the interactive process. Just like with requests for accommodations not related to COVID-19, you can ask her to provide appropriate documentation from her healthcare provider about the impairment and its effect on her ability to wear a mask.

As in any other case, if you need to consult with the employee's healthcare provider, you must obtain a written medical release or permission from the employee. Her healthcare provider may not disclose information or answer questions about her disability without her permission.

Step 3: Determine whether you can make a reasonable accommodation. For mask-wearing, the CDC considers allowing the employee to wear a scarf, loose face covering, or a full-face shield instead of a mask to be a reasonable accommodation. Another reasonable accommodation could be a temporary reassignment so the affected employee isn't near other employees or customers. Work-from-home arrangements, if feasible, could be an additional possibility.

You may deny a reasonable accommodation request if it poses an undue hardship on your business or if the disability poses a direct threat in the workplace. Undue hardship may depend on financial hardship, significant disruption to business operations, or hardships imposed on coworkers. The undue hardship determination is extremely fact-specific, and you must prove it if litigation arises. A direct threat is a significant risk to the health and safety of coworkers that cannot be eliminated by a reasonable accommodation.

3 steps to take to limit liability

To limit the risk of harm to employees brought on by the COVID-19 pandemic, private businesses may impose legitimate safety requirements necessary for safe operation. That said, you must ensure your safety requirements reflect real, specific risks, not speculation, stereotypes, or generalizations about individuals with disabilities. The safety requirements must track the ADA regulations about direct threats and legitimate safety requirements and be consistent with advice from the CDC and public health authorities.

Employers that choose to mandate masks should:

- Have a clear policy outlining employee obligations and right to reasonable accommodations under the ADA;
- Inform their employees and supervisors of such policy; *and*
- Uniformly enforce their policy while being mindful of and responsive to ADA accommodations.

Doing those three things can protect you and curtail the risk of future ADA litigation.

Responding to an employee's COVID-19 diagnosis

As the number of individuals being tested and diagnosed with COVID-19 continues to increase, the likelihood an employee will report a confirmed diagnosis also increases. Employers should take steps now to understand COVID-19 so they can respond appropriately to an employee's diagnosis.

It's important to know how COVID-19 is transmitted, the probability of transmissions and complications, and the duration of the risks, all of which are evolving. You should seek the most up-to-date information about the virus through sources such as the publications and guidance materials issued by the CDC, OSHA, and state and local health departments.

Supervisors are the most likely persons to receive reports of an employee's COVID-19 diagnosis or potential infection. An informed and trained supervisory staff can greatly assist your response to COVID-19.

Supervisors should be instructed to report any disclosed diagnosis or potential infection immediately to HR (or your designated contact) and be reminded to maintain the confidentiality of any such report to avoid any potential violation of the ADA or the Health Insurance Portability and Accountability Act (HIPAA).

7 steps to take when a diagnosis is reported

First, HR (or the designated contact) should verify the diagnosis with the employee immediately. You should advise her that her self-disclosure is appreciated, that she won't be discriminated or retaliated against because of the diagnosis, and that, while information about the diagnosis may be shared with others, she won't be identified by name.

Second, you should instruct her to stay home for at least 14 days or any such longer period of time recommended by her healthcare provider or the applicable health department.

Third, you should take steps to identify the scope of the risk immediately. The employee should be interviewed to determine all coworkers with whom she may have come into meaningful contact during the 14-day period prior to the positive test (the "incubation period"). She should also be asked to identify all areas within the workplace where she was physically present during the incubation period.

Fourth, directly contact each coworker identified by the employee and each coworker who worked in any identified areas of the workplace and advise them that a person with whom they have been in recent contact and/or with whom they recently shared a common work area has been diagnosed with COVID-19. Instruct them that, out of an abundance of caution, you are requesting they remain out of the office for at least 14 days since the last point of contact (or such greater period of time that may be recommended by their healthcare provider) and to work remotely, if possible. They should be encouraged to self-isolate and seek all medical care and testing they feel may be appropriate. They should also be reminded that discrimination or retaliation against individuals suspected to have tested positive for, or been exposed to, COVID-19 (or any other illness) is strictly prohibited.

Fifth, you must consider the wage and hour issues presented if the affected employee and any potentially affected coworkers aren't able to work remotely and communicate the pay policies to employees.

Sixth, depending on your size and workplace logistics, you should also consider issuing a general notice to your workforce that an employee has tested positive for COVID-19 (without identifying her). Any such notice should reassure employees that, unless they have been notified directly, it isn't believed they have been in close contact with or shared a common workspace with the infected employee. They should be reassured you are only providing the general notice to dispel any rumors and so that employees may continue to monitor themselves for symptoms and seek treatment if needed.

Seventh, you should shut down the areas of the workplace identified by the employee until they can be cleaned in accordance with CDC guidelines.

OSHA guidance for recording COVID-19 cases

At first, OSHA required only employers in the healthcare industry, emergency response organizations, and correctional institutions to make individualized determinations about COVID-19's work-relatedness under the agency's general recording criteria. Other employers, however, were spared from strict compliance, essentially creating a presumption that coronavirus cases weren't work-related.

In late May, the agency switched course and stated it would enforce the recording requirements for all employers. The agency noted that it continues to recognize, however, the difficulty employers will face in determining the work-relatedness of COVID-19 cases and will exercise discretion in assessing a company's efforts in making the determinations.

According to the enforcement memorandum, safety and health compliance officers should consider the following matters when determining if an employer has reasonably investigated whether a COVID-19 case is work-related:

- Did the employer inquire how the employee believes he contracted COVID-19 and discuss his work and out-of-work activities, taking into consideration employee privacy concerns?
- Did it review the work environment for potential exposure and determine if other workers had contracted the illness?
- What evidence was available to the employer at the time of its investigation?

The memorandum provides instances of when the evidence may weigh in favor of a determination of work-relatedness, including when (1) several COVID-19 cases developed among workers in close proximity, (2) an employee contracted the virus after a lengthy encounter with a customer or coworker who is a confirmed case, and (3) an employee has frequent, close exposure to the general public with high incidence of community transmission. In the absence of an alternative explanation, work-relatedness would be likely and need to be recorded.

If a COVID-19 case is determined to be work-related and recordable, it doesn't automatically mean the employer has violated a safety standard. In addition, employees can request their names not be entered on the log.

All employers are now required to conduct a reasonable investigation to determine if COVID-19 cases are work-related and recordable. If, after an investigation, you're unable to determine whether the coronavirus exposure was more likely than not work-related, you don't need to record the case. But you should take the new guidance into consideration to ensure you're conducting a reasonable investigation.

Difficult decisions

In the vast majority of cases, the truth of the diagnosis and the communication from the employee will not be in question, but if they are, you can examine the treating physician's medical certification and confirmation of the positive test results. If it is questionable, you can contact the healthcare provider who filled out the medical certification. Although the information will be extremely limited because of the HIPAA, the provider should be able to confirm the medical certification documentation is valid and that its office created and sent it to you.

It can be even more difficult to navigate circumstances in which an employee either will not or is unable to self-disclose a COVID-19 diagnosis. For example, what are an employer's obligations to its workforce to disclose that an employee is quarantined because she believes she has been infected but has not yet been tested? What if the employee is awaiting test results?

Current guidance is unclear, but we suggest, under either circumstance, that you require the employee to remain home pending testing. Additional steps to be taken, such as notifying coworkers of an unconfirmed diagnosis, should be considered on a case-by-case basis, depending upon the nature of the workplace, the proximity within which the employee worked with others, and any factors that may increase the likelihood she is actually infected, such as multiple diagnoses in the geographical region, her recent travel, or close contact with infected persons. As a general rule, when in doubt, err on the side of caution and workplace safety and don't be afraid to seek expert guidance.

When to report COVID-19 hospitalizations, fatalities

As a follow-up to its enforcement guidelines on recording workplace COVID-19 cases, OSHA has issued *additional guidance* to employers for reporting coronavirus-related hospitalizations and fatalities.

OSHA's reporting guidance appears to give employers some leeway in reporting inpatient hospitalizations and fatalities subject to an ultimate determination of work-related COVID-19 exposure. You still have a duty to conduct a reasonable investigation to determine if coronavirus cases are work-related and therefore reportable. Failure to do so may result in citations and penalties.

Hospitalizations

OSHA reiterated that employers must report inpatient hospitalizations to the agency if they occur within 24 hours of a work-related incident. In COVID-19 cases, an "incident" is an exposure to the virus in the workplace.

For the hospitalization to be reportable to OSHA, the employer must know it was triggered by a work-related case of COVID-19. If it's found to be work-related after the fact, the employer must report the hospitalization within 24 hours of the determination.

Fatalities

If a death occurs within 30 days of a workplace exposure to COVID-19, the employer must report the fatality to OSHA within eight hours. If the fatality occurs within 30 days of the incident but the connection isn't made until later, the employer must report it within eight hours of the determination.

Employers, be aware: OSHA's new guidance doesn't replace the reporting requirements already in place under 29 C.F.R. 1904.39. Minnesota OSHA adopted the reporting requirements, which became effective on October 1, 2015.

Also, keep in mind that OSHA enforcement guidance from 2016 states a "citation shall be issued if an employer fails [to] report" under 29 C.F.R. 1904.39.

CDC weighs in on bringing back employees after a positive test

Based on previous guidelines and advice, many business owners have been telling employees who tested positive for COVID-19 to stay away from the workplace until they test negative. But guidance released by the CDC in late July has obviated the need for retesting if certain symptom-based hurdles can be met.

Sometimes, obtaining a negative retest after a coronavirus diagnosis can mean waiting weeks and even months. Numerous reasons are contributing to the problem:

- Some people test positive for weeks after fully recovering and no longer being contagious;
- It's getting harder to schedule a test, and the results are taking longer and longer to come back; and
- The tests themselves are still unreliable, with the "quick" ones having the highest rates of false positives and false negatives.

The *CDC's new guideline* allows for the use of a symptom-based strategy—rather than a negative test—for ending the isolation and precautions for persons with COVID-19. Specifically, the CDC said patients who have experienced mild to moderate infections may discontinue isolation 10 days after the symptoms' onset and at least 24 hours after resolution of fever (without the use of fever-reducing medications) and with improvement in other symptoms.

For people who tested positive but were asymptomatic, the CDC said, "Isolation and other precautions can be discontinued 10 days after the date of their first positive RT-PCR test for SARS-CoV-2 RNA." For those with a more severe to critical illness or who are severely immunocompromised, they may remain infectious for longer than 10 days, but no more than 20 days after the symptoms' onset.

Most important, the guidelines apply only to those who have tested positive, not those who have been exposed to the virus and told to quarantine. The consensus remains that COVID-19 has a 14-day incubation period, and those who know they have been exposed should wait at least that long to see if symptoms develop.

So, what should employers do?

A negative test can provide you with the greatest defense in litigation and the court of public opinion (which shouldn't be discounted in today's climate). But, to the extent waiting on retesting isn't practical or affordable, the CDC's guidelines may assist you in getting employees back to work faster.

A few caveats

First, be careful to avoid developing or revising a COVID-19 return-to-work policy in a vacuum. Remember, most if not all coronavirus-related issues can trigger employer liability under the ADA, the FMLA, the FFCRA, HIPAA, and other federal, state, and local statutes.

Second, it's important to remember that the EEOC continues to recognize COVID-19 testing as a medical examination employers are empowered to require.

Finally, also at play is EO 2020-145, which mandates that employers return symptomatic/diagnosed employees to work "after they are no longer infectious according to the latest guidelines from the [CDC,] and they are released from any quarantine or isolation by the local public health department."

The CDC specifically permits relying on the test-based strategy if it returns an employee earlier and, if otherwise used, is more restrictive than the symptom-based strategy. This supports the conclusion an employer that follows and fulfills the test-based strategy is complying with EO 2020-145.

Therefore, employers still have the option to implement the symptom-based and/or test-based strategies, but both need an update.

Terminating employee for exposing coworkers

Although the COVID-19 pandemic has changed many things about how companies operate, most employers still have formal disciplinary policies establishing ground rules for employee conduct and setting out consequences for failure to meet the expectations. If an employee still required to work in person has been exposed to the coronavirus and gotten tested without notifying her employer (and later is confirmed positive), can she be fired for violating a formal disciplinary policy prohibiting actions that pose a danger to others or jeopardize the business's safe and efficient operations?

The short answer is a qualified yes. You may direct your employees to inform you if they have been exposed to COVID-19. To fully answer the question, one needs to know if the employee knew she was exposed to the virus, which prompted her to get tested.

If the employee did know she was exposed but came to work anyway without knowing if she were positive, you would have ample grounds to terminate her for failing to comply with the disciplinary policy.

On the other hand, if she was asymptomatic, not exposed, or didn't know she was exposed to COVID-19, and got a test regardless, her coming to work before knowing the results would not, in itself, be a violation of the disciplinary policy.

In its *interim guidance*, the CDC has provided guidance for employers about how to handle employees' exposure to COVID-19:

- Employees who appear to have symptoms (e.g., fever, cough, or shortness of breath) upon arrival at work or become sick during the day should immediately be separated from coworkers, customers, and visitors and sent home.
- If an employee is confirmed to have COVID-19, you should inform coworkers of their possible exposure but maintain confidentiality as required by the ADA. They should then self-monitor for symptoms.

Given the CDC's guidance, it's consistent with an employer's disciplinary policy to fire an employee for knowingly exposing coworkers, customers, and others in the workplace to the virus.

Employment law factors to consider. In addition to the ADA's confidentiality provisions, two other employment law issues come into play in this scenario:

- **At-will employment.** In general, you can terminate an at-will employee at any time for no reason, as long as she isn't being fired based on a protected class or because of a disability or infirmary. If you can truthfully say you're terminating her for failing to adhere to your disciplinary policy (and not because she has COVID-19), you're in the clear.
- **FMLA concerns.** Covered employers must provide an eligible employee with up to 12 weeks of unpaid leave each year to take medical leave when she is unable to work because of a serious health condition, such as COVID-19. If you're subject to the FMLA and it's determined you fired the employee because she had COVID-19 (and not because she violated the disciplinary policy), then you could be subject to liability under the FMLA.

In addition to the confidentiality provisions noted above, the ADA also plays a role in this scenario. Under the Act, you cannot fire an employee because of a disability. In broad terms, you cannot fire the employee because she has COVID-19.

Disparate treatment discrimination. In addition, be sure to avoid engaging in unlawful disparate treatment based on protected characteristics in decisions related to COVID-19 screening and exclusion. The ADA does permit you to make certain inquiries, however, if they're related to the employee's job and consistent with business necessity.

That's especially true when an employee's medical condition poses a direct threat to others' health or safety. By that standard, if an employee knowingly violated your disciplinary policy, thereby posing a direct threat to the health or safety of coworkers or patrons, you likely wouldn't be in violation of the ADA by firing her.

Setting aside potential liability, it's certainly a best practice to notify other employees of exposure to COVID-19. A disciplinary policy designed to further that practice likely won't violate various employment laws if it's followed properly.

Don't forget about FLSA

The FLSA is one of the most important workplace laws in the United States, and it hasn't been quarantined or suspended during the coronavirus outbreak. It's critical to remember that the FLSA does not address the availability or use of leave time, including sick leave, PTO, or vacation. Except for state and local requirements and regulatory standards for federal government contractors, leave benefits are a matter of company policy and practice.

If you send workers home, you should keep in mind that nonexempt employees typically aren't entitled to be paid when they aren't working. If nonexempt employees work remotely, you must track their hours worked so you can properly compensate them. Make sure you have the procedures and technologies in place to track your employees' hours worked outside the workplace. If nonexempt employees are idle, they should be entitled to unemployment benefits and subsidized federal paid leave if they meet the eligibility requirements.

On the other hand, exempt employees must be paid a full week's salary if they perform any work in a workweek. However, exempt workers need not be compensated for full-day absences if they receive pay under a bona fide sick leave, PTO, or disability plan. Again, depending on the extent and nature of the layoff, exempt employees should be entitled to unemployment benefits and subsidized federal paid leave if they meet the eligibility requirements.

Once the federal paid leave program recently passed by Congress is fully understood and operational, it may alleviate the need for employers to consider suspending pay to idle workers. In any event, you must balance the economic demands of paying employees who are unable to work against the hit to your reputation and workforce morale if you decide to suspend your pay practices during this crisis.

Nonexempt employees for absences due to COVID-19

The phrase "due to COVID-19" encompasses a lot of scenarios, including employees testing positive for the virus and employees ignoring the CDC's advice to stay home when they're experiencing symptoms of acute respiratory illness. It can also encompass the scenario in which employees miss work because their employer has temporarily suspended its operations or reduced their hours due to health concerns or negative market conditions. Regardless, the legal analysis for compensating nonexempt employees (sometimes referred to as "hourly employees") is fairly straightforward.

The FLSA provides that employers must pay nonexempt employees only for time they actually work. For example, let's assume a nonexempt employee is regularly scheduled to work 8 hours a day, Monday through Friday. On Monday, the employee works only 4 hours and then takes the rest of the week off because she has symptoms of acute respiratory illness. Because she is nonexempt, the FLSA requires her employer to pay her only for the 4 hours she actually worked.

Reducing hours for full-time nonexempt employees

Let's assume an employer decides to reduce a nonexempt employee's work schedule from 40 hours a week to 20 hours because international restrictions have had a negative impact on the company's financial condition. That's completely fine under the FLSA. The employer can reduce the employee's schedule, and it must pay him only for the time he actually worked (i.e., 20 hours).

In preparation for employees missing work because of COVID-19, you should also review your personnel policies and benefit plans, including any policies related to PTO and short-term disability benefits. Although the FLSA doesn't require you to compensate nonexempt employees for absences, your own policies and benefit plans may create different obligations.

Deducting pay for exempt employees due to absences

Most FLSA exemptions require that the exempt employee be paid on a salary basis. Being paid on a salary basis means an employee is paid a predetermined weekly salary of at least $684, *regardless of how many hours she works in a week.* In other words, if an exempt employee works 1 hour on Monday and takes the rest of the week off because she's ill, you may be required to pay her entire weekly salary.

FLSA regulations allow you to make deductions from exempt employees' salaries for one or more full-day absences occasioned by sickness or disability if the deductions are made in accordance with a bona fide plan, policy, or practice of providing compensation for a loss of salary occasioned by sickness or disability. In plain English, that means if you have created a benefit plan that specifically allows for paid leave in the event of sickness or disability (i.e., paid vacation, paid sick leave, or general PTO), you may "deduct" from an exempt employee's leave bank and use available PTO in order to pay her regular salary.

IRS designates safe harbor for HSA holders

High-deductible health plans (HDHPs) may cover COVID-19 testing and treatment without jeopardizing participants' eligibility for a health savings account (HSA), according to March 11 guidance from the Internal Revenue Service (IRS).

An otherwise HSA-compatible HDHP will not lose that status "merely because the health plan provides health benefits associated with testing for and treatment of COVID-19 without a deductible, or with a deductible below the minimum deductible (self only or family) for an HDHP," the IRS stated in *Notice 2020-15*. "Therefore, an individual covered by the HDHP will not be disqualified from being an eligible individual" who may contribute to an HSA.

"Due to the nature of this public health emergency, and to avoid administrative delays or financial disincentives that might otherwise impede testing for and treatment of COVID-19 for participants in HDHPs," the IRS applied this safe harbor to "all medical care services received and items purchased associated with testing for and treatment of COVID-19."

The guidance does not actually require health plans to cover any specific service. "Individuals participating in HDHPs or any other type of health plan should consult their particular health plan regarding the health benefits for testing and treatment of COVID-19 provided by the plan, including the potential application of any deductible or cost sharing," the IRS stated.

Section 223 of the Internal Revenue Code, which governs HSAs, requires account holders to be enrolled in an HDHP. To avoid discouraging preventive care, the IRS has previously carved out certain preventive and chronic care services that can be covered on a first-dollar basis without disqualifying a health plan from being an HDHP.

"This guidance does not modify previous guidance with respect to the requirements to be an HDHP in any manner other than with respect to the relief for testing for and treatment of COVID-19," the IRS noted. "Vaccinations continue to be considered preventive care under section 223(c)(2)(C) for purposes of determining whether a health plan is an HDHP."

Economic downturn brings WARN Act back into play

Another federal law to keep in mind during the downturn is the Worker Adjustment and Retraining Notification Act of 1988 (more popularly known as the WARN Act). Follow its dictates closely if you're cutting employees' work hours significantly, laying off or furloughing workers, or unfortunately closing the business completely.

If you're an employer with 100 or more employees, chances are you may be covered by the WARN Act. When determining the 100-employee threshold, however, not all of your workers must be counted. You may exclude employees who have worked (1) less than 6 months in the past 12-month period or (2) on average less than 20 hours a week.

A "plant closing" or a "mass layoff"—defined as distinct events by the WARN Act—triggers compliance with the law. In both cases, an "employment loss" suffered by a sufficient number of employees must occur. Here is how the critical phrases are defined:

Plant closing. An employment site (or one or more facilities or operating units within the site) will be shut down (including temporarily) and result in an "employment loss" for 50 or more employees during any 30-day period. Again, the number of employees excludes those who have worked less than 6 months in the past 12-month period or an average of less than 20 hours a week.

Mass layoff. No plant closing occurs, but the reduction in force (RIF) results in an "employment loss" during any 30-day period at the employment site of:

- 500 or more affected employees (not counting those who have worked less than 6 months in the past 12-month period or on average less than 20 hours a week); *or*
- Between 50 and 499 affected employees *if t*hat number makes up at least 33% of your active workforce (not counting those who have worked less than 6 months in the past 12-month period or on average less than 20 hours a week).

Keep in mind there is a 90-day rolling period when considering whether the required number of employees has suffered an "employment loss." The DOL won't look favorably on any action or decision viewed as an effort to circumvent the WARN Act's requirements.

Employment loss. This happens when an employee is being (1) terminated (other than for cause, voluntary departure, or retirement), (2) laid off for more than 6 months, or (3) reduced in work hours by more than 50% in each month of any 6-month period.

An exception to the phrase "employment loss" is allowed if an employee is given transfer opportunities within a reasonable commuting distance (or outside the distance if accepted by the individual within 30 days of offer or closing/layoff) with no more than a 6-month break in employment. Any employee provided with such a transfer opportunity wouldn't be counted as having suffered an employment loss.

If you're a covered employer and a qualifying plant closing or mass layoff occurs, you must provide a 60-day notice in advance of the pending closure or layoff. You must send a written notice containing certain information to:

- (When there is no union) employees who may reasonably be expected to experience an employment loss;
- (When there is a union) the chief official of the union representing the employees;
- The state dislocated worker unit; *and*
- The chief elected official of the local government (usually the mayor or president of the county board of supervisors or both).

There are 3 exceptions to the WARN Act's 60-day notice obligation: (1) a faltering company, (2) unforeseeable business circumstances, and (3) a natural disaster. With regard to the COVID-19 pandemic, "unforeseeable business circumstances" will be the most commonly relied upon exception, as the "faltering company" applies only to plant closings and is narrowly construed. It's unknown whether the coronavirus outbreak would be viewed as a "natural disaster" even though most feel it should be so.

To rely on and use the unforeseeable-business-circumstances exception, the situation must have not been reasonably foreseeable at the time the 60-day notice would have been required. Usually, that means the circumstance is caused by some sudden, dramatic, and unexpected action or condition outside the employer's control. Examples provided in the regulations include a principal client's sudden and unexpected termination of a major contract with the employer, a strike at a major supplier, an unanticipated and dramatic economic downturn, and a government-ordered closing that occurs without prior notice.

In any case, you must provide as much notice as is practical once you know your actions will trigger the WARN Act. The longer you wait during the COVID-19 pandemic while business slowly falls off, the more difficult it may be to argue the action was unforeseeable—unless there is an unexpected loss of a major contract—although we're all hoping for a quick turnaround.

Changes to state mini-WARN Acts

Many states have their own mini-WARN Act statutes with their own requirements. In fact, some of them may be implicated before the federal law is triggered.

The following is a brief synopsis for any state that has its WARN law and/or any notice requirements for private employers beyond the federal law. We will note any exceptions to notice requirements or relevant changes or notices that states have made in the wake of the COVID-19 pandemic.

California

COVID-19-related WARN exception: California has its own California WARN Act. However, Executive Order N-31-20, signed by Governor Gavin Newsome on March 17, 2020, suspended the requirement that an employer provide 60 days' notice, and consistent with federal WARN, instead "gives as much notice as is practicable, and, at the time notice is given, provides a brief statement of the basis for reducing the notification period." The notice must include the following statement: "If you have lost your job or been laid off temporarily, you may be eligible for Unemployment Insurance (UI). More information on UI and other resources available for workers is available at *labor.ca.gov/coronavirus2019*." It also notes that for the period of March 4, 2020, "through the end of this emergency" employers will not face liabilities or penalties under California WARN.

Delaware

State WARN: The Delaware WARN Act has a lower "total employee" threshold triggering its requirements than the federal WARN Act. The federal law applies to employers with 100 or more full-time employees or 100 or more employees who work at least a combined 4,000 hours per week (excluding overtime). The Delaware law also applies to employers with 100 or more full-time employees, but it covers employers of 100 or more employees (including part-timers) who work at least a combined 2,000 hours per week.

Georgia

Additional notice requirements for layoff: Except in the case of a labor dispute, whenever (1) 25 or more workers employed in 1 establishment are separated on the same day, (2) for the same reason, and (3) the separation is (i) permanent, (ii) for an indefinite period, or (iii) for an expected duration of 7 or more days, the employer shall within 48 hours following such separation, complete and furnish the following forms to the local office of the DOL nearest its place of business: Form DOL-402, "Mass Separation Notice (in duplicate)" and Form DOL-402A, "Mass Separation Notice (Continuation Sheet)."

COVID-19-related additional responsibility for employers—filing for unemployment on behalf of employees. As a result of COVID-19, the Georgia DOL (GDOL) has implemented an *Emergency Rule* that requires employers to "file partial claims on behalf of their employees whenever it is necessary to temporarily reduce work hours or there is no work available for a short period. Any employer found to be in violation of this rule will be required to reimburse GDOL for the full amount of unemployment insurance benefits paid to the employee."

Hawaii

State WARN: Hawaii's Dislocated Workers Act requires employers with 50 or more employees in the preceding 12-month period to give 60 days' written notice of a "closing" or "divestiture" to affected employees and the state Department of Labor and Industrial Relations.

Information on exceptions related to economic crisis: In a *Hawaii Workforce Development Council FAQ* on WARN, they provided an answer to the question: "Is an economic crisis considered to be an unforeseen business circumstance?" The answer was that *"If an employer believes their situation is the result an economic crisis, it may apply the unforeseen business circumstance exception; however, there could be a burden on the employer to prove why it could not plan 90 days in advance*"

Illinois

State WARN: The Illinois Worker Adjustment and Retraining Notification Act (IL WARN) requires covered employers to give their affected employees 60 days' notice of a mass layoff, relocation, or employment loss to affected employees, union representatives of affected employees, the Department of Commerce and Economic Opportunity, and the chief elected official of each municipality and county where an employment loss, relocation, or mass layoff occurs.

Employers must comply with IL WARN if they have:

- 75 or more employees, excluding part-time employees; *or*
- 75 or more employees who, in the aggregate, work at least 4,000 hours per week (exclusive of hours of overtime).

Mass layoff means a reduction in force, which is not the result of a plant closing, and results in an employment loss at the single site of employment during any 30-day period for (1) at least 33 percent of the employees (excluding any part-time employees) and at least 25 employees (excluding any part-time employees) or (2) at least 250 employees (excluding any part-time employees).

Information on exceptions. There are no new exceptions to the IL WARN law notice requirements due to COVID-19. However, the law stipulates that exceptions can be made if the DOL "determines the need for a notice was not reasonably foreseeable at the time the notice would have been required."

Iowa

State WARN: The Iowa Worker Adjustment and Retraining Notification Act (Iowa WARN) requires employers with 25 or more full-time employees to provide at least 30 days' advance written notice of a business closing or mass layoff.

Maine

Additional notice requirements: Under the Maine Severance Pay Act, unless a plant closing is a result of **unforeseen circumstances or a physical calamity**, the employer must give 90 days' notice if it plans to terminate the establishment or move the establishment out of Maine. Within 7 days of a mass layoff of 100 or more employees, a covered employer must notify the state of the expected duration of the layoff.

We do not have any information at this time to indicate whether, according to the Maine DOL, COVID-19-related layoffs apply to the bold-faced exception noted above.

Maryland

Additional notice requirements: Maryland law requires employers to give notice to their local Office of Unemployment Insurance when laying off 25 or more employees for a common reason for periods in excess of 7 days. For more details, visit the *Maryland DOL's Displaced Workers page*.

Voluntary notice guidelines: Maryland's *voluntary* "quick response" program is an early-warning incentive program, designed to minimize the adverse effects of a shutdown to employers, employees, and communities. The program provides that employers with 50 or more employees (as opposed to 100 under the WARN Act) that plan to relocate, close, or reduce their workforce over a 3-month period, by the greater of 25 percent or 15 employees, should give workers advance notice of at least 90 days, if possible.

Massachusetts

Additional notice requirements: Massachusetts law contains suggested voluntary standards of corporate behavior in plant-closing situations. Employers financed, insured, or subsidized by a quasi-public agency of the commonwealth must agree to accept these standards. Those employers must provide the longest practicable advance notice and at least 90 days' notice or equivalent benefits to employees in the event of a plant closing or partial closing.

Massachusetts law also requires employers with 50 or more employees "promptly" to notify the Massachusetts Department of Career Services in the event of a plant closing or partial closing.

Michigan

COVID-19-related notice requirement: Among steps recently provided to employers by the *Michigan DOL* in the wake of COVID-19, it says that employers must complete an "*Unemployment Compensation Notice to Employee*" and provide it to each employee separated from its employment for the purposes of filing a claim for unemployment benefits.

Minnesota

Additional notice requirements: The commissioner of employment and economic development encourages employers considering a plant closing, substantial layoff, or relocation of operations to give notice to the commissioner, the local government, the employees, and their union, if applicable. Employers providing notice of a plant closing, substantial layoff, or relocation of operations under the federal WARN Act must report to the commissioner the names, addresses, and occupations of the employees who will be or have been terminated.

New Hampshire

State WARN: New Hampshire WARN requires that an employer that orders a mass layoff or plant closing must, at least 60 days before its effective date, give written notice of the order to (a) the affected employees and their representatives; (b) the New Hampshire DOL; (c) the New Hampshire Attorney General; and (d) the senior official in the New Hampshire municipality within which the mass layoff or plant closing will occur.

"Mass layoff" means a reduction in force that (a) is not the result of a plant closing and (b) results in an employment loss at a single job site in New Hampshire during any 30-day period for at least 250 employees, excluding part-time or seasonal employees, or at least 25 employees, excluding any part-time or seasonal employees, if they constitute 33 percent of the full-time employees of the employer. "Plant closing" means the permanent or temporary shutdown of a single job site in New Hampshire,

or one or more facilities or operating units within a single site, if the shutdown results in an employment loss during any 30-day period for 50 or more employees, excluding part-time employees.

New Jersey

State WARN: The Millville Dallas Airmotive Plant Job Loss Notification Act (or New Jersey WARN) tracks the federal law in some ways, but has very important differences such as: 1) A New Jersey WARN notice must contain more information than a federal WARN Act notice and 2) Notice must be provided to more parties than under federal law.

Meanwhile, effective July 19, 2020, employers with at least 100 employees must provide their workers with **90** days' notice before a large layoff, plant closing, or transfer. Under the new law, notice must be provided if 50 or more full-time employees are impacted.

New York

State WARN: New York WARN applies to businesses with at least 50 employees within New York state (excluding part-time employees) or 50 or more employees (including part-time employees) who work in the aggregate at least 2,000 hours per week to provide written notice 90 calendar days before taking any of the following actions: (1) a "mass layoff" resulting in an employment loss at a single site of employment during any 30-day period, beginning on the date of the first employment loss, for either (a) at least 25 employees constituting at least 33 percent of the employees at the site (excluding part-time employees); or (b) at least 250 employees (excluding part-time employees); (2) a "reduction in hours" of work of more than 50 percent during each month of any consecutive 6-month period for employees who are not participating in a shared work program and that affects either (a) at least 25 employees constituting at least 33 percent of the employees at the site (excluding part-time employees); or (b) at least 250 employees (excluding part-time employees); or (3) a "plant closing" affecting 25 or more full-time employees.

COVID-19 information related to New York WARN: The *New York DOL has stated* that the "WARN Act requirement to provide 90 days' advanced notice has **not** been suspended because the WARN Act already recognizes that businesses cannot predict sudden and unexpected circumstances beyond an employer's control, such as government-mandated closures, the loss of your workforce due to school closings, or other specific circumstances due to the coronavirus pandemic. [Emphasis provided] If an unexpected event caused your business to close, please provide as much information as possible to the Department of Labor when you file your notice about the circumstances of your closure so we can determine if an exception to the WARN Act applies to your situation."

North Carolina

COVID-19-related additional notice requirements. North Carolina employers must provide employees with notice of the availability of unemployment compensation at the time of separation from employment. As per the *North Carolina Division of Employment Security (DES)*, the notice "shall inform employees of the following:

- Unemployment insurance benefits are available to workers who are unemployed and who meet the State's eligibility requirements;
- Employees may file a claim in the first week that employment stops, or work hours are reduced;
- Employees may file claims online at des.nc.gov or by telephone to (888) 737-0259.
- Employees must provide DES with the following information for DES to process the claim: (a) full legal name; (b) social security number; and (c) authorization to work (if the employee is not a U.S. citizen or resident).

Employees may contact DES at (888) 737-0259 and select the appropriate menu option for assistance."

North Dakota

Additional notice requirements: Employers are required to submit advance notice to Job Service North Dakota of "mass separations" (i.e., permanent or temporary layoffs of 25 or more workers in a single establishment for an expected duration of 7 days or more). Employers must provide Job Service with a list containing the names and Social Security numbers of the workers affected. If employers have no advance knowledge of a mass separation, then they have 48 hours after the mass separation to provide notice. Employers must provide all separated workers with instructions to contact the public employment service office.

Ohio

Additional notice requirements: Employers that lay off or separate within any 7-day period 50 or more individuals because of a lack of work must furnish notice to the director of Jobs and Family Services of the dates of layoff or separation and the approximate number of individuals being laid off or separated. The notice must be furnished at least 3 working days before the date of the first layoff or separation. At the time of the layoff or separation, the employer must furnish to the individuals and to the director information necessary to determine the individuals' eligibility for unemployment compensation.

Oregon

Additional notice requirements: Employers must provide notice of a plant closing or mass layoff under WARN to the state Office of Community Colleges and Workforce Development.

Tennessee

Additional notice requirements: Employers with 50 but not more than 99 full-time employees must notify employees of a reduction in operations. The employer must then notify the commissioner of Labor and Workforce Development. There's no time requirement as to when notice must be given, although the intent probably is that there be some notice before the reduction occurs. "Reduction in operations" is defined as the closure or partial closure of a workplace, modernization of a workplace, relocation to another site located more than 50 miles from the original location, or implementation of new management policy within the workplace. To trigger the statute, any of those events must put 50 or more employees permanently or indefinitely out of work for 3 months.

COVID-19 information: The *Tennessee Department of Labor and Workforce Development (TDLWD)* includes the following statement addressing COVID-19: "Should an employer need to stop conducting business due to the COVID-19 virus, the employer may contact the TDLWD at 844-224-5818 to discuss the options available for affected employees.

Vermont

COVID-19-related WARN exception: Vermont has its own version of WARN—the *Notice of Potential Layoffs Act* (NPLA). However, as the *Vermont DOL (VTDOL) explains* on its website, the NLPA "provides exceptions to that rule in the event that the business closing or mass layoff is caused by business circumstances that were not reasonably foreseeable at the time the 45-day notice would have been required; and/or the business closing or mass layoff is due to a disaster beyond the control of the employer." Therefore, the VT DOL announced that it "does not intend to enforce the provisions of the Notice of Potential Layoffs Act against businesses who are forced to lay off employees due to the effects of the COVID-19 pandemic."

Wisconsin

Additional notice requirements: With certain exceptions, businesses employing 50 or more employees within the state must provide written notice 60 days before implementing a mass layoff that affects: (1) at least 25 percent of the employer's workforce or 25 employees, whichever is greater or (2) at least 500 employees. Such businesses must also provide the same written notice of business/plant closings affecting 25 or more employees. Employers must provide at least 60 days' advance

written notice of a mass layoff and/or business/plant closing to affected employees, collective bargaining unit representatives, and specified units of government.

Furloughs

In the collective bargaining context, a "furlough" generally refers to a temporary layoff in which employees have certain recall rights, but the term has no legal meaning outside that context. A "furlough" is no different from a layoff; it's simply a separation from employment or termination. In the current COVID-19 environment, however, many employers are using the term to refer to employees being placed on a sort of temporary unpaid leave of absence, which in some cases may involve the continuation of certain benefits such as health insurance.

Some employers are allowing their employees to use vacation or PTO, even intermittently, to continue their pay for as long as they can while on furlough. Some employers aren't allowing that option, but if an employee were to quit while on furlough, most states, including Louisiana, would require the employer to pay out her unused vacation and PTO.

To the extent employees on furlough aren't receiving pay, they would be eligible and likely would qualify for unemployment benefits. Because they aren't working, however, they wouldn't be eligible for paid COVID-19-related leave under the FFCRA. If you decide you want to continue benefits such as health insurance for furloughed employees, be sure to consult the terms of your plans, which may require amendments to allow such coverage. And if it is allowed, arrange for your employees to pay their share, if any, of the premium costs while on furlough. If employees won't be covered by your health plan while on furlough, you must provide notice of their rights to continue coverage under the Consolidated Omnibus Budget Reconciliation Act (COBRA).

If you choose to furlough exempt employees, you must make sure they do absolutely no work for you during the workweek in which the furlough is implemented. This means they cannot check e-mails or take calls. Any work would result in the requirement that they be paid for the week. If you choose the salary reduction option, take care to ensure it doesn't drop below $684 per week.

It's essential to ensure the process isn't discriminatory and has no discriminatory impact, such as the inclusion of a disproportionate number of employees who are female or over the age of 40, compared with remaining employees.

The criteria for the selection of the furloughed employees should be based on objective factors. You will also want to review any employment agreements and leave policies to ensure no further special compensation is required for the furloughed employees under such circumstances.

Finally, consider the anticipated length of the furlough. If you expect it to last 6 months or more, depending on the number of affected employees, advance notice may be required by the WARN Act. While the WARN Act includes an exception to the normal 60-day notice requirement for unforeseen circumstances, if the furlough is expected to go on for at least 6 months, you still must give notice as soon as practicable. Of course, any and all of these decisions should be made in consultation with your labor, employment, and benefits counsel.

Furlough options

Weeklong furlough for exempt employees. If an employer sets up a weeklong furlough and doesn't pay exempt employees, there is no risk of losing the employees' exempt status because the FLSA regulations provide that exempt employees need not be paid for any workweek in which they perform no work.

Partial-week furlough deducting exempt employee pay. If an employee sets up a partial-week furlough and deducts the pay of exempt employees for the furlough days, the employees are at risk of losing their exempt status and may be entitled to overtime.

Partial-week furlough of exempt employees using vacation time. If an employer sets up a partial-week furlough and uses vacation time for the furlough time so that the employees receive their usual salary, there is no risk of losing the exemption. But this requires that every employee on furlough have enough vacation time to cover the furlough.

Permanent furlough arrangement for exempt employees. Employers may set up a permanent change in an employee's usual weekly schedule, such as changing the weekly work schedule from 5 days to 4 days, and alter the employee's salary to match. As long as the exempt employees receive at least the $684 weekly salary required by the FLSA for exempt status, they will remain exempt.

Furloughs for nonexempt employees. Furloughs may be used for nonexempt employees by an employer during pandemics. Employers only need to pay nonexempt employees for hours worked. Employers may reduce nonexempt workers' hours per week in order to reduce costs during a pandemic.

If an employee is on call during a furlough day. On-call time must be counted as hours worked when the employee is required to remain on call so that his or her time is so restricted that the employee cannot use it effectively for personal purposes. If, in the case of standby or on-call status, the restrictions placed on the time of the employee are such that the employee is unable effectively to engage in private pursuits, the time is subject to the control of the employer and constitutes hours worked.

Factors to consider include the terms of the employment agreement, if any; physical restrictions placed on an employee while on call; the maximum period allowed by the employer between the time the employee was called and the time he or she reports back to work (response time); the percentage of calls expected to be returned by the on-call employee; the frequency of actual calls during on-call periods; the actual uses of the on-call time by the employee; and the disciplinary action, if any, taken by the employer against employees who fail to answer calls. Some minor restrictions on freedom do not trigger compensation requirements. The more restrictive the on-call policy is, the more likely that a court will conclude the on-call time is compensable working time.

Health plan coverage for furloughed workers

Because of the sudden and dramatic slowdown of the global economy caused by COVID-19, many employers have had to make difficult decisions about their workforce. In addition to layoffs, some have reduced employees' scheduled hours or completely furloughed workers. Terminations of course result in the loss of health plan coverage and generally entitle the individuals to continuation coverage under the COBRA. Furloughed employees, however, present other challenges. In particular, can you allow furloughed workers to remain eligible for coverage under your health plan? Here are several important issues to consider.

Large employers

The Affordable Care Act (ACA) requires employers with 50 or more full-time-equivalent employees to offer qualifying and affordable coverage to 95 percent of their full-time workforce or be subject to its employer mandate penalty. A full-time employee is one who works at least 30 hours per week or 130 hours per month. Because the hours for some employees vary, employers may measure full-time status for them in one of two ways.

Under a monthly measurement method, you review the hours an employee works on a monthly basis to determine if she has worked 30 hours per week or 130 hours per month. Employees who drop below this full-time threshold, including through furlough, will lose coverage after the month in which the hours are reduced below 30.

Under a lookback measurement method, you determine full-time status retroactively during a determined measurement period based on the employee's hours of service during that stint. If the employee averaged 30 hours per week or 130 hours per month during the measurement period, she would be eligible for coverage during a set "stability" period. For example, if you use a 12-month measurement period and a 12-month stability period, and she averages 30 or more hours per week during the measurement period, she must be offered coverage for the entire stability period—even if she starts working fewer than 30 hours per week during the latter period.

Thus, for any employees subject to a stability period whose hours are significantly reduced or who are completely furloughed, you'll need to continue providing coverage to them for the duration of the stability period. Coverage would end, however, when the stability period ends, or sooner if she is later terminated or fails to pay her share of the premiums (discussed below).

Small employers

Employers with fewer than 50 full-time-equivalent employees aren't subject to the above requirements for determining full-time status. They will need to review the terms of their plans to determine whether an employee on a reduced schedule or who is completely furloughed will remain eligible for coverage.

Amending a plan's eligibility terms

To cover employees under the plan who would otherwise lose coverage because of a reduction in hours or complete furlough, you'll need to amend the terms. For example, you could amend a plan to provide special eligibility for employees furloughed because of the COVID-19 pandemic and treat them as being under an approved temporary leave of absence.

Before amending a plan, you should check with any insurance carriers involved. For example, a fully insured plan will need to check with its health insurance carrier for any such amendments. Otherwise, carriers will decline to pay claims for employees who aren't eligible and may pursue your company and the workers for reimbursement of the incorrectly paid benefits. In response to COVID-19, however, some carriers have announced certain furloughed employees will be eligible for coverage if requested by the employer.

A self-insured plan has greater flexibility in making amendments. Nevertheless, those of you with self-insured plans should contact your stop-loss insurance carrier before implementing any such change. Without the carrier's approval, you'd have full financial responsibility to pay all claims incurred by the employees.

How are premiums paid when there's no paycheck?

Even if furloughed employees can stay on the health plan because of the stability period or a plan amendment, their share of the premium must still be paid. Because their share is collected through payroll deductions, you'll need to communicate with them and collect it in one of three ways:

- Require furloughed employees to prepay the premiums;
- Have them pay monthly as they go; *or*
- Have them pay when they return to work.

All three options are difficult. The third option, in particular, would require you to front the premium cost for employees until they return to work, but you may eventually need to terminate them. Although it would be difficult for most employees to pay you back for several months' worth of premiums, it would be especially challenging in a slow economy.

Consequently, you might consider paying both the employer and the employee share of the premiums for a certain period. For example, you might agree to pay the full amount of a furloughed employee's premium for a set number of months and then determine whether she can return to work or be discharged. Termination would trigger COBRA continuation coverage.

Reviewing benefits during long term furloughs

Many struggling but optimistic employers have continued to offer medical, dental, and other benefits to employees on furlough during the COVID-19 pandemic. But with no immediate end in sight, they're wondering what to do next.

Most businesses in the United States and the world remain hobbled because of the coronavirus crisis. Employees in several industries, including travel, hospitality, and entertainment, remain uncertain about their futures.

Before the pandemic, "furlough" was a concept more familiar in European countries where it's mandated by law. We've now settled on the concept that the employer hasn't severed the employment relationship of a furloughed employee, who is still active in the HR system. Instead, the individual isn't actively working or being paid except for the value of the benefits the employer continues to provide.

Employer options

Check your benefit plans and insurance policies. Determine how long you may extend eligibility even though furloughed employees aren't actively working. Many employers have clauses limiting the coverage to six months. Other plans or policies don't specifically address the duration, but carriers have allowed the coverage to remain in place so long as the employer pays the necessary premium. (Please get this in writing from your insurance carrier.)

As your benefits department begins delving into 2021 open enrollment, don't forget about the last quarter of 2020 and its special circumstances for any furloughed group.

Revisit your benefits plan's COBRA provisions. Normally, the reduction in the number of hours worked would constitute a COBRA-qualifying event but not if the event doesn't also result in the loss of eligibility for coverage. For furloughed employees who still have health coverage, their COBRA event presumably won't occur until actual termination of employment, at which point presumably they will remain eligible for COBRA coverage for at least 18 more months, depending on plan terms, albeit without the employer subsidy.

With appropriate plan provisions, an employer with furloughed employees may now take action before termination to trigger COBRA earlier and thereby have at least some portion of the furlough period with the company's subsidy counting toward the 18 months of required COBRA coverage.

Rehiring employees before year's end

Some employers may have terminated employees but still hope to rehire them before the end of 2020. The laid-off workers likely withdrew their vested 401(k) plan account balances.

The IRS has provided helpful guidance on the "partial termination" issue affecting 401(k) plans and other tax-qualified retirement plans. Identifying the occurrence of a "partial termination," which generally occurs with an employer-initiated plan participant reduction of 20% or more, is important because affected individuals will become 100% vested in the employee contributions on their behalf. As a result, the laid-off employees might be entitled to a greater vesting percentage of their account balances.

Significantly, the IRS announced employees who were laid off (not just furloughed) during 2020 won't count to determine if the 20% threshold was reached if they're rehired before the end of the year. Furloughed employees, who haven't actually severed their employment, presumably won't factor into the partial termination calculations.

Legal risks arise as furloughed employees return to work

If you're returning all furloughed employees to the positions they held before the shutdown or cutback and at the same rate of pay, there will be little legal exposure. That rosy scenario isn't likely to happen, however, given the staged reopening required in most states and the pandemic's economic impact on certain industries. Under the best circumstances, you'll bring employees back in waves until the business is fully operational again and they can return to their prepandemic wages.

If you don't anticipate returning to the level of your prepandemic operations, you'll have to choose who will return and who will be terminated. Further, those who return may experience a pay cut. Both scenarios, if not handled properly, could expose your organization to costly legal risks.

The decision to bring back only certain furloughed employees has legal implications. Some employees who aren't selected to return may assume the company's choices were rooted in discrimination based on their membership in a protected category, such as race, gender, disability, or age. To minimize the legal risk, you should take the following actions:

Documentation. Document the business reasons for why the number of staff members was cut back and/or certain skill sets are no longer needed to resume operations at the outset. Develop and document objective, business-related, skill-based, and nondiscriminatory criteria for deciding which workers will return to work. Changing business needs may now require certain skill sets for the available jobs. Or you could take a "first furloughed, first reinstated" approach or rely on seniority to decide callbacks.

Although performance is a possible basis for making recall decisions, you should proceed with caution. Performance appraisals are often based on a manager's subjective assessment. Accordingly, evaluation ratings are susceptible to legal challenge. Performance should be relied upon only when the criteria are job-related and objective and a numerical rating is supported by contemporaneous documentation.

Employers shouldn't base recall decisions on an employee's former pay. Doing so can expose the business to discrimination claims based on age, race, and gender.

Personnel policies. Review and/or revise the furlough and recall policies and written communications you provided to employees in connection with their separations. To the extent the documents set out the procedures for recalling furloughed employees, you should follow them as much as possible. If you must deviate from the written guidance, document the legitimate business reasons for going in a different direction.

Supervisor training. Train managers tasked with determining which employees should be recalled on the criteria you have identified along with their uniform application and the required documentation.

Statistical analysis. Before finalizing the selection decisions, you should conduct a statistical analysis, pursuant to legal privilege, to ensure the choices don't disproportionately affect a protected group.

Communication plan. Develop a communication strategy for informing furloughed employees whether they have or have not been selected to return to work, including:

- Business reasons that made it impossible to bring all workers back at this time;

- Criteria the company applied to select the furloughed workers who would return to work; *and*
- Whether it's possible others may be reinstated in the near future.

If the company doesn't plan to ever recall the remaining furloughed employees, you should let them know their employment is terminated and provide information about unemployment, healthcare, and retirement benefits.

Changes to returning employees' pay and benefits

In a perfect world, all employers would be able to recall furloughed employees at the same rate of pay, benefits, and work schedule as before the shutdown. Unfortunately, that won't be the case for many businesses. If pay cuts are necessary, you need to be mindful of the legal implications, particularly for exempt employees:

- If you make changes to exempt employees' compensation, review the modified salaries to ensure they still meet the salary basis threshold to qualify as exempt from the Fair Labor Standards Act (FLSA) and state overtime requirements.
- If you make changes to exempt employees' job duties, such as adding nonexempt tasks because of a reduced workforce, review the tasks to ensure their primary duties continue to satisfy the duties test for the applicable FLSA or state exemption.
- Review benefit plan documents to determine whether changes in returning employees' job duties or number of work hours affect their eligibility.
- If applicable, you should communicate any changes in duties, pay, and benefits to the union representative before implementation.

Impact of restructuring on pay equity

Workforce reductions, pay cuts, and/or job restructuring are inevitable in most companies dealing with COVID-19's economic impact. Shareholders, employees, unions, enforcement agencies, and plaintiffs' attorneys are closely monitoring the changes to the terms and conditions of employment in the wake of the pandemic. Employers undergoing those kinds of significant developments should consider conducting a pay equity review to identify and remedy unintended pay gaps. The analysis should be done under the protection of the attorney-client privilege.

Work from home

Telecommuting will be a viable option for many employers. Asking some employees to work from home is a relatively easy matter. If an employee has a laptop, an Internet connection, and a cell phone, remote work isn't difficult. But what about support staff who field telephone calls, deal with clients, customers, or vendors, and perform other traditional office support functions? Typically, those employees, who are often the backbone of a small business, are only set up to work in their employer's office, and they don't have a company laptop and phone or remote computer access.

Policy concerns

Whether your business already has a telework policy or is just beginning to look at policy options, it's absolutely vital that you spell out the details of the policy up front.

First, you must have a plan and specific policy in place addressing the remote workforce. The plan should identify which workers may work remotely and establish guidance for the work. In establishing who may work remotely, be mindful of discrimination laws to ensure there's no selection that could be viewed as biased.

Your remote workforce policy should address security, expectations, and workload issues. Study each job that will be allowed to happen remotely to be sure the standards and expectations are reasonable. You should base eligibility for the remote work on clear criteria and reserve the right to terminate the policy at your discretion.

A remote work policy should:

- Define eligibility to participate. Who will you permit to work from home? Long-time employees? Part-time employees? Will the decision be based on the job? Only employees who need a reasonable accommodation or intermittent leave? Who will be allowed to telecommute under emergency circumstances?
- Address whether remote work arrangements are temporary (What dates?), permanent, or up for review (When? What triggers a review?).
- Identify when will employees be allowed to work from home. Telecommuting can be informal, such as during special, short-term projects; on a regular basis, such as 1 or 2 days a week; a formal arrangement for 100 percent of work time; or as part of emergency planning.
- Identify positions that can be successfully performed via computer and/or telephone. Also identify positions where job functions can be done via telecommuting when emergency conditions prevent employees from coming to the facility (contagious diseases, inclement weather, travel disruptions, etc.). Additionally, management positions that require the person to be on-site to supervise others may not be suitable for telecommuting.
- Set limits on the number of employees you will permit to work from home if needed. Is there a limit on the number of telecommuters in any particular department? Is there a limit on the number of telecommuters who have a particular skill?
- Determine a policy for use-of-equipment, reimbursement, and insurance requirements.
- Detail the performance standards expected of the telecommuters. Supervisors should identify and set deadlines for completion of work. Supervisors should also identify quantities of work to be accomplished. In general, your policy should set out as many objective standards of measurement of performance as possible.
- Define your time management expectations for remote employees to address the availability of flexible work hours, which may be needed if they're telecommuting because of childcare issues.
- Address expectations about remote workers' level of virtual availability (e.g., by e-mail, phone, video) and whether they must come into the office on occasion.
- State that the company's timekeeping policies apply to remote tracking of work hours and breaks, especially for nonexempt employees to avoid off-the-clock and break violations.
- State that all the rules that govern behavior in the workplace also apply to telecommuters. For example, they are expected to only perform work for the company, not for themselves or others, and they are to adhere to all ethics and privacy policies. Similarly, any company equipment that they use at home is expected to be used for company business, not their own.
- Clarify remote working isn't an alternative to dependent care or meant to accommodate personal or other business responsibilities. *During the COVID-19 pandemic, however, you may want to include an exception since many working parents are juggling childcare because of school and care center closures.*
- Specify company property must not be used by anyone who isn't employed by your organization and that all such equipment and information must be kept secure. Outline a process for employees to follow if company property is lost or damaged.
- State that your drug and alcohol policy and drug testing policy apply to telecommuters. Even though there may be intoxicants in their homes, they are expected not to be intoxicated while performing work.
- Establish a communications process among on-site employees and those working remotely. Include mechanism for identifying what work has been accomplished, the status of any task, and where information or files can be located.

- Address issues such as privacy of company information, security of software, data, and equipment that may be used at an employee's home, as well as the safety of the employee while performing tasks outside the workplace.

Additionally, you should consider having a remote work agreement in writing signed by each employee who works remotely. That agreement should:

- Clearly define the remote working plan's effective dates;
- Establish the expected hours of work;
- Establish expectations for work performance;
- Continue the application and enforcement of all employment practices;
- Proceed with employment reviews with an emphasis on employees achieving expectations;
- Have an agreement that allows for a home office inspection;
- State specific days and times employees are required to come to the office and note that they should have contingency arrangements in place for things such as child care or transportation should they be called into the office at another time. This will prevent misunderstandings that could result in lawsuits. If telecommuters may attend meetings via phone or Internet, indicate at which days and times they must be available to be contacted;
- Outline use-of-equipment, reimbursement, and insurance requirements;
- Address the safeguarding of company data files, trade secrets, and other proprietary information on electronic devices, even when owned by the employee but used for work; *and*
- Protect the company's right to recall employees to an on-site location (to the extent allowable under local law); and
- Ensure the rules and expectations apply to all employees working remotely.

Trying to decide whether to adopt a policy, an agreement, or both? A policy communicates the guidelines and processes for remote working to all employees, while an agreement can be customized for an individual along with more general guidelines. But, keep in mind, as a general rule:

- Because a policy isn't a contract, you may unilaterally modify it; *and*
- Modifying an agreement requires the consent of both parties.

So, if you want the flexibility to modify the arrangement unilaterally at any time, you could issue a policy. If you prefer an individualized arrangement for each employee, you could enter into an agreement.

Your best practice would be to have either (1) a policy with an acknowledgment signed by the employee or (2) an agreement containing general guidelines and the individual's specific details for the remote work arrangement along with his signature.

Expense reimbursement

In an office environment, employers typically provide what employees need to complete the job. The opposite may be true in a remote work situation, where employees must provide what they need to do the work.

You should determine everything employees need to work remotely, taking into account demands on productivity, and then decide whether to provide or reimburse them for it. Telecommuting workers may need:

- Computer/laptop;
- Internet access (reasonable portion of an employee's monthly plan);
- Cellphone (reasonable portion);
- Apps or software;

- Printers (only if documents can't be used virtually for the position);
- Office supplies (pens, paper, printer cartridges); *and*
- Ergonomic office furniture.

Many states have laws requiring employers to reimburse reasonable and necessary business expenses employees incur in the course of employment. California, for example, requires employers to indemnify employees for all necessary expenditures or losses they incur as a direct consequence of discharging their duties. Whether certain expenses must be reimbursed will depend on whether the telework arrangement and/or related expenses are optional (e.g., the job duties aren't necessary to perform or are available in the office). Illinois, Massachusetts, Montana, and New Hampshire also have specific state law requirements applicable to employee expense reimbursements.

Employers in jurisdictions without state-specific laws aren't off the hook with regard to potential liability for business expenses incurred by employees working from home. Under the FLSA, no employer can require employees to pay for its business expenses if doing so would reduce their earnings below the required minimum wage.

Finally, your method of reimbursing expenses should account for the fact that reimbursements aren't wages for tax purposes.

Legal points to consider

Here is a checklist of legal and practical issues you should consider for a remote workforce.

- **FLSA.** Employers covered by FLSA must monitor hours of work by nonexempt employees and maintain records of total hours worked each day and workweek. Nonexempt employees are covered by the FLSA's restrictions on minimum wage and overtime regardless of where they perform their jobs. Require nonexempt employees to accurately record and report all hours worked remotely in the same manner as hours worked on-site. Employees may be required to keep written timecards, but computer or telephone tracking systems that generate logs of hours worked are more reliable. In addition, meal and rest break laws apply equally to remote work arrangements.
- **Independent contractors.** Telecommuters cannot be classified as independent contractors simply because they do not work on-site. The Internal Revenue Service uses a "reasonable basis" test or a "common law" test to determine whether an individual is an employee or an independent contractor. Whether a worker is an employee or an independent contractor is critical when it comes to such important issues as benefit eligibility, workers' compensation coverage, wage and hour law, and many other matters.
- **Collective bargaining agreements.** Because collective bargaining agreements cover wages, hours of work, and working conditions for employees, any telecommuting policies may be covered under collective bargaining agreements. Contact an attorney specializing in labor law for assistance.
- **Meal and rest breaks.** Many states have requirements that employees take meal and rest breaks and indicate their duration. Your telecommuting policy should require nonexempt employees to document and certify in their timekeeping records that they have taken these breaks. If there are concerns that specific individuals are not taking these breaks, employers can consider monitoring computer and telephone traffic to ensure that telecommuters actually do go "off line" when they are supposed to be taking breaks. However, this procedure is not foolproof, and monitoring can raise privacy concerns that may need to be addressed in a separate policy.
- **ADA.** While the ADA does not mention telecommuting as a potential reasonable accommodation, several courts have suggested that employers must consider allowing an employee to telecommute under certain circumstances. Employers offering telecommuting as a reasonable accommodation under the ADA should evaluate the essential functions of the employee's job to determine whether telecommuting is even feasible.

- **FMLA.** The availability of telecommuting may assist both the employee and employer by providing an alternative to taking a full leave by allowing an employee to telecommute full- or part-time on an intermittent basis. Note that while the FMLA does not prohibit working at home during leave, the U.S. Department of Labor has said that any time spent working for the company cannot count against the employee's federal allotment of 12 weeks of leave.
- **OSHA.** The OSH Act contains a so-called "general duty" provision, which requires employers to provide places of employment "free from recognized hazards that are causing or are likely to cause death or serious physical harm." According to OSHA, you aren't required to inspect employees' homes to determine whether safe working environments exist. You are required, however, to record work-related injuries "regardless of whether the injuries occur in the factory, in a home office, or elsewhere." Telecommuting employees who suffer work-related injuries at home may also be eligible for workers' compensation benefits. If a home-office worker is infected with COVID-19 while engaged in work (even at home), and the infection qualifies as a recordable or reportable illness, then you must record it on your OSHA 300 log or report it to the agency.
- **Workers' compensation.** When telecommuters are working out of their homes, they are probably covered by workers' compensation. Check with your insurance provider for rules in your state. However, gray areas will certainly arise, such as whether an injury occurring at home was "in the course of employment." For example, the employer will normally take the position that if an injury occurs while running a personal errand or providing personal care for a family member, it is not covered under workers' compensation. On the other hand, courts have found that workers' compensation applied in cases where an employee fell downstairs while returning from a coffee break to answer the phone or tripped over her dog while carrying samples out to the car.
- **Return of equipment.** If telecommuters are using company equipment, the employer should take steps to protect itself if that equipment is not returned upon termination or if it is damaged. All devices should be inventoried, recording their make and serial number information so you can track stolen or damaged devices. Elsewhere in this publication, you will find a discussion of making deductions from employees' compensation for unreturned equipment. Care must be taken not to violate any wage and hour laws with respect to such deductions.

Access the HR Hero Telecommuting policy at *https://hero.blr.com/hr/resources/workplace-safety-policies/HR-Administration/Employee-Handbooks/Telecommuting*

DOL addresses posting requirements for virtual workplaces

Recognizing remote work is here to stay for many employees, the DOL recently issued guidance on how employers can use virtual means to distribute and maintain the various posters required by federal employment laws.

Several federal laws, including the FLSA, the FMLA, and the Employee Polygraph Protection Act (EPPA), require employers to post a notice of employee rights in a conspicuous location. The FLSA, for example, requires employers to post a DOL-issued notice "in every establishment where such employees are employed so as to permit them to observe readily a copy." The FMLA goes even further, mandating the notice be "posted prominently where it can be readily seen by employees and *applicants for employment*."

Traditionally, employers have satisfied the various notice requirements by placing posters on bulletin boards in well-trafficked locations such as break rooms or lobbies. Because many of the laws were passed decades before the first portable computer (the FLSA dates back to 1938), few of them specifically address the concept of distributing notices through electronic means.

On December 29, 2020, the DOL issued *Field Assistance Bulletin 2020-7*, which provides guidance to the agency's field staff on enforcing posting requirements in circumstances when there's no traditional workplace. According to the bulletin, notice requirements generally appear as either (1) a one-time notice or (2) continuous posting.

You may satisfy one-time notice requirements (e.g., as required by the Service Contract Act) by e-mail delivery if employees customarily receive such messages from you. For continuous-posting requirements (e.g., the FLSA, the FMLA, the EPPA, and the Davis-Bacon Act), the guidance makes a distinction between employers with only some remote employees and employers with an entirely remote workforce.

For employers with *some remote* workers, physical posters are required for on-site employees, and the DOL "encourages" electronic posting for the teleworking individuals. If you have an entirely remote workforce, you may satisfy the continuous-posting obligations through electronic-only means if you meet the following requirements:

- All employees exclusively work remotely.
- They customarily receive information from you via electronic means.
- All employees have "readily available access" to the electronic posting at all times, e.g., via an internal or external website or a shared network drive or file system. The DOL notes that whether access is readily available is fact-specific and requires, for example, that employees can get to the notice without having to request permission.
- You must take steps to inform employees of where and how to access the notice(s) electronically.

If you have multiple groups of employees to whom different notices apply, the individuals must be able to "easily determine" which posting is applicable to them.

For laws that require posters be visible to applicants (e.g., the EPPA), virtual-only posting is permitted if (1) the hiring process is itself conducted remotely and (2) the applicants have ready access to the electronic posting at all times.

The DOL's guidance applies only to federal posting requirements enforced by the agency. It doesn't address posting rules enforced by other federal agencies—e.g., the Equal Employment Opportunity Commission (EEOC)—or the states.

For employers embracing remote work as part of a long-term strategy, the DOL's guidance is welcome news. Here are some practical considerations for businesses taking the approach:

- Consider designing an easily accessible space in your company intranet or employee portal for federal and state posters.
- Think about making your company intranet/portal automatically appear on employees' computers upon logging in.
- If you have multiple groups of employees covered by different laws (e.g., a group involved in government contracts or other units in different states), ensure each group can tell which posters are applicable.
- For help in determining which federally mandated posters are applicable to your workforce, visit the DOL's *FirstStep Poster Advisor* tool.
- Consider using your employee handbook (or even the handbook acknowledgement page) to inform employees about the virtual location of the postings.
- If hiring is conducted remotely, incorporate all required notices into your applicant portal/tracking system.
- Check applicable state (and municipal) agencies for guidance on the electronic posting of state and locally mandated notices.

Tips for tackling income tax issues triggered by remote employees

The COVID-19 crisis has brought major changes to the U.S. workforce. Many employers have transitioned their workforces to remote work. Now, employees can work from anywhere with an Internet connection. Many employees have taken advantage of the flexibility by investing in home office spaces, moving to different states, and even traveling the country. What most employees and employers haven't considered, however, are the unique and complex income tax issues that have arisen with a remote workforce.

Generally, an employee's home state can tax her income regardless of where the money is earned. She also can be required to file a tax return in her state of employment if different from her home state. In other words, employees may be required to elect tax withholding and file tax returns in both their home state and the state of employment. There are various exceptions to the general rule.

In the age of COVID-19, employees and employers that traditionally didn't have to worry about the general rules of state income taxes between states may be blindsided by both the employer's and the employee's new tax situations:

- Some commuter employees who reside in State A and commuted to work in State B before the pandemic now work remotely in State A. They may no longer have income tax obligations in State B.
- Others who worked and lived in State A have decided to relocate temporarily to State B, meaning they could be subject to tax withholding and filing in both states, depending on their situation.

Employers are left helping employees to navigate their specific income tax withholding obligations and reconciling the company's tax obligations.

As remote work continues and likely becomes a regular part of business operations for the foreseeable future, you need to be aware of the potential effects caused by employees' telework habits and locations:

State tug-of-war over taxes. Currently, many states have issued temporary guidance essentially maintaining the "status quo" method of state income taxation for nonresident employees working inside their borders. As states struggle with budget shortfalls, however, the temporary status quo will likely end, and employers and employees will be stuck in the middle of the battle for revenue.

Lawsuits are currently underway between states over the potential tax revenue. The cases are in the early stages, and the outcome is far from certain. Nevertheless, the litigation raises legitimate constitutional questions about states' ability to tax employees working beyond their borders.

New tax-filing obligations. You could potentially face additional business and employment tax-filing obligations as a result of remote employees working in a state in which your company doesn't otherwise have a physical presence or other nexus. Depending on the various states' tax schemes, you could potentially be required to alter unemployment insurance withholding, worker's compensation, and disability insurance based on the duration and location of an employee's remote work.

Business tax nexus in new state. Next, remote employees may cause you to acquire a business tax nexus in a state where you traditionally had no substantial link. Having a nexus would subject your business to income and sales tax within that state. Prolonged remote work also has the potential to affect business income tax apportionment. Unless there's temporary guidance, a shift in labor costs (e.g., payroll) could change how you're required to apportion income in states in which labor costs are a key factor.

Disqualification from incentive programs. Finally, if your company benefits from existing state or local incentive programs or agreements, you need to critically evaluate remote employees' impact on the specific job creation or employment requirements. Remote work may disqualify your company from the incentive programs.

You must recognize the potential risks inherent in allowing employees to choose the location and duration of their remote work. As we wait for permanent state-specific guidance and the conclusion of the state lawsuits, you should consider paying close attention to tracking employees' remote work locations to ensure accurate payroll tax withholding and business tax filings as much as possible.

Next, consider reviewing your remote work policies and their interaction with state tax laws. Depending on the state's tax policy, there can be a difference between whether you require remote work or allow it for employee convenience. As you begin to reopen your offices, you should strategically evaluate the implication of making the office available to employees on a periodic basis. For the above reasons, you should continue to monitor state taxation developments and the impacts on your workforce.

Dealing with hostile work environment claims in a work-from-home world

As of now, we don't know if the increase in remote working will accelerate the resurgence of hostile environment claims. Yet it almost certainly will alter how you investigate and defend them and, more important, how you modify your policies and train to prevent wrongful conduct irrespective of location.

The EEOC advises a hostile work environment occurs when severely or pervasively offensive conduct based on sex, race, or another legally protected classification exists. If the unwelcome conduct is of lesser severity, it must occur frequently. Alternatively, a single occurrence can constitute harassment if it's particularly severe.

Either way, the conduct must create a work environment that would be intimidating, hostile, or offensive to reasonable people and negatively affect work performance.

Context remains important. Some commentators believe a remote setting increases the risk of a hostile work environment, citing an EEOC task force report observing that decentralized work may make employees feel less accountable. Others recognize claims arising in the home workplace could occur less often or face inferences of legitimacy. For example, an employee could repeatedly call a colleague in a harassing manner and say it was for work purposes.

Still others point out harassment in a remote environment could happen more frequently on chat, text, or video applications. With remote work situations, standards of offensiveness could change because of family members' proximity to potentially abusive communications, possibly giving rise to new manifestations of misconduct.

The remote working situation may raise an additional question: Could the employee have just hung up the telephone, ended the videoconference, or turned away? In theory, a remote worker could end an electronic communication whenever it became unwelcome. In practice, the effectiveness of that response likely would depend on who is doing the harassing. After all, an employee might well find it more difficult to hang up on a supervisor than a coworker.

Emerging forms of proof

The potential risks of facing work-at-home hostile environment claims also bring new uncertainty to investigating, proving, and defending harassment allegations.

Although the physical isolation while working from home should help to reduce unwelcome touching cases, other claims relating to severely or pervasively hostile environments likely will rely on evidence similar but not identical to cases arising at factories and offices. In both situations, hostile environment evidence often rests on what was said or done, requiring fact finders to weigh conflicting accounts to determine if unwelcome conduct occurred.

Therefore, as before, proving exactly what orally or visually happened during one-on-one meetings, in person or virtually, will remain difficult unless the interactions were recorded. Employees will still need to show (1) statements and conduct occurred, (2) they were harassing, and (3) the actions rose to a "severe or pervasive" level and materially (or significantly) affected their ability to work.

Hostile environment claims in the work-at-home situation, however, may provide new types of more persuasive proof than typically arises from in-person interactions in break rooms, offices, and common areas of a business:

- Because work-at-home communications likely occur electronically, such as through e-mail, video conferencing platforms, and instant messaging applications, evidence of what was shown or said may exist.
- At a minimum, digital data, calendars, phone logs, and any retained journal of video calls can establish the fact that a communication took place and perhaps when, with whom, and for how long.

Although employees will still need to prove the content of the communication was harassing, the data provide a starting point and may help with credibility assessments—for example, when one employee denies a communication exists but records prove it occurred.

Special case of recordings

Since work-from-home harassment claims typically will involve electronic interactions, a real possibility exists they were recorded. Undeniably, the recipient of an unwelcomed message, photo, or video encounter at home will have the means to take contemporaneous screenshots and make audio/visual recordings. Employers, in turn, will need to review their policies and state laws on unconsented recordings to determine whether the evidence was unlawfully obtained.

At least 10 states require multiparty consent to record electronic communications, and some make it a criminal offense to tape a conversation without the approval of all parties. Also, it isn't always clear which law applies when the parties are in different states.

Moreover, some state statutes prohibit using unlawfully recorded communications as evidence. Even in the absence of such a bar, courts retain wide discretion under the rules of evidence to determine if recorded conversations constitute admissible proof regardless of whether they were made with or without all parties' consent.

Further, Zoom, WebEx, Outlook, text messaging, and other applications may allow for the creation and archiving of electronically stored information (ESI), such as a transcript or a full-meeting recording. Accordingly, investigation and defense budgets can anticipate expensive ESI search and retrieval costs. Similarly, legal hold orders should cover information from such communication platforms.

Practical steps you can take to prevent harassment

- Consider modifying your harassment and discrimination policies and training to make sure they apply to all work environments, whether in the office or remote.
- Continue to investigate every discrimination or harassment claim and identify any data the remote working platforms retained.
- Become familiar with your state laws and know what consents are necessary before recording an electronic communication or meeting.

Establish where employees may work: Location, location, location

As a part of remote work, you may want to limit employees to working from their primary residence, i.e., in their own home that's in the same city or state as your company's office. Employees, on the other hand, may want to work from a vacation home or a location farther from their "home" office.

Employee expansion into a new location may trigger legal issues because some jurisdictions may see people working there as establishing a legal presence for the employer. Before allowing remote work in new jurisdictions, you should consider the following potential legal issues:

- Local, state, and/or municipal leave laws covering wage and hour, vacation, and sick pay among others;
- Local, state, and/or municipal health and safety regulations;
- Registration as a local employer for payroll tax withholding;
- Unemployment insurance contributions; *and*
- Notification to workers' compensation and health and welfare insurance providers.

The problems with remote work become more complicated if employees are doing their jobs in locations outside of the United States, where obligations to set up collective representation, requirements for hiring employees in protected categories, and termination protections may apply.

Also, employees working from home in a particular state or jurisdiction may constitute a presence of the employing entity in that location for corporate tax purposes. You should communicate to employees that they may be responsible for changes in their individual tax consequences because of relocations made in connection with a remote work program.

In addition, consider the impact remote work may have on other employment laws (including antidiscrimination and antiharassment), information technology resources and communications systems, data privacy and other confidential and proprietary information, and workplace safety.

All of the issues should be investigated with counsel before a remote work policy is published. That way, you can ensure the company (1) will be able to meet additional legal requirements if allowing remote work from a wider geographic area or (2) should set the policy to exclude remote work from certain areas or from all areas outside the current operating locations.

Managing remote working environments

While you may need to restrict your employees to working at their primary residence or, at least, in the same jurisdiction as the office, the actual remote work environment can take many forms. From kitchen tables to dedicated home offices to spare nooks and crannies of all sizes, your employees may be working from an unusual "office." In a household where two parents and multiple children are trying to work and attend online school, the best workspace available may be a table outside or the front seat of a car.

Space doesn't necessarily dictate productivity. And these days it may be more difficult to justify a requirement to maintain a separate, designated workspace when your employees may be able to work virtually anywhere Internet services are available. If you seek to impose physical standards on remote workspaces, be sure you have legitimate reasons for doing so, such as confidentiality concerns or the need for access to high-speed Internet services.

The job duties will affect the type of workspace needed to function remotely and meet your expectations. Key considerations include:

- Whether other household members are restricted from using the workspace or the employee's password-protected devices for nonwork-related purposes;
- Extent to which you may structure, monitor, and/or inspect the physical space;
- Whether you or the employee will provide the desk, chair, office supplies, and IT equipment (computer, tablet, phone) and related support; *and*
- Whether you'll have a "bring your own device" (BYOD) policy for personal devices employees use for work purposes.

Managing a remote workforce

Manage productivity, not punctuality

Some employers and their managers expect employees to treat working from home just like working in the office. Stop. That doesn't work. The fact is, working from home and working from the office are very different. For example, working from home allows employees to skip the commute, which may mean they work earlier or later than they would in the office. If they can accomplish their goals wearing their pajamas, taking a power walk in the middle of the day, or shooting hoops with their kids, is there really any harm?

Consider requiring a productivity log. They boost employee efficiency, motivation, and focus. They cause employees to become aware of wasted time (searching the web, doing household chores, browsing social media) and minimize the time spent not working.

In addition, productivity logs allow you to identify which employees are close to burning out, who needs more work, and who needs help staying on track. They also help you to analyze whether the work is being distributed evenly.

Provide access to programs

Equip your employees with tech and productivity tools. If they had access to specific programs in the office (e.g., Outlook, Adobe, and Word), be sure they have the same options at home.

Also, think about how working remotely may have affected certain work tasks. For example, do employees need a DocuSign account to send documents electronically for signatures? Do they need an external webcam to attend video conferences?

Encourage breaks

On average, people can focus on any given task for about 90 to 120 minutes. After that, they need a five-minute break to recharge.

You should encourage employees to take appropriate breaks to prevent fatigue. Statistics show regular breaks increase productivity, improve mental well-being, and boost creativity.

Connectivity

People need to still feel like they are working for an organization. They'll also likely need to access the company's services. Therefore, connectivity on many levels is very important.

A big part of connectivity is technology. Can employees easily access the firm's intranet and other applications? Do you have effective and efficient videoconferencing services?

Beyond technology, are you doing things to keep employees up to speed on what's happening? By having your whole team telecommute, you are effectively eliminating the "watercooler." So, people are getting information from an array of sources, even if they aren't getting it from you. Remember that this is a stressful time, so your team needs to hear from you.

Technical concerns

Have discussions with your IT department or consultant regarding access to and interconnectivity of servers and databases, hardware issues such as acquisition of laptops and other devices, software issues and, most importantly, data-security issues. IT may need to acquire additional software licenses for remote workers or install tracking apps on personal devices. Also discuss how IT plans to service computers of off-site workers and address connectivity problems.

Using VPNs for remote computer access

The simplest solution for remote access to your company's computer network is a dedicated virtual private network (VPN). You may already have such a service in place. However, just having a VPN doesn't mean you're ready for mass remote connections.

Your Internet connection is "throttled" to the speed you've paid for in your business plan. A productive and reliable VPN connection relies primarily on upload speeds, and if you don't have sufficient upload speeds, a higher number of remote connections to the VPN will render remote work slow and unstable. Consult with your Internet service provider to ensure you have sufficient upload speeds to enable multiple simultaneous outside connections for remote work.

You may not have invested in the network hardware to make VPNs possible. Not to worry—there are other services that offer many of the same benefits of a VPN—i.e., remote access to office networks—without the need to purchase or install additional hardware. Many of these services can be set up in a matter of minutes, and you can choose plans that range from monthly to yearly.

Equipment

As you consider which jobs can be accomplished through telecommuting, you will need to identify the equipment. Is high-speed Internet service needed? Is a color printer/scanner needed? Is a dedicated phone line needed? How about accessories like a headset or webcam? The setup in the office may give some guidance as to the needs of the telecommuter, but additional needs could arise.

Setting up phone services

In addition to setting up remote access to work files for employees, you must ensure that incoming phone calls are answered even if you have no receptionist. Some businesses have sophisticated phone systems that allow incoming calls to be automatically redirected to cell phones and home landlines. If you have a traditional landline-based phone system without advanced features that allow for automatic call routing, you might want to consider an answering service.

There are myriad services available with a range of plans and features to suit your needs. The greatest benefit of an answering service is that you can keep your firm's current phone numbers. Simply have your phone system forward all calls to the answering service provider, and allow your vendor to handle the rest.

Also, if sales or customer service employees will be working from home, you do not want them using their personal phones. Ask your phone provider to access your current system for functionality to determine if you will need a server-based telephone system or other options. It is essential that workers off-site sound as if they are in your facility.

Workspace set-up

The job duties will affect the type of workspace needed to function remotely and meet your expectations. Key considerations include:

- Whether other household members are restricted from using the workspace or the employee's password-protected devices for nonwork-related purposes;
- Extent to which you may structure, monitor, and/or inspect the physical space;
- Whether you or the employee will provide the desk, chair, office supplies, and IT equipment (computer, tablet, phone) and related support; *and*
- Whether you'll have a "bring your own device" (BYOD) policy for personal devices employees use for work purposes.

Cybersecurity

The office is likely a more secure environment than an employee's home, so it's crucial employees know how to work safely in the new business "normal."

What are the risks?

Cybersecurity experts have always warned against letting employees use free Wi-Fi at coffeehouses or other places remote workers like to go for a change of scene. Since those environments are invitations to cybercriminals, an employer-provided secure "hot spot" device can be a smart investment for workers without secure Wi-Fi.

Remote workers who need to stay connected to an organization's IT network need an enterprise virtual private network (VPN). But to keep data safe and avoid various cyberattacks, you need to adopt a heightened state of cybersecurity, according to a March 13 alert from the Cybersecurity and Infrastructure Security Agency (CISA), an arm of the U.S. Department of Homeland Security.

The CISA alert lists five specific cybersecurity considerations related to employees working remotely because of the pandemic:

- With more organizations using VPNs, more vulnerabilities are being found, meaning malicious cyber actors are targeting those weaknesses.
- Since VPNs may be in use 24/7, organizations may be less likely to keep them updated with the latest security updates and patches.
- There may be an increase in phishing e-mails targeting teleworkers to steal their usernames and passwords.
- Organizations that don't use multifactor authentication (MFA) for remote access are more susceptible to phishing attacks.
- Since organizations may have a limited number of VPN connections, critical operations may suffer, including IT security personnel's ability to perform cybersecurity tasks.

Keeping safe

As daunting as cybersecurity may seem, you aren't helpless. The CISA alert includes the following recommendations for employers using remote workers:

- Update VPNs, network infrastructure devices, and devices used to remotely access work environments with the latest software patches and security configurations.
- Alert employees to an expected increase in phishing attempts.
- Ensure IT security personnel are prepared for new remote access cybersecurity tasks. Those tasks include log review, attack detection, and incident response and recovery.
- Implement MFA on all VPN connections. If MFA isn't implemented, require remote workers to use strong passwords.
- Make sure IT security personnel test VPN limitations to prepare for mass usage.
- Contact CISA to report incidents, phishing malware, and other cybersecurity concerns.

The National Institute of Standards and Technology (NIST), a part of the U.S. Department of Commerce, has issued a bulletin that includes recommendations for improving security for remote workers. The NIST list includes planning telework security policies and controls based on the assumption that external environments contain hostile threats. Encryption technology can help.

Also, assume telework client devices will become infected with malware. NIST says possible controls include antimalware technologies, network access control solutions, and a separate network at the organization's facilities for telework client devices brought in for internal use.

Strong telework security policies also are necessary. Each organization must make its own risk-based decisions about what kind of remote access should be permitted.

Of course, training remote workers about threats and how to avoid them is a key part of maintaining security. Workers should understand how to recognize phishing and spoofing, and they should know all your rules for minimizing cyber risks.

Keeping work on work devices also is effective in preventing trouble. Employees should understand that a work computer, smartphone, or other device should be used for work only.

Also, a remote worker's Internet connection needs to be considered. Employees working from home should be requested to turn on encryption (WPA 2 or WPA 3) on their wireless routers to enhance security.

Implications for disability accommodations

Many employees have been working from home since March 2020 as a result of the COVID-19 pandemic. With no signs of slowing and the rollout of a vaccine to the general public not likely to occur until well into 2021, teleworking looks like it's here to stay for the foreseeable future. Some employers, however, may be eager to see their offices bustling with productive employees, especially once the pandemic subsides. Confounding the issue is that some employees, having worked effectively from their homes, may seek telework as a disability accommodation. To assess the claim, you must determine whether teleworking would be a reasonable accommodation under the ADA.

ADA disability and reasonable accommodations

Under the ADA, an individual is generally deemed to have a disability if he suffers from a "physical or mental impairment that substantially limits one or more major life activities." The ADA further provides that "working" constitutes a major life activity for the purpose of determining the existence of a disability. Notably, the definition of "disability" is to be construed broadly and includes conditions that are episodic in nature or are in remission.

Title I of the ADA contains guidelines for employers dealing with employees' disabilities in a work setting. That chapter of the Act is applicable to "employers" that employ 15 or more individuals for each workday in 20 or more workweeks of a given year.

The rules established under Title I state that employers must provide reasonable accommodations to a disabled employee as long as they don't create an undue hardship for the business operations.

The ADA defines a reasonable accommodation as "any change in the work environment or in the way things are customarily done that enables an individual with a disability to enjoy equal employment opportunities." Thus, permitting an employee to telework may be considered a reasonable accommodation when a qualified employee cannot successfully perform her essential functions unless she is working remotely.

An employer isn't required to provide a reasonable accommodation, however, if it would pose an undue hardship, meaning that doing so would be significantly difficult or expensive. To determine the validity of such a request and whether it would constitute an undue hardship, you and the employee must engage in an "interactive process" during which you analyze the job requirements, identify the restraints implicated by the disability, and determine any suitable accommodations.

EEOC guidance

In our current pandemic environment, employers are not only encouraging employees to work from home in efforts to curtail the spread of the coronavirus, but some are also temporarily required to do so under some form of authoritative order or regulation. In addition, technological advancements over the past 25 years give some employers the ability to track employees'

performance and productivity remotely, even when they're not present on the employer's premises. As a result, the discussion about teleworking as a form of reasonable accommodation is resurfacing.

Foreseeing such issues, the EEOC recently issued guidance for employers to address such claims and telework requests. Specifically, the agency said:

- If an employer provided telework arrangements during the COVID-19 pandemic, it isn't automatically required to permit remote work as a reasonable accommodation for employees with disabilities. Rather, it's required to engage in the interactive process.
- If the employee requesting telework experiences a disability-related limitation at work that can effectively be addressed with other reasonable accommodations on the employer's site, then the remote-work arrangement wouldn't be required.
- An example may include providing an immune-compromised employee with a workstation or office separate from other workers.

The EEOC also addressed whether an employer that previously denied a disabled employee's request for a telework accommodation before the pandemic—based on concerns she would be unable to perform her essential functions from home—would be required to grant the accommodation after employees begin to return to the work premises. In this instance, if the employee was actually able to perform her job from home during the pandemic, it undermines or dispels the employer's concerns about remote job performance.

The EEOC again stressed, however, that an employer wouldn't automatically be required to grant the request postpandemic. As with any disability-related request, the interactive process should play out.

Note: you are well advised to consult with a qualified attorney to determine whether there are any additional requirements, including state laws, to consider in addressing an employee's disability-related telework request.

Telework poses potential risk for businesses with foreign workers

With remote workers, U.S. employers need to consider foreign workers' visa status or risk fines. So long as Internet access is available, many can potentially work anywhere or change a worksite location on a whim, with or without notice to the employer. The flexibility, often viewed as a perk, is a potential pitfall to businesses with foreign workers.

Many immigration statuses (such as the H-1B visa) grant work authorization for a *specific worksite address only*, which means any change in a worksite location may trigger a requirement to post a notice and/or amend a filing.

The first challenge is to know and remember the specific address where a foreign worker is authorized to work.

The second challenge is to contact your immigration attorney before any change in worksite happens. A quick stop and check can save a lot of anguish and legal work. An immigration attorney will verify if the proposed change requires any legal compliance work. That's critical because the regulations require legal compliance *before* any change happens or a technical violation results.

The rule sounds simple—stop and check before a change in worksite is made—but the fluidity of a remote worksite makes the task challenging to manage in practice.

For example, if an H-1B worker who is authorized to work remotely from her home in Des Moines, Iowa, starts visiting and working remotely from a friend's house in Denver, Colorado, for weeks at a time, a material change in worksite may occur

without anyone realizing the violation. No work time is lost thanks to the flexibility of remote work and good Internet, but unfortunately, the risk of a technical violation increases with each day the worker logs in and works from a location different from the specific address on the approved petition.

Technical violations are serious and can result in fines being assessed to the employer and/or problems with the foreign worker being able to immigrate later.

A remote worksite isn't too risky for foreign workers as long as:

- Both the employer and the foreign worker know and remember the specific worksite address (location, location, location!) linked to her visa status; *and*
- If a change is wanted, the employer and the worker check the rules before any change is made, even a temporary one.

Regardless of U.S. citizenship status, employees working outside the employer's jurisdiction may be subject to local laws governing everything from time off and safety regulations to payroll tax withholding. Such considerations are important to keep in mind when a foreign worker asks about working remotely as well.

Best practices for ending pandemic-related work-from-home arrangements

As the COVID-19 outbreak begins to subside, many employers are preparing to call employees back to the workplace. What's the best way to go about it? And can you now refuse to let employees work from home as a reasonable accommodation under the ADA even though they may have been teleworking for upwards of an entire year?

Many employers turned to telework during the COVID-19 pandemic. Often, the arrangements "weren't perfect" but were necessary to survive the unprecedented circumstances.

Many employers changed (or were forced to alter) the nature or extent of the duties performed by teleworking employees. They simply couldn't perform certain tasks from home.

In addition, the pandemic itself eliminated certain job duties. For example, under normal circumstances, attendance in the workplace may have been considered an essential function so an employee could supervise direct reports or participate in significant staff meetings. During the outbreak, many of those duties went away.

Take these five steps when ending pandemic work-from-home arrangements:

1. **Give employees advance notice about termination of teleworking arrangements.** Being summoned back to the workplace can have a tremendous impact on your employees, who have likely adapted their own altered schedules and routines during the pandemic. Provide as much advance notice as possible so they'll know when they are expected to return.

2. **Notify them about reinstatement of any essential functions that may have lapsed.** This is key. If you have, let's say, relaxed things a bit during the pandemic, whether intentionally or not, you should address the matter directly and reset expectations. If possible, identify the specific duties that were altered or not required during the past year and provide notice they will be reinstated effective with the recall to the workplace.

3. **Educate employees about COVID-19 protective measures in your workplace.** If your employees have been working from home, the concept of wearing a mask around the office isn't something they are accustomed to (yet). To the extent you have policies for mask wearing, social distancing, vaccinations, or other protective measures, be sure to provide notice and information before your workforce returns. Consider providing remote training about the policies.

4. **Tell people with concerns over returning to contact HR immediately.** The earlier you can have the conversations, the better. If possible, designate a particular contact person to handle the talks so you can ensure consistent messaging and responses.

   Be prepared to distinguish between two general categories of concern: (1) general fear of COVID-19 and (2) worries implicating underlying physical or mental impairments, which the virus-related circumstances may exacerbate and place the employee at risk. The former typically isn't grounds to refuse to return to the worksite. The latter may require interactive discussions and considerations of potential accommodations under the ADA.

5. **If necessary, engage in interactive process required by ADA.** To the extent an employee's worries about returning to the workplace implicate mental or physical impairments, you should engage in the ADA interactive process. Again, it's best to have the conversations early. They can occur by phone before the return-to-work date. The purpose is to obtain information about an employee's impairment, including its duration and impact on the performance of essential functions.

To the extent the job duties have been relaxed or paused during the pandemic, the interactive process is a good chance to discuss your expectations about the return to the worksite, particularly regarding any reinstated duties that can't be performed (effectively) from home. Employees must actively participate in the discussion, and potential accommodations should be addressed. Be sure to document the talks.

The EEOC's guidance "What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and other EEO Laws" states when you recall employees to the worksite after a period of teleworking caused by the COVID-19 crisis, you aren't automatically required to let them continue to work from home as an accommodation for a disability under the ADA:

> *To the extent that an employer is permitting telework to employees because of COVID-19 and is choosing to excuse an employee from performing one or more essential functions, then a request—after the workplace reopens—to continue telework as a reasonable accommodation does not have to be granted if it requires continuing to excuse the employee from performing an essential function.*
>
> *The fact that an employer temporarily excused performance of one or more essential functions when it closed the workplace and enabled employees to telework for the purpose of protecting their safety from COVID-19, or otherwise chose to permit telework, does not mean that the employer permanently changed a job's essential functions, that telework is always a feasible accommodation, or that it does not pose an undue hardship. These are fact-specific determinations. The employer has no obligation under the ADA to refrain from restoring all of an employee's essential duties at such time as it chooses to restore the prior work arrangement, and then evaluating any requests for continued or new accommodations under the usual ADA rules.*

The EEOC's guidance illustrates the importance of notifying employees about any duties you're reinstating after a recall to the worksite. The guidelines suggest those of you who decline to continue the teleworking arrangements must be prepared to show (1) there were changes to the essential job functions attributable to the pandemic, and (2) you specifically reinstated the functions when employees were able to return to the worksite.

Even your IT systems are susceptible to COVID-19

Current events have often been used as cover for cyberattacks, and unfortunately, COVID-19 is no different. Along with the recent uptick in coronavirus cases across the United States, we've seen an uptick in e-mail scams, ransomware, malicious

domains, and other cyberattacks that use the pandemic in an attempt to compromise businesses' IT systems and employees' personal information.

Cyberscams

IBM researchers are credited with discovering one of the first e-mail scams tied to the coronavirus, in which a cybercriminal urged recipients to download a malware-infected e-mail attachment that supposedly contained infection-prevention measures. A hoax being perpetrated in the Android app store also recently came to light. An app available at coronavirusapp[.]site claims to provide access to a map that allows real-time virus tracking. However, researchers from DomainTools say the app is laced with ransomware. Once it's installed, the ransomware will deny a victim access to his phone unless he pays a ransom in bitcoin.

Researchers have also uncovered e-mail scams in which cybercriminals posing as university personnel claim to be sending college students official communications from the university as well as e-mails purportedly from the CDC that urge the recipients to open a link that deploys malware. Another scam points people to an online map that purports to track COVID-19 cases but actually steals usernames, passwords, and credit card numbers stored in the computer's browser. The World Health Organization and similar entities are seeing an increase in the use of their logos in phishing e-mails that claim to provide information on the virus but contain malicious links or attachments.

Cybercriminals are also trying to take advantage of the increasing number of employees working from home. Telecommuters may be working outside their employer's firewall, meaning they're lacking many of the protections the corporate IT structure would otherwise provide. As a result, malicious attacks by cybercriminals posing as employers are likely to increase.

For example, a known scam targeting employees working from home involves hackers pretending to be the employer asking employees to download new or updated software. The e-mail provides a link to fake downloads of Microsoft and other products in an attempt to capture the user's credentials. Spam e-mails in which cybercriminals falsely claim to be suppliers providing updates in light of the pandemic have also been reported.

Moreover, there have been cyberattacks focused on the medical community while healthcare providers are struggling to deal with the spread of the coronavirus. Researchers have uncovered social engineering attacks that rely on the urgency of the crisis to obtain users' log-in credentials so hackers can access a hospital's IT infrastructure or financial information. The growing risks of these scams for U.S. healthcare companies and other corporations has led the U.S. Department of Homeland Security's (DHS) Cybersecurity and Infrastructure Security Agency to issue an alert urging organizations to "adopt a heightened state of cybersecurity" as the pandemic unfolds.

Be mindful and train your employees

Employers must be mindful of the growing cybersecurity risks for businesses. Protect your company by implementing internal controls that will help you defend against e-mail scams and data hacks, including:

- Training your employees to recognize scams;
- Ensuring that employees who handle financial transactions use a two-step verification process;
- Conducting routine cybersecurity health checks;
- Updating your software regularly;
- Making sure employees use a secure Internet browser;
- Requiring employees to change their passwords frequently;
- Conducting mock phishing attacks to identify your weak spots; *and*
- Investing in reliable antivirus software.

Hackers seeking to capitalize on topical events are nothing new, but growing concern about the spread of the coronavirus may cause companies to lose sight of their IT vulnerabilities. So, as you urge your employees to be diligent about their physical health and safety, you should also remind them to stay vigilant about your company's IT health and security.

In light of the uptick in coronavirus-related scams, companies should stress cybersecurity awareness and remind employees to look closely at e-mails, be wary of clicking on any links and attachments, use common sense and prudence when something doesn't look right, and go to a primary source of information such as *www.cdc.gov* rather than relying on unsolicited e-mails.

Immigration

The DHS has been busy responding to the changing work environment, issuing revisions to the normal processes for I-9 and E-Verify requirement satisfaction and providing guidance to employers in these uncharted times.

Form I-9 procedures relaxed

On March 20, 2020, the DHS announced it would temporarily revise the requirements for reviewing documents presented in the Form I-9 process to accommodate employers whose HR departments are now working remotely. The revised requirements allow the Form I-9 document review to temporarily be conducted remotely. The department's official announcement can be found at the following link: *https://www.ice.gov/news/releases/dhs-announces-flexibility-requirements-related-form-i-9-compliance*.

The revised rules allow for HR departments working remotely to review I-9 documents via Skype, FaceTime, e-mail, fax, or similar means. If they do this, they must write "COVID-19" in the "Additional Information" box in Section 2. Within 3 days of resuming normal operations, the original documents must be reviewed by HR and then "documents physically examined" must be written with the date noted in the "Additional Information" box.

Thus, to remain compliant, it will be important to set up a procedure for keeping track of the I-9 forms where documents were reviewed remotely, so inspection of the original documents can take place at the appropriate time. A memo should also be prepared indicating the date normal operations resumed, so it can be produced in the event of an I-9 audit to demonstrate the original documents were reviewed within 3 days.

It's important to note the following:

- The revised requirements apply only to employers whose HR departments are now working remotely. If you still have someone with HR physically working at your office, then you must continue to review the original documents presented when the Form I-9 is completed.
- The revised requirements don't apply to a new hire who will permanently work remotely and won't be physically present at the employer's worksite when the COVID-19 work restrictions end. In these cases, you must make arrangements to have Section 2 of the Form I-9 completed remotely.
- The time requirements for the Form I-9 have not been relaxed. Section 1 still must be completed on or before the first day of work for pay, and Section 2 must be completed on or before the third day of work for pay.

The flexible document review requirements are valid for 60 days or until three days after the national emergency is terminated, whichever is earlier. If the flexible review requirements need to be extended, the DHS will make an announcement at the appropriate time.

Guidance also has been issued related to accepting and documenting a state-issued driver's license or identification (ID) card that expired on or after March 1, 2020, in a state where driver's licenses/identification cards have been automatically extended

because of the closure of motor vehicle offices. If the employee's state ID or driver's license expired on or after March 1 and the document expiration date has been extended by the state due to COVID-19, then it's 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. As a best practice, it's recommended employers attach a copy of the state motor vehicle department's webpage or other notice indicating their documents have been extended.

As a reminder, after April 30, only the 10-21-19 version of the Form I-9 can be used. This deadline will not change despite COVID-19. So, while many employers aren't hiring right now, it's important to make certain you have implemented the use of the revised Form I-9 so your company is in compliance when hiring begins again. The revised Form I-9 and the Form I-9 instructions can be found at *https://www.uscis.gov/i-9*.

E-Verify procedures relaxed

Guidance also has been provided with respect to E-Verify, instructing employers how to handle a tentative nonconfirmation (TNC) while government offices are closed due to COVID-19. If an employer receives a TNC from E-Verify and the new hire contests it, the employer should continue to employ her while the case is in extended interim case status. This means she will not be required to resolve the issue within the normal 8-business-day period due to the closure of Social Security Administration and Immigration offices. When offices reopen, the 8-day period will begin to run.

Although an E-Verify case must still be created within 3 business days of the date of hire, if the case opening is delayed due to COVID-19 precautions, the employer should select "other" from the drop-down list of reasons for opening the case late and then type in "COVID-19" as the specific reason.

REAL ID deadline extended

On March 26, the DHS announced it is extending the REAL ID enforcement deadline for 12 months beyond the current deadline due to circumstances resulting from the COVID-19 pandemic. The new deadline for REAL ID enforcement will be October 1, 2021, and a notice confirming this will be published in the *Federal Register* in the near future.

Processing of employment authorization card extensions

In addition, procedures are being revised for processing applications for extension of employment authorization cards by foreign nationals. Typically, the filing of such an application requires the foreign national to have biometrics (digital fingerprints and photographs) taken at an Immigration Application Support Center (ASC) before the extension application can be processed and approved.

Because all ASC offices are closed until at least May 4, the employment authorization extension applications will be processed using previously submitted biometrics. This revised procedure will remain in effect until ASC offices resume normal operations.

Understanding immigration changes imposed during pandemic

Over the last few months, you may have read about major travel restrictions for foreign workers entering the United States. What key facts do employers need to know?

Restrictions in response to COVID-19

Two presidential proclamations were issued that restrict U.S. entry and consular visa processing abroad until December 31, 2020.

- As of April 23, **immigrants** are barred entry into the United States if they are outside the country without a valid green card or other official travel document. U.S. embassies also suspended issuing green cards (permanent residency) for applicants abroad. Note that the changes don't affect individuals already in the country seeking green cards or other visas such as an H-1B through the domestic immigration agency, U.S. Citizenship and Immigration Service (USCIS).
- **H-1B, J-1, H-2B, and L-1 nonimmigrants** (and their dependents) are barred from U.S. entry if they (1) were outside the United States on June 24 and (2) didn't have a visa in the specified categories or other official travel document that was in effect on June 24, unless their work serves national interests (e.g., medical care and research for COVID-19 or work facilitating U.S. economic recovery or essential to the country's food supply chain). Nonimmigrants already in H-1B1, E Trade Treaty, TN, O-1, and F-1 status lawful permanent residents aren't affected.

Concurrently, various restrictions have been implemented for U.S. consulate visa processing and in countries worldwide for international travel (e.g., bans on discretionary travel or specific countries and mandatory quarantines). For instance, Europeans and Brazilians who aren't U.S. citizens or permanent residents, or family members of U.S. citizens, are generally restricted from entering the country based on a presidential proclamation. The restrictions greatly affect nonimmigrant workers' ability to travel internationally or apply for visas (e.g., E-3 visas) abroad to enter the United States.

Consequently, employer options to extend or change status and/or transfer employment for nonimmigrant workers are generally limited to seeking USCIS approval by submitting applications while present in the United States, which involves longer processing times, additional fees, and a higher level of scrutiny for adjudication and could potentially delay employment start dates.

For nonimmigrant extensions for certain visa types such as an H-1B or L-1 with the same employer, work authorization is automatically extended for up to 240 days after the I-94 expiration when a petition is submitted to USCIS before the I-94 expiration date. Such nonimmigrants can continue working while their extension petition is pending with USCIS.

Nonimmigrant petitions with a new employer require USCIS approval before work commences, and there is a 60-day grace period for an unemployed nonimmigrant to remain in the United States and obtain USCIS approval before accruing unlawful presence.

USCIS and DOL flexibilities

For submissions, USCIS will consider: (1) accepting responses received at most 60 days after the stated deadline for requests for evidence, continuations to request evidence, and notices regarding intent to deny, revoke, or rescind issued between March 1 and September 11, 2020, and (2) excusing late nonimmigrant application submissions delayed by COVID-19 difficulties based on circumstances, including the length of delay and credibility of the supporting evidence.

USCIS also continues monthly extensions of relaxed I-9 verification "physical presence" requirements for Section 2 documents by permitting employers to remotely inspect (i.e., viewing a PDF of a driver's license and Social Security card). This applies only to new hires who work remotely and doesn't extend the traditional requirement of completing an I-9 Form within three business days.

For worksite changes, the U.S. Department of Labor (DOL) confirmed H-1B, H-1B1, and E-3 workers do not require new labor condition applications (LCAs) for unintended worksite changes to an existing LCA with no changes to employment terms and conditions if the new location is either within the same metropolitan statistical area (MSA)(typically the same county) or outside the MSA and short-term placement provisions apply. Employers must post notices at the location for 10 days before the employee starts working at the new location, such as working from home. The DOL will consider notices as timely, however, if posted as soon as practical, not exceeding 30 days after the worker starts at the new location.

DOL extension accommodations for PERM recruitments, filings, notice of filings, and responses based on pandemic difficulties ceased on May 12, 2020. The DOL will review extension requests submitted per usual requirements by the deadline but won't accept recruitment completed after the deadline lapses.

Although the restrictions imposed in response to COVID-19 greatly limit employer options for hiring foreign national talent, there are still options for securing work authorization for new hires and maintaining work authorization for current nonimmigrant employees in the United States.

COVID-19 benching: H-1Bs can't sit this one out

The H-1B visa is an effective vehicle to recruit talented foreign nationals and, with the employer's assistance, paves the way to permanently retain talented individuals in the United States. But, the ongoing COVID-19 pandemic continues to complicate how employers approach temporary layoffs and furloughs spawned by lost revenues and reduced demands for their services. As if navigating the employment-based immigration laws weren't complicated enough, now employers must balance implementing cost-saving measures with their federal obligations to employer-sponsored migrant workers.

Consider this scenario: As a cost-saving measure, a company advises its employees that each employee is required to take a certain number of unpaid hours or days off, every week or every month, through the end of the year. If it employs H-1B workers, this measure potentially runs afoul of the federal laws governing their conditions for employment. In the immigration world, this is referred to as "benching."

The prohibition on benching is hardly a novel concept. The prolonged pandemic, however, brings the antibenching regulations into focus as employers grapple with cost-saving measures. The Labor Conditions Application (LCA) prescribes the H-1B employee's wages, payment frequency, and employment status and certifies the employer will pay the employee for "nonproductive time." The regulations define "nonproductive time" as time an employee isn't performing work and is in a nonproductive status "due to a decision by the employer."

Examples of "nonproductive status" include lack of assigned work and lack of permit or license. If the employee is in a nonproductive status unrelated to her employment, however (e.g., vacation, family medical leave, or conditions that render her temporarily incapacitated), you aren't obligated to pay her for the nonproductive time if you don't provide the benefit to the other employees.

The DOL's Wage and Hour Division (WHD) is tasked with enforcement and oversight of the H-1B program. The WHD ensures H-1B employees are compensated as certified on the LCA and that they are working in the occupations and at the locations specified.

The looming question: Will the WHD attribute temporary layoffs and furloughs due to the pandemic or governmental decrees affecting workflow as a "decision by the employer" or a condition unrelated to employment?

Bottom line. In implementing cost-saving measures, you must be mindful of your federal obligations. A material and substantive change to the H-1B employee's employment conditions may cost you thousands in civil money penalties, back wages, and temporary suspension from the H-1B visa program. You have several options to implement your cost-saving measures legally as it relates to H-1B employees.

NLRA considerations

As if employers and their HR personnel don't have enough to deal with, all must be mindful of the protections and prohibitions found in the National Labor Relations Act (NLRA) when addressing the many employment-related issues triggered by the coronavirus. Even if you don't have a union, the NLRA can be implicated when you're making difficult employment decisions in order to ride out the COVID-19 wave.

If you don't have a union

The NLRA protects employees who engage in "concerted activity" to improve or change their working conditions. If an employer disciplines an employee for having engaged in concerted activity, it will have violated the Act's antiretaliation provisions and be subject to an unfair labor practice charge. That is the case regardless of whether the employees are union members or not. Concerted activity occurs when two or more employees act together with respect to any matter that's related to the terms and conditions of their employment.

In the COVID-19 context, most, if not all, employee concerns will be prompted by workplace safety issues. For instance, they may mutually decide to wear or insist on wearing masks to work—even though your organization hasn't previously allowed them. Since the request would be viewed as a safety issue (and thus affecting a term or condition of employment), you should be cautious about disciplining them.

Additionally, some employers require employees to wear personal safety gear (hard hats, goggles, gloves, smocks, etc.) while performing their jobs. As a cost-saving measure, many companies require employees working different shifts to share the gear. In light of the coronavirus outbreak, however, employees collectively may object to sharing and request their own gear. Similarly, they may insist on more frequent sanitizing of workstations by the employer. All such requests should be considered and addressed in light of the NLRA's protections and prohibitions.

If you do have a union

If some or all of your employees are represented by a union, your company is subject to a collective bargaining agreement (CBA). As a general matter, the CBA requires your company to bargain over some changes in the terms and conditions of employment before they're made. Some topics are subject to mandatory bargaining while others may be a permissive subject of bargaining.

Even if the topic is permissive and not mandatory, however, you may be required to bargain with the union over the effects of any proposed changes. In other words, when your company is under a CBA, there are few instances when you should feel comfortable making unilateral changes to the terms and conditions of employment for employees covered by the agreement.

Some CBAs contain language, however, that may permit the easing or slacking of some of your bargaining obligations in the event of national or other emergencies over which you had no control, which could possibly cover the COVID-19 pandemic.

Similarly, some CBAs may contain a *force majeure* clause, which would excuse a party from its contractual obligations because of extraordinary and uncontrollable circumstances or events. Such language or clauses, however, would work both ways. For instance, citing a *force majeure* clause, union members may decide not to show up for work because of realistic safety concerns even though the CBA contained a prohibition against work stoppages or strikes.

After all is said and done, it would be prudent for employers subject to a CBA to sit down with the union representatives and "negotiate" the changes the company believes are necessary. Once the union is on board, you can be assured of not being

impeded when implementing the changes. Otherwise, you may find yourself spending more time dealing with charges filed with the National Labor Relations Board than tending to the efforts of keeping your business operational.

Minimizing the risk of liability

As Americans continue living in an unprecedented era of quarantining, many employees aren't quarantining at all. Workers in big-box retail shops, warehouses, grocery stores, and more are all still powering the economy as "essential employees," and they are still physically interacting with other people throughout the day. They can't be asked to work from home—their safety requires different solutions. And where there is a dispute over safety, litigation is sure to follow. What does that mean for employers, and how will workers' compensation interact with social distancing? We are all going to find out—litigation over COVID-19 deaths has already begun.

In Illinois, a retail worker died of complications from COVID-19. In a new lawsuit—apparently the first of its kind—his lawyers blame the death on the employer's failure to follow social distancing guidelines.

The lawsuit faults the employer for allegedly not doing enough to clean and sterilize the workplace, not providing protective equipment for staff, and not providing adequate warnings. Similar lawsuits will proliferate in the months to come.

The workers' comp system of each state is built around the idea that an exclusive, administrative remedy should exist for workers injured on the job. But the exclusivity has never been absolute. For example, most states exempt intentional torts (wrongful acts). But how can a court draw that line when evaluating the impact of a virus—especially when the employee could have contracted the virus anywhere?

While it would be ridiculous to say an employer could be "substantially certain" any particular human interaction resulted in viral transmission, businesses with "essential employees" on the front lines are still going to be heavily scrutinized in lawsuits.

Claims by employees against their employers

Suppose employees of an accounting firm (or really any company, for that matter) return to work as the business reopens. One employee infects another. The compromised individual, in turn, infects other members of his household. Can any of them sue the accounting firm?

The workers' compensation system prevents employees from suing their employers for injuries suffered in the workplace. So, the infected coworker cannot sue but is likely to receive benefits through the workers' comp system, if she can prove the infection came from the workplace and not some other source, which can be extremely difficult. Of course, if many employees simultaneously tap the system for benefits, it will come under strain. Employers pay into the program, so more frequent claims will drive up their experience ratings and increase premiums.

So, what about the infected worker's family members—can they sue the employer? The workers' comp statute doesn't prohibit them from suing the employer directly. As with the employee, proving the root cause of the infection will remain a thorny issue for the family members.

At the time of this article, the family of a deceased Walmart employee has already filed suit against the company claiming the death resulted from being infected while working. This first case warrants watching.

Applicable standard of care

We know companies won't be held to the standard of perfection, but where should society draw the line? How far must companies go to prevent the spread of the virus? In other contexts, the standard is what a reasonable person would do under similar circumstances. But we haven't faced circumstances like this before, so existing case law may prove less than helpful.

Generally, to prove negligence, an individual must show (1) a duty was owed and (2) the breach of it caused injuries that were reasonably foreseeable. But, what does that mean in the context of an invisible harm, including when the carriers may be asymptomatic? Shouldn't it matter whether the source employee is asymptomatic? Will we hold companies liable only if he openly displays symptoms? Here are additional questions facing employers:

- Must you check employees for symptoms each day before the start of work?
- Can you rely on a requirement that employees self-report if they feel sick and therefore stay home?
- If an employee disregards the requirement, works a shift, and infects someone, is your company still liable?

The concept of negligence is likely broad enough to allow employees and others to assert claims in a variety of situations, provided they can demonstrate causation. The claims are more than just theoretically viable. It will be up to the courts to determine what duty is owed.

Travel concerns

With no end to the COVID-19 crisis in sight and the numbers of positive cases increasing in many areas, you may want to consider implementing a policy for your employees' travel, if you haven't already done so. As with most subjects in these uncharted waters, you should proceed cautiously when considering and implementing a pandemic-related travel policy. Such unprecedented times require thinking outside the box to protect the safety of your employees and customers. Although you may have never had any interest in where your employees went on their time, you should now. And you should consider what actions you will take if an employee travels to a location with an increased risk of COVID-19 exposure.

Can you require employees to inform you of their travel?

The first question is whether you can require employees to notify management of personal travel. There's no law prohibiting such a requirement. And given the concerns about the spread of COVID-19, a policy requiring employees to notify management of travel out of state or out of the country could be wise to protect coworkers and customers from potential exposure to the virus.

If you decide to implement, or have implemented, such a policy, you should put it in writing and distribute it to all employees. It should require them to notify a specific individual or individuals in management (for example, the HR director or an immediate supervisor) before traveling out of state or out of the country for any reason—including weekend travel for which no vacation time is used. The notification should include the dates of travel, locations traveled to, the method of travel (car, airplane, etc.), and information on accommodations (home, condominium, hotel, campground, etc.).

Of course, you should consider certain exceptions. One would be for employers operating near a state border whose employees may routinely cross state lines traveling to or from work or for shopping and the like. You would probably want to expressly provide an exception to such same-day, routine travel, while still requiring notification of any other travel across state lines.

Another exception you might consider would be for travel caused by an unexpected emergency (for example, a close relative in another state being admitted to a hospital due to serious injury). In that case, your policy may omit the mandate for advance notification but require the employee to tell management as soon as possible.

Finally, you should consider putting some "teeth" in your policy. You may want to include an express statement that failure to comply may result in disciplinary action.

What's reasonable to ask employees about personal travel?

If your governor, mayor, or other state authority has indicated your state, county, or city is "open," it can be more difficult to limit personal travel for your employees. Basic safety and OSHA considerations, however, necessitate that you talk with employees before they return to the workspace after personal travel.

Reasonable inquiries about travel include:

- Date;
- Location;
- Form of transport used (planes, trains, buses, cruise ships, and other mass transit are higher risk); *and*
- High-risk activities (e.g., volunteer work in a nursing home with a significant number of COVID-19 cases).

Other factors to consider include a travel companion testing positive for COVID-19, staying at a resort where multiple cases have been logged, or similar issues. Particular attention should also be paid to whether they have chosen to travel to a state with a high coronavirus rate or, in violation of governmental authority, traveled in a "closed" state. These can be routinely checked on the CDC and state and local websites.

Employees with high-risk factors such as plane travel to a state that is currently closed or experiencing a significant spike should be prohibited from returning to the workspace for a minimum of 14 days and 72 hours symptom-free.

What about travel for work?

Employers bear a heightened obligation to ensure employees' safety, particularly when assessing travel for work during the COVID-19 pandemic. Assessment factors should include:

- Travel location;
- How contact will occur;
- What safety measures can be put into place; *and*
- An appropriate process for contact tracing.

You should maintain contact tracing documentation to minimize the litigation risk. It is suggested that you keep this type of documentation for at least as long as the statute of limitations in your state for a personal injury claim. While contact tracing apps may be used, the type of consent and security policies needed vary by state.

Can you require employees to self-quarantine after travel?

Your policy also should clearly let employees know what will happen if they travel out of state or out of the country. Here, it's important to keep in mind the policy's purpose—preventing the spread of COVID-19.

There's no need to require self-quarantine every time an employee travels out of your state. It isn't the mere fact the employee traveled that raises concerns, but rather, where she traveled and how she got there. There's really no need to require a quarantine if her destination has the same, or even fewer, cases of COVID-19 than your location; the issue is whether she went to a place with an increased risk of contracting the virus.

Therefore, your policy should allow flexibility in deciding whether to require employees to self-quarantine following travel. You may want to require them to self-quarantine for up to 14 days upon their return depending upon the total circumstances surrounding the travel, including their means of travel and whether any place they visited is a COVID-19 "hot spot" or becomes a "hot spot" while they are there. Your policy should inform employees that you will make the determination if a location is a "hot spot" by considering:

- Executive Orders of your state and any states visited;
- CDC guidance and information;
- The county COVID-19 data for the area visited; *and*
- Any other relevant information.

To paraphrase Spider-Man, "With great flexibility comes great responsibility." Although your policy should allow flexibility in deciding whether an employee must self-quarantine, you must ensure you apply it fairly and evenly. Some employees may accuse you of discrimination or favoritism if they are required to self-quarantine after travel but other employees are not.

You should make notes anytime your policy comes into play about what factors you considered when deciding whether a particular employee had to quarantine, including:

- What website or information you used to decide whether the destination was a hot spot (maybe even print it off);
- How the employee traveled;
- What she did to physically distance;
- Whether she wore a mask;
- How long she was at the destination; *and*
- Any stops she made at hot spots along the way.

You don't have to share the reasons for your decision with the employee, but you may need to be able to explain later if you're being sued why employee A had to quarantine but employee B didn't. Save your notes in a file, either the employee's personnel file or a separate file for COVID-19 quarantines.

Do you have to pay employees for self-quarantine?

If you require an employee to self-quarantine following travel, the next question will be whether she will be paid for staying at home if she is ready and willing to work but you are requiring her to stay home. It certainly isn't her fault we are experiencing a pandemic, and therefore, you may be inclined to pay for any self-quarantine period. I would advise against paying for quarantine because it may create an incentive for some employees to travel to COVID-19 "hot spots" to get time off with pay.

If you are not going to pay your employees for any period of self-quarantine, what can you do? The best option is to have them work remotely from home if possible. Of course, not all employees' job duties are amenable to remote work. In that case, your policy may either permit or require employees to use vacation time, sick leave, or other PTO during any period of quarantine. If they have no more PTO, then the quarantine period would be an unpaid leave of absence.

You must keep in mind the requirements of the FLSA and any similar state law, however. If you have exempt, salaried employees, you may not deduct from their salaries for any week in which they perform any work. But if they are quarantined for an entire week, you are not required to pay them in weeks for which they perform no work. Also, if you offer a bona fide leave plan to exempt, salaried employees, you may require them to take leave days during quarantine periods.

Also remember that an employer-directed quarantine period is entirely different from other COVID-19-related time off. While you aren't required to pay employees for quarantine periods you direct them to take due to travel, the FFCRA requires you to provide paid time off when:

- The employee is subject to a federal, state, or local quarantine order, not just an employer directive;
- She has been advised by a healthcare provider to self-quarantine;
- She is experiencing COVID-19 symptoms and seeking a medical diagnosis;
- She is caring for another individual subject to a quarantine order or doctor-directed self-quarantine; *or*
- She is caring for a child whose school or daycare is closed for COVID-19-related reasons.

It could be that both situations apply—for example, after traveling to a hot spot, an employee is ordered by a doctor to quarantine. In that case, the FFCRA would apply if your business is subject to it, and you would be required to provide the employee with PTO.

How to handle spring break travel in a COVID-19 world

After being cooped up for nearly a year because of COVID-19, many employees may be looking to take spring break getaways in the coming months. As is the case with most issues involving the pandemic, however, the travel opportunity creates several employment law concerns and considerations for employers to navigate.

With respect to travel, the CDC now recommends viral testing be completed one to three days before individuals depart on a trip and conducted again one to three days before they return home. For travelers entering the United States after traveling abroad, a negative COVID-19 test three days before their return isn't just a recommendation—it's a *requirement* for reentry into the country as of January 26, 2021.

The CDC further advises individuals should get tested three to five days after travel and stay home for seven days after their return. If they're unable to get tested, the agency recommends they stay home for 10 days instead to monitor for any symptoms.

The smiles on employees' faces before they go out on a week of PTO may make it obvious a vacation trip is in their near future. Nevertheless, the EEOC COVID-19 guidance *FAQ* notes employers may inquire into the reason for their absence from work, including asking where they will travel (regardless of whether the trip is personal). Therefore, there's no problem in asking why an employee is requesting time off this spring (other than the jealousy it may induce).

The less clear question, however, is whether you should require employees to quarantine or receive a negative COVID-19 test after their travel but before returning to the office. For employees electing to travel during the spring break period, you have the right to require them to follow any CDC-recommended quarantine period upon their return, including using any hours in their PTO bank to cover their absence, unless the relevant policy has language mandating otherwise.

Similarly, you have the right to assign employees to work remotely during the posttravel quarantine period (if their job duties allow) or require them to take an unpaid leave of absence (assuming they don't wish to use PTO to cover their time and have the right to decline to use it).

One caveat: An applicable CBA may impose different requirements on an employer-mandated use of PTO, so you should review any union contracts to make sure you aren't inadvertently violating any relevant CBA.

As for mandating a negative test before returning to work, this would likely be something you can require: The same EEOC guidance FAQ discussed above notes employers may "take screening steps to determine if employees entering the workplace have COVID-19 because an individual with the virus will pose a direct threat to the health of others."

Further, the same guidance states the ADA "does not interfere with employers following recommendations by the CDC or other public health authorities regarding whether, when, and for whom testing or other screening is appropriate." As noted above, the CDC recommends individuals get tested upon returning from travel.

As spring break season approaches, you'll need to balance your employees' desire for fun in the sun with the company's duty to maintain a safe and COVID-19-free workplace. To comply with the current CDC travel guidelines, you may have to keep them out of the office for a longer period than their beach getaway.

Weighing whether to use waivers

As stay-at-home orders were being lifted across the country, many businesses began considering liability waivers for clients and/or customers to sign. Here are some general principles to follow in deciding whether they make sense for your enterprise:

- **Liability waivers are limited.** Courts generally won't enforce waivers that contravene public policy (we don't yet know where the coronavirus falls), excuse intentional conduct, or attempt to avoid liability for gross negligence. So, while a liability waiver is a good idea, it cannot substitute for following the standard of care for your industry.

  In the coronavirus context, "standard of care" means you at least need to follow the CDC and Executive Order guidelines for your business. If your industry has a national governing body or trade group, it also may have guidelines you need to follow.

  Being able to say you followed the prevailing legal requirements and/or industry standard (whichever is stricter) will be helpful. Your insurance policy and insurance broker may be able to provide additional guidance. Also, remember, best practices may change over time, depending on the severity of any outbreak in your area.

- **Don't overpromise.** In any waiver, website, or other publicly available documents, be careful what statements you make about precautions your business is taking.

  For example, if you say on your website you are following all guidelines but you miss a few, then you may have a harder time enforcing a liability waiver. Only promise what you can do, and do what you promise.

- **Be very clear.** If you ask your lawyer to draft a waiver for you, be sure clients and customers will read and understand all of it. The more legalese the waiver contains, the harder it will be to understand and enforce. If you don't understand it, then the people signing it won't get it either. Don't hesitate to send it back and ask for a version you can understand.

  Furthermore, be very clear what rights a person is waiving. The waiver should include all claims as well as costs and expenses. If there is any confusion, a court will construe the waiver against your business.

- **It's a two-way street.** Finally, reiterate that individuals signing the waiver also have a responsibility related to their health. Take the opportunity to have them reaffirm they (1) have no symptoms, (2) haven't traveled to areas of known infection in the last 14 days, and (3) haven't come in contact during that stretch with anyone showing symptoms. Getting through the coronavirus will be a group effort, and the people signing the waiver need to be part of the team.

Best practices for employers with 'essential employees'

Employees at grocery stores, gas stations, and the many shops now offering curbside service are going to experience the most potential exposures. When fighting over whether their injuries are compensable under workers' comp schemes or through traditional lawsuits, litigators and courts alike are going to ask, "Did the employer follow state, federal, or health authorities' safety guidelines? Did it limit the number of guests in the store at any time? Did it make antibacterial soap or face masks available for staff?"

Many businesses have developed creative solutions to keep their doors open during this crisis; however, that same creativity should also be used when thinking about safety. And employers will be asked to consider not only basic pandemic procedures but also specialized guidance or concerns raised by industry and trade associations, unions and employee advocates, and employees themselves.

Taking any proactive steps now will be crucial in the years to come, as plaintiff lawyers second-guess pandemic decision-making. It's not yet clear where the line will be drawn on intentional torts, substantial certainty, and viral transmission in the context of workers' comp. What is clear is that employers must act now to protect their employees and their businesses.

Best practices for all employers

Employers should place posters at the entrance and around the workplace encouraging employees to:

- Stay home if they are or may be sick, especially if experiencing fever, cough, or shortness of breath;
- Engage in appropriate cough and sneeze etiquette; *and*
- Maintain hand hygiene.

Employees who appear to have symptoms of respiratory illness, including cough or shortness of breath, should be separated from other workers and sent home immediately. They should remain home until they're free of fever or its symptoms for at least 24 hours without the use of medication, including over-the-counter treatments.

Employers need to make sure employees are aware of any paid/unpaid sick time and personal leave policies. Also, employers should be flexible about work-from-home policies for employees who are sick or staying home to care for a sick family member.

If employees become sick while traveling, they should promptly notify their supervisor and contact a healthcare professional if needed.

Employers also should:

- Supply additional tissues, disposable wipes, hand sanitizer, and no-touch trash cans throughout the workplace;
- Encourage employees to wipe down commonly used surfaces;
- Ensure all soap, tissue, hand sanitizers, and other hygiene supplies are well stocked; *and*
- Consider adding more wash stations to make handwashing not just easy but also visible to others.

Develop an infectious disease protocol compliant with safety laws and regulations. The plan should address issues such as:

- When employees may be sent home because of illness and under what circumstances they may return;
- When an employee should disclose potential exposure and how the disclosure will be treated;
- Whether and when employers may want employees to use PPE, such as face masks or gloves, and how it will be implemented;
- What leave benefits are available and restate any required procedures for their use;
- How the employer will maintain employees' privacy; *and*
- Who will be the designated point of contact for the plan.

To streamline and organize communications, employers may set up an internal webpage to communicate coronavirus information. That would allow for consistency in messaging and, equally beneficial, provide assurance to employees that their companies are taking the risk seriously and addressing it proactively. A hotline number also may be helpful.

Employers also should review handbooks and other policies that may come into play when responding to employee leaves because of the coronavirus. For instance, policies covering absence due to illness or job abandonment based on absence should be reviewed for possible modification.

Screening and testing

Under the Americans with Disabilities Act ADA, you may conduct mandatory medical tests of employees if the exams are job-related and consistent with business necessity. According to the EEOC, you may take steps to determine if employees entering your workplace have contracted COVID-19—including testing—because anyone with the virus may pose a direct threat to others. The agency encourages you to use reliable and accurate testing methods based on the most up-to-date guidance from public health authorities.

If you choose to test employees as a condition of returning to the workplace, be sure to develop and apply your testing policy consistently and objectively. Targeting the testing toward certain groups of employees based on a protected class status (e.g., age, an actual or perceived disability, or national origin) could subject your business to a discrimination claim.

In separate guidance documents, the EEOC and OSHA have addressed questions about temperature screening, COVID-19 testing, and related issues concerning confidentiality and recordkeeping. Here's what you should know before implementing a screening or testing program.

Temperature screening

Employers can lawfully check the body temperatures of employees entering the workplace. Generally, measuring an employee's temperature is a medical exam, and the ADA requires it to be "job-related and consistent with business necessity," according to the EEOC. The exams meet the standard if they're necessary to determine whether employees have a medical condition that would pose a "direct threat" to health or safety.

Applying the standard to the COVID-19 pandemic, the EEOC has said employers may take steps to determine if employees entering the workplace have the virus because an infected individual will pose a direct threat to the health of others. Because the CDC and state and local health authorities have acknowledged community spread of the coronavirus and a temperature of greater than 100.4° F as one possible indicator of infection, employers may measure employees' body temperatures. OSHA has noted nothing in the OSH Act or its regulations prohibits employer screening for COVID-19, including conducting temperature checks, which may be part of your more comprehensive plan for monitoring workers' health during the pandemic.

Both the EEOC and OSHA urge employers to act cautiously on the results. Even if individuals don't have a fever, you shouldn't presume they also don't have the virus that causes COVID-19.

Both agencies also set forth their respective requirements for recording temperature check results. The OSHA guidance explains employers aren't required to make a record of temperatures when they screen workers but may instead conduct the reading in real time. If records are created by a physician, nurse, or other health care personnel (or a technician), they qualify as medical records under the OSH Act's access to employee exposure and medical records standard, with retention mandated for the duration of employment plus 30 years and a confidentiality requirement.

Even if the records aren't covered under the OSH Act because they're created by someone other than a physician, nurse, etc., the ADA's requirements for maintaining medical information confidentially will apply to documentation of the temperature check results (such as a log of employee temperatures), along with a one-year record retention requirement. The OSHA guidance suggests an alternative: Instead of conducting on-site checks, you may choose to implement a program requiring employees to

(1) conduct temperature checks and symptom monitoring at home before arriving for work and (2) stay at home if they have a fever or other signs of illness.

COVID-19 testing

The EEOC and OSHA also agree employers can conduct a COVID-19 test to detect the presence of the virus. The EEOC's reasoning is the same as for temperature checks: A test for the virus is a medical exam that's "job-related and consistent with business necessity" because it may detect whether individuals entering the workplace have COVID-19 and pose a direct threat to others. The agency reminds employers that, consistent with the ADA standard, the tests must be accurate and reliable. OSHA adds there is no prohibition against such testing under the OSH Act. The record retention and confidentiality requirements are similar to those applying to the temperature checks.

The EEOC's position makes some sense based on its rationale for condoning testing for the virus. Unlike with the viral testing, antibody testing reportedly identifies only if a person has already had the disease. Assuming at least some period of immunity from infection, the individual arguably isn't putting his own or other employees' health at risk. In other words, the scenario doesn't fit the "direct threat" standard applied to viral testing. Nevertheless, the EEOC advised it will continue to monitor CDC recommendations and could update its position.

What about applicants and new hires?

If you're in the fortunate position of being able to hire new workers, here are a few things you should know:

- You may screen candidates for COVID-19 only after making a conditional offer as long as you do so for all people in the same job category;
- You may delay the start date if a new hire has the coronavirus or its symptoms;
- You may withdraw a job offer if you need someone to start right away, and the employee has COVID-19 or its symptoms; *and*
- You may not delay the start date for pregnant women or those over 65 simply because they're at greater risk of contracting the coronavirus.

Testing protocol

Here are a few things for employers that want to implement a COVID-19 testing protocol.

- It's ideal for tests to be administered by medical professionals. HR or environment, health, and safety professionals, though, are potential alternatives. Another best practice is to conduct testing while employees are on the clock.
- For large plant-like environments, you may consider a "drive-through" approach similar to the public testing centers being set up at retail locations. It may not be feasible in an office-building setting, which could necessitate a staged entry approach or additional direction to maintain adequate line spacing.
- If you don't want to test the whole workforce, it may be defensible to test only employees who pose a higher risk, but it's important to be consistent and document the basis for your decision.
- To keep the process confidential, testing protocols that permit employees to discern the results received by their coworkers should be avoided whenever possible.
- Employee medical records should be treated as part of the company's confidential medical files and retained per any applicable regulatory requirements. Retaining all testing records would likely necessitate more administrative paperwork, but these records could be needed if an employee later alleges discriminatory exclusion from work because of some protected status (e.g., disability, age, race, sex, etc.).

Steps to take if employee refuses to test

Even though testing is permitted, certain employees may resist the procedure. If so, you should first ask why the individual is refusing to participate. Your next step may depend on the reason given.

Religious objections

An employee may cite religious reasons for refusing to take a COVID-19 test. Under Title VII, you're required to accommodate employees' "sincerely held" religious beliefs that can be handled without undue hardship. An "undue hardship" exists if the accommodation would impose more than a *de minimis* (minimal) cost on your operations.

A refusal to test may create an undue hardship because a COVID-19 infection in the workplace poses a direct threat to others. Other accommodations may be possible, however, in the manner or logistics of the testing, depending on the employee's religious beliefs. You and the individual should engage in a discussion to determine if an accommodation exists.

Disability concerns

A similar discussion should occur if an employee cites disability-related reasons for refusing to be tested. The ADA requires you to provide reasonable accommodations to qualified individuals with disabilities, provided the solutions don't constitute an undue hardship.

The threshold for "undue hardship" under the ADA is much higher than for religious accommodations. Nonetheless, depending on the employee's disability constraints with testing, accommodations may be possible in the examination process.

Personal reasons

Other employees may resist testing for entirely personal reasons. Under the circumstances, you may remind them that all medical information will remain confidential.

Discipline and documentation

If an employee continues to refuse to follow your mandatory testing policy, you may discipline and/or exclude him from the workplace until he agrees to be tested. You should document any refusal to cooperate.

Documenting the refusal (and the employee's workplace departure) is particularly important in the event of a subsequent OSHA investigation. OSHA has issued a new requirement (reversing previous guidance) that all employers must investigate and determine whether an employee with COVID-19 contracted it at work. Maintaining documentation demonstrating your efforts to maintain a safe, COVID-free workplace (including showing an employee was sent home after refusing to test) will be important.

Antibody testing

Relying on the CDC's *Interim Guidance for Businesses and Employers to Plan and Respond to Coronavirus Disease 2019 (COVID-19)*, the EEOC has affirmatively stated employers cannot require COVID-19 antibody testing before permitting employees to reenter the workplace.

Antibody test is a medical exam. The CDC's interim guidelines state that antibody test results "should not be used to make decisions about returning persons to the workplace." The EEOC stated that an antibody test constitutes a medical examination under the ADA, which are only appropriate when they are "job-related and consistent with business necessity."

Because of the guidance from the CDC, at this time, an antibody test doesn't meet the ADA's "job-related and consistent with business necessity" standard. Therefore, requiring antibody testing before allowing employees to reenter the workplace isn't allowed under the ADA.

General principles

If you choose to perform COVID-19 viral tests, temperature checks, or other symptom screening, the EEOC and OSHA guidance make clear the processes must be conducted on a nondiscriminatory and nonretaliatory basis. You can't presume individuals who test negative for the virus one day or don't have a temperature when arriving at work present no hazard to others in the workplace because they may acquire the virus later.

Therefore, you should continue to implement policies and practices to prevent the transmission of COVID-19 in the workplace, such as good hygiene practices, social distancing, cleaning and disinfection, and workplace controls. The latter may include installing physical barriers or shields to separate workers, adding enhanced ventilation, allowing more teleworking, and limiting in-person meetings. Be sure employees are wearing appropriate face coverings, and provide PPE in accordance with OSHA's applicable standards.

Return to work

As employers begin calling back employees after the COVID-19 slowdown, they're confronting a host of legal and practical challenges.

As with all policies and procedures, you should ensure any return-to-work plan is implemented uniformly, without a disproportionate impact on any protected class. You must remember that although the pandemic has created a crisis method of operating, once the dust settles, employers will be held accountable to state and federal employment discrimination laws.

Keeping the workplace safe

OSHA requires employers to provide a workplace "free from recognized hazards that are causing or are likely to cause death or serious physical harm" to employees. To minimize the risk of complaints filed with OSHA and/or workers' compensation claims, you are encouraged to follow the recommendations of the CDC for maintaining a healthy work environment. CDC and state-mandated recommendations include, but are not limited to:

- Ensuring sick leave policies are flexible and consistent with public health guidance, and employees are aware of and understand the policies.
- Reviewing HR policies and procedures to ensure they are consistent with public health recommendations.
- Connecting employees with employee assistance programs (EAP), if available.
- Providing employees with break time for repeated handwashing throughout the workday.
- Placing conspicuous signage alerting staff and customers to keep six feet of physical distance.
- Taking measures that support respiratory etiquette and hand hygiene for employees, customers, and worksite visitors.
- Performing routine environmental cleaning and disinfection.
- Performing enhanced cleaning and disinfection after persons suspected or confirmed to have COVID-19 have been in the facility.
- Isolating employees who appear to have COVID-19 related symptoms or who have tested positive for COVID-19.
- Discouraging employees from using other employee's phones, desks, offices, or other tools and equipment.
- Providing disinfecting supplies, such as wipes and hand sanitizer, in multiple locations throughout the workplace.
- Limiting in-person meetings and gatherings and using videoconferencing and/or teleconferencing whenever possible.
- Encouraging employees to notify their employer if they are experiencing COVID-19 symptoms, have tested positive for the virus, or if someone in their family is experiencing symptoms or has tested positive.

On a practical level, this means that when considering the new workspace, it should not only look clean but also be fairly sparse. *To ensure social distancing within the confines of smaller workspaces, you may be forced to implement staggered shifts or rotating days/schedules.* You must also consider maintaining supplies of personal protective equipment for employees, such as gloves and masks.

On April 8, OSHA issued an advisory notice indicating employers are prohibited from retaliating against employees who report unsafe and unhealthful working conditions during the COVID-19 pandemic. Retaliation can include termination, demotion, denial of overtime, denial of a promotion, and/or reduction in pay or hours.

As with all employee complaints, you are advised to be proactive in handling the employee's concerns and to take swift and prudent remedial actions in addressing any health-and-safety-related issues. *If no action is warranted, you should document your investigation of the employee's complaint and explain why no remedial action is needed.*

OSHA's reopening guidance

On June 18, OSHA issued guidance on returning to work for businesses deemed nonessential. The guidance is intended to supplement the agency's previously issued guidance, CDC guidelines, and state and local-specific information and reopening requirements. You can use the guidance to develop policies and procedures to ensure your employees' safety and health.

Phased reopening

OSHA recommends a three-phase reopening process to be aligned with the lifting of stay-at-home orders and other specific federal, state, and local requirements. Businesses should generally follow these guidelines:

- **Phase 1.** Make telework available when feasible. Limit the number of people in the workplace to maintain strict social-distancing practices. Limit nonessential business travel. When feasible, accommodate workers at higher risk of severe illness, including workers over age 65 and those with serious underlying health conditions. Additionally, consider extending special accommodations to workers with household members at higher risk of severe illness.
- **Phase 2.** Continue to make telework available when possible. Nonessential business travel can resume. Limitations on the number of people in the workplace can be eased, but moderate to strict social-distancing practices should continue. Continue to accommodate vulnerable workers as identified in the first phase (above).
- **Phase 3.** Resume unrestricted staffing of work sites.

Although OSHA recommends providing accommodations to older workers and those with vulnerable family members during the first and second phases, the measures aren't legally mandated. The EEOC guidance, "What You Should Know about COVID-19 and the ADA, the Rehabilitation Act and Other EEO Laws," clarifies employers aren't required to provide coronavirus-related accommodations to older workers merely because of their age. In addition, employers can't unilaterally exclude older workers from the workplace based on their age.

The ADA may require reasonable accommodations that could offer protection to an employee whose disability puts the individual at greater risk from COVID-19 but doesn't require you to provide accommodations based on a disability of an employee's family member. Although not required, you may consider voluntarily making temporary accommodations in those situations during the pandemic if feasible.

OSHA recommends during all stages of reopening, you should develop and implement plans that address preventing, monitoring for, and responding to any emergence or resurgence of COVID-19 in the workplace or community. Increases in the numbers of infected and sick employees in a workplace can create a need for contact tracing of individuals who visited the site and enhanced cleaning and disinfection practices—or even a temporary closure of the business.

9 guiding principles

During all phases of reopening, OSHA urges employers to implement strategies to address nine principles. Many of the principles are similar to those recommended by the agency in its earlier guidance for preparing the workplace for COVID-19:

1. **Hazard assessment.** Determine when, where, and how workers might be exposed to the virus in the course of their job duties.
2. **Hygiene.** Encourage frequent and proper handwashing, provide workers with hand sanitizer when they can't readily wash their hands, and identify high-traffic areas for enhanced cleaning and disinfecting.
3. **Social distancing.** Limit business occupancy, demarcate flooring in six-feet zones, and post signs reminding workers to keep at least six feet between one another.
4. **Identification and isolation of sick employees.** Ask employees to self-evaluate for COVID-19 symptoms before coming to work, and establish a protocol for managing people who become ill in the workplace.
5. **Return to work after illness or exposure.** Follow CDC guidelines for discontinuing self-isolation and returning to work after an illness or exposure, and ensure workers who have been exposed to the coronavirus are monitored for symptoms.
6. **Controls.** Implement engineering controls (e.g., installing physical barriers/shields, adding enhanced ventilation) and administrative controls (e.g., staggering work shifts, replacing in-person meetings with video conference calls, and ensuring workers wear face coverings), and provide workers with appropriate PPE.
7. **Workplace flexibilities.** Consider revising your policies for telework and sick leave to minimize workers' exposure risk, and communicate the options to your staff.
8. **Training.** Provide training covering your COVID-19 response measures, cloth face coverings, and the proper use and maintenance of PPE.
9. **Antiretaliation.** Ensure workers understand their rights to a safe work environment, know whom to contact with concerns about workplace safety, and realize they may report coronavirus-related safety concerns without fear of retaliation.

Additional guidance

Additional guidance comes in the form of a Q&A section addressing issues such as workplace health screening. The reopening guidance confirms neither the OSH Act nor the agency's standards prohibit employers from conducting SARS-CoV-2 (the virus that causes COVID-19) testing, as long as it is done in a transparent manner for all employees and isn't retaliatory. The EEOC guidance likewise makes clear you may conduct the testing on a nondiscriminatory basis, consistent with the ADA's requirement that medical tests of employees be "job-related and consistent with business necessity."

Applying the ADA standard to the current pandemic, you may conduct tests to determine if employees entering the workplace have the COVID-19 infection (but not the antibody) because an individual with the virus will pose a direct threat to the health of others. OSHA cautions, nevertheless, you can't presume individuals who test negative for the virus present no hazard to others in the workplace and should therefore continue to implement basic hygiene, social distancing, workplace controls and flexibilities, and employee training described in its guidance.

OSHA's reopening guidance and the EEOC's guidelines apply the same approach to other screening, such as temperature checks, again advising they be only one part of a comprehensive program to monitor worker health during the pandemic.

OSHA's guidance also comments on recordkeeping, explaining employers aren't required to make a record of temperatures when they screen workers but may instead acknowledge a reading in real time.

If records are created by a physician, nurse, or other healthcare personnel or technician, they qualify as medical records under the OSH Act's access to employee exposure and medical records standard, with its retention (duration of employment plus 30 years) and confidentiality requirements. Keep in mind, however, even if the Act doesn't cover the records because were created by someone other than a physician or nurse, the ADA's requirements for maintaining their confidentially will apply, along with a one-year record retention requirement.

OSHA has no standard or regulation specific to SARS-CoV-2 or COVID-19. Likewise, the agency's reopening guidance isn't a standard or regulation creating any legal obligations. Nevertheless, covered employers are responsible for providing a safe and healthy workplace free from recognized hazards under the OSH Act's General Duty Clause. The guidance is a tool to assist in performing a hazard assessment and creating workplace policies and practices that satisfy your obligations under the clause.

To the extent specific OSHA standards for respiratory protection, PPE, and sanitation standards apply to your workforce, you should incorporate provisions in your policies and practices to comply with them.

Take a cue from the EEOC

Like almost everyone else, the EEOC has been doing some things differently since COVID-19 arrived, including changes to office procedures. See if there are any that you might be able to incorporate into your workplace.

Although most companies have been trying to reopen in some form, EEOC offices have remained closed to outside traffic. All contact with the agency, including filing new charges, is either electronic (via e-mail or the Web portal) or by phone. Investigations are relying on documentary evidence and phone interviews, which, for the most part, is no different than before the pandemic. Fewer mediation conferences are being held (and none in person).

EEOC employees tell me they have been advised to expect at least two weeks' notice before the office sites reopen, and they haven't heard anything further yet.

To preserve charging parties' rights, the EEOC temporarily stopped issuing charge closing documents (right-to-sue letters) on March 21, 2020, unless the party specifically requests it. The document gives the individual the right to file a federal lawsuit within 90 days.

As a reason for taking the step, the EEOC says it was concerned people with pending charges might believe they had to choose between "jeopardizing their safety and protecting their right" to file a lawsuit during the COVID-19 pandemic.

Be wary of risky decisions when bringing back employees

Only a few weeks or months after furloughing or laying off employees, many employers are beginning to bring some of the same people back to work on a staggered basis. Under those circumstances, pay close attention to your decisions about who gets to return and when. If you choose one person or group of individuals to return over another, you could potentially expose your business to liability:

- If you decide to bring back a group of employees under the age of 40 because they're possibly at less risk for developing complications from COVID-19, there could be a disparate impact based on age, which is a protected class.
- If you decide against calling back an employee you believe has an underlying condition that makes her vulnerable to the coronavirus, there could be disparate treatment against her based on an actual or perceived disability.

- If you opt to bring back a Caucasian employee as opposed to an Asian worker because of a stigma related to the virus, you could face a race or national origin discrimination claim.

To avoid potential discrimination claims, you should carefully review the demographics of your decisions. Strive to treat similarly situated employees equally, and ensure you have legitimate business reasons for your decisions about which individuals to call back.

What if workers unwilling to return?

Restrictions put in place because of the COVID-19 pandemic are beginning to ease in many parts of the country, and employers are starting to call back the millions of workers who joined the ranks of the unemployed a few months ago. Many workers are champing at the bit to get back to work, but others are hesitant. And that can put already-struggling employers in a bind.

Workers have a variety of reasons for not wanting to return to work. Many are fearful of catching the virus since it remains a threat. Others have taken on childcare responsibilities that haven't changed just because their employer has resumed operations. Others are caring for members of their household stricken with COVID-19. Still others are happy to continue collecting unemployment benefits.

A hasty decision to fire someone who doesn't want to return can turn into trouble. First, the employer would need to understand whether the employee qualifies for some type of legally protected leave—perhaps paid leave under the new FFCRA or maybe leave as an accommodation under ADA or some other federal, state, or local legislation.

Employers faced with workers refusing to return to work need to evaluate each case to determine whether a reluctant employee has a legally protected reason for not going back to work. For example, an employee suffering from medically documented extreme anxiety or some other condition that would qualify as a disability under the ADA may be entitled to a reasonable accommodation, which might mean allowing the employee more time off.

An accommodation doesn't have to be time off. Telework is often a suitable accommodation. But employers aren't required to provide an accommodation if it presents an "undue hardship"—one that presents a "significant difficulty or expense" for the employer.

Many employees reluctant to return to work may cite anxiety, but that may not qualify them for leave or unemployment benefits. Unless the anxiety rises to the level of a disability as that term is defined in the law, state labor agencies are likely to consider an employee who refuses to return to work as voluntarily unemployed and therefore ineligible for benefits.

If an employee doesn't have a qualifying reason for not going back to work, you can terminate him, but you must treat similarly situated employees the same and not retaliate against employees for any protected activity, such as taking legally protected leave.

5 possible scenarios

If an employee calls or e-mails to let you know he won't be returning to work, you first need to find out why. Depending on the answer, any number of scenarios can play out. Here are five.

1. **Employee has been exposed to or tested positive for COVID-19.** Your organization is safer if the employee remains home, quarantines for the appropriate amount of time, and preferably gets a negative test before returning to work.

During the away time, you can have the employee check in weekly with a supervisor or a designated HR person to determine when it's suitable for him to return to work. He also may be eligible for paid leave under the FFCRA if your organization is covered.

2. **Employee says she is part of a higher-risk group and doesn't feel comfortable returning to work.** Your organization has the right to ask more questions and/or request medical documentation confirming she falls into the higher-risk group. If her status in the group is confirmed, your organization must determine whether it's covered by the FFCRA and, if so, whether the employee is also covered (beyond the initial two weeks). If yes, let her know she is eligible for pay and leave benefits under the Act.

   If your organization isn't covered by the FFCRA, you still need to determine whether you fall under the jurisdiction of the FMLA and, if so, whether the employee is eligible for protected leave. If yes, your organization should send the appropriate FMLA notification and allow her to take up to 12 weeks of unpaid leave.

   If your analysis under the FFCRA and the FMLA both result in a no answer, then you must determine whether the employee is seeking to work from home, work with modifications, or not work at all. If she is aiming to work from home or with modifications (for example, relying on a different schedule or a modified work environment with plexiglass or limited exposure to others), you must go through the interactive process under the ADA to determine whether you can provide a reasonable accommodation. If the answer is no, you're free to terminate the individual.

   While the process may seem cumbersome, it's necessary to protect your organization from future litigation.

3. **Employee is caring for a relative subject to coronavirus-related quarantine or a child under 18 whose school or childcare facility is closed.** Your organization must go through the above analysis with regard to eligibility under the FFCRA and the FMLA. If the answer is no to eligibility under both statutes, then you're free to provide a discretionary leave of absence (advisably for a set period of time) or terminate the individual.

   Additionally, while the third scenario doesn't require the ADA analysis, there's no law prohibiting you from allowing the employee to work from home or have other modifications if feasible for the position. Just be consistent across race, age, sex, and other protected categories.

4. **Employee is uncomfortable returning to work until a cure for COVID-19 is found.** Your organization is under no obligation to keep the employee employed. Americans are having to make difficult and deeply personal decisions about whether to return to work during the pandemic. Likewise, employers are balancing employee safety with the business necessity to resume operations. In some instances, you'll choose to reopen, and employees will decide not to return.

   If feasible, you may allow employees to work from home for an extended period, which would help morale. But if you need them to be physically present in the workplace, you may have to make the tough decision to discharge those who refuse to return.

5. **Employee wants to put off returning until after jobless benefits run out.** Your organization is again under no obligation to keep the employee employed. Unemployment benefits are for people who don't have work—not for employees who don't wish to work.

Things to consider before requiring employees, visitors to wear face masks

Wearing a face covering has become a political signal in the polarizing clash between those who see doing so as a moral responsibility and others who view it as an infringement on their freedom. Consequently, employers can likely expect

resistance—including the potential for aggression and violence—if they establish a face-covering policy. Before taking action, you should plan carefully.

Even in states without mask mandates, employers have a general duty under the OSH Act to provide a safe workplace for employees. The protection may include a company policy on masks and social distancing. You may require employees to wear masks in the workplace during the pandemic, according to general guidance from the EEOC.

Accordingly, we recommend employers have a policy for masks in the workplace. The policy should be based on guidance from the CDC and state, local, or county governments and departments of health.

Be sure to accommodate employees with health conditions or religious limitations that prevent them from wearing masks. You may require them to present certification from a healthcare provider about the medical conditions.

If you decide to mandate face coverings for employees, make masks available to them and uniformly enforce the policy. As with all other employment policies, you may discipline workers for failing to wear the masks.

Again, be sure employees with legitimate medical or religious reasons are accommodated by other means, for example, allowing them not to wear a mask, isolating their workstation, or permitting them to work remotely.

Working with managers who are opposed to masks

Most managers are committed to the success of their organizations, employees, customers, and communities. They work hard to provide safe and healthful workplaces. They give their best efforts to manage in good-faith compliance with the myriad of federal, state, and local laws applicable to their organizations. They are generally mission critical to protecting their organizations against liability exposure. Even so, some organizations have faced significant manager resistance to the use of COVID-19-related face-coverings in the workplace. Why is that, and what can be done about it?

As employers, we are dealing with the human condition, which is inherently good but which suffers from certain frailties from time to time—including while in the workplace. Some manager resistance to face-coverings is likely attributable to the multiple, divergent, and conflicting opinions of medical and health experts concerning the efficacy of their use in protecting against the spread of COVID-19. Other resistance may be connected to legal and political debates concerning the constitutionality of face-covering mandates. Still other resistance may be related to discomfort or embarrassment.

Ultimately, managers should feel comfortable wearing face-coverings in the workplace when required by applicable law or employer policy, without feeling like they are compromising their personal integrity, because it's simply part of their overall duties to help their organizations and others be successful.

Managers with strong personal feelings against face-covering mandates must understand they don't compromise their personal integrity by wearing a face-covering in the workplace. To the contrary, by setting aside their personal feelings and wearing them, they actually exhibit strong leadership qualities by modeling positive behavior consistent with their longstanding commitment to help their organizations and others be successful.

From a legal perspective, owners, directors, officers, and some key managers may owe their organizations certain fiduciary duties including the duties of care and loyalty. The nature and extent of such duties depend, in large part, on state law. Some state corporate codes make the individuals personally liable for willful misconduct. Accordingly, compliance with face-covering mandates or policies may be part of managers' overall duties and responsibilities to their organizations and may help reduce the risk of personal liability.

When a manager fails to comply with a face-covering mandate or policy, such conduct may violate existing emergency health orders and the employer's concomitant expectation that all employees and business leaders will comply with applicable laws while at work or engaged in work activity away from the work premises. This is no different from a manager's duty to comply with the rules of the road while operating a vehicle for work purposes. Additionally, a manager's failure to comply with a mask mandate or policy may:

- Expose coworkers, their families, and possibly others to an increased risk of COVID-19;
- Expose the manager and business to civil liability to the government, employees, employees' family members, and the general public at a time when the employer has directed the manager and all of its other employees to comply with the mandate or policy while at work;
- Constitute insubordination with respect to a lawful directive of the employer;
- Unfairly expose other employees who follow the manager's negative lead in not wearing a face-covering to disciplinary action up to and including discharge at a time when the employer is asking the manager to model the employer's standards of conduct and positive behavior while at work; *and*
- Undermine the employer's efforts to maintain a positive and harmonious relationship among its owners, managers, and nonsupervisory employees because it gives the appearance of an "us vs. them" approach where the manager is acting "above the law," which is not the message that the employer wants to convey.

Despite the best efforts of legislators, rule makers, and enforcement agencies, the workplace is a microcosm of society with all the stresses, strains, and challenges we see play themselves out on a daily basis in our outside world. There's enough negativity outside the four walls of every business such that leaders should seek to avoid conflict from within. For leaders who are charged with setting and modeling the standard, this means being the standard all the time.

Bottom line. When you are faced with a manager's resistance to a face-covering requirement, encourage her to continue to lead with integrity and excellence in everything she does. Managers who have the most long-term, sustained success are those who have a strong commitment to a systematic, process-oriented approach that leads to continuity, predictability, and repeatability. As the saying goes, control the controllables. Challenge her to foster a culture of servant leadership where all employees are committed to helping each other develop and be successful.

Leadership is personal, not positional. It doesn't matter what one's station is within an organization—everyone has the ability to affect the organization's culture and success. Remind the manager that with one word or action, one can lift up or tear down—so lift up! When an individual engages in positive conduct for the benefit of others, other people of integrity will follow suit, and the organization, manager, and others will benefit from that kind of positive momentum at the institutional and individual levels.

Have a plan for customers or visitors

Before implementing a mask mandate for visitors, make sure your employees understand what to do when they're confronted by a customer or visitor who refuses to wear a face covering. Your workers shouldn't be placed in the position of having to push the mask policy if the customer or visitor threatens violence. The requirement should be treated like any other policy, such as "no shirt, no shoes, no service."

Your plan should start with a workplace violence prevention policy. Distribute the policy to all employees and be sure it includes a statement about your commitment to maintaining a safe working environment free from violence and intimidation, as well as the company's reporting procedure.

We strongly encourage you to have a person or a team of people available to provide guidance on threatening behavior and educate employees about how to prevent incidents from escalating to violent attacks.

Confirm the workplace violence policy covers nonemployee violence and make workers aware of the procedure for reporting customer or visitor threats and aggressions. The policy also should include guidance on when to contact law enforcement to help mitigate and prevent violence.

Violence prevention training

Once the policy is in place, conduct periodic training on violence prevention for all employees, particularly with those most likely to interact with customers or visitors. The training should include education on your emergency response plan and how employees should react to aggressive or threatening visitors. The response may include:

- Securing the business site;
- Contacting law enforcement;
- Informing coworkers and other customers of the danger; *and*
- Dealing with a media response.

Employees should have access to phones or alarms to use in an emergency.

Another suggestion: Bring in an expert, a reputable security consultant, or someone from local law enforcement to train your employees on how to handle potentially violent situations. Make clear, however, the recommendations are coming from the expert and not the employer.

Have sufficient signage on entry

Use signage outside the store or workplace as your first line of communication to let customers and visitors know (1) no one will be permitted inside without a face covering and (2) they must practice social distancing.

The CDC recommends using verbal announcements, signs, and visual cues to promote social distancing and safety initiatives, even before the customers or visitors enter your place of business. If possible, supply masks for them before they enter.

Politely request compliance

Don't put your employees in the dangerous position of escalating a confrontation because of mask enforcement. Generally, employers aren't security experts and lack the training and expertise to direct employees on how to react when confronted by a violent customer or visitor. For that reason, instruct your employees on how to politely ask customers and visitors to wear a mask and comply with social-distancing orders.

When a customer or visitor attempts to enter the building without a mask, employees should politely ask the individual to put on a face covering. They also may ask the person to leave and return when he has a mask. Again, you may wish to provide spare masks at the front door for such circumstances.

Some customers or visitors have a valid medical reason for not wearing a mask. In those situations, businesses need not require certification or medical documentation of proof for the condition. We recommend simply accepting the individual's statement.

Don't escalate situation when customer or visitor refuses to wear mask

When a customer or visitor has been asked, but refuses, to wear a mask and insists on entering the business, employees should remain calm. In any case, and especially if the customer or visitor threatens violence, they shouldn't confront the individual. Instead, they should discreetly call local law enforcement and allow the police to handle the situation.

Additionally, employees shouldn't attempt to apprehend resistant customers, block their entry, or physically attempt to force them to leave. Such a response could result in legal action against the employee or business.

Similarly, employees shouldn't get involved in disputes between customers about face masks or social distancing. Intervention is more likely to lead to physical altercations and provoke violence than to deescalate the tense situation.

What if employee becomes reinfected with COVID-19?

Although COVID-19 reinfection rates appear to be low at this time, a case was recently documented in Nevada. Consequently, you should consider how to respond if an employee catches the virus again after exhausting all available FFCRA leave (if applicable) and sick leave.

The CDC may provide additional guidance if and when reinfection cases increase. For now, "accumulating evidence supports that people who have recovered from COVID-19 do not need to undergo repeat quarantine in the case of another [coronavirus] exposure within three months of their initial diagnosis."

Still, employees who are symptomatic should isolate for at least 10 days after symptom onset and until the indicators subside, with at least 24 hours fever-free without the use of fever-reducing medications, or longer for those who are severely ill or have conditions that weaken their immune systems (up to 20 days after symptoms first appeared). Your paramount concern should be keeping sick workers out of the workplace.

Now what?! COVID-19 collides with flu season

While many workplaces are settling into a COVID-19 groove of social distancing, face masks, and hand sanitizer, we have entered flu season in the United States. Although flu season is hard to predict, the CDC says influenza activity often peaks between December and February. Consequently, many workplaces are likely to see a rise in flu activity at the same time much of the country is experiencing an increased rate of COVID-19 infections.

Influenza and COVID-19 are both contagious respiratory illnesses with some of the same symptoms, but they're caused by different viruses. The CDC says testing may be required to distinguish between the flu and the coronavirus.

Best practices for employers

Provide flu shots for employees. If your employees are working on-site, consider contracting with a vendor to come out and give flu shots. There will be exceptions, and you may not force everyone to get a shot. But being able to get one at work may increase the number of vaccinated employees.

Moreover, if employees aren't already fully covered under your group health plan, they may appreciate the benefit of the subsidized shots, especially if nonexempt workers are allowed to get vaccinated while on the clock. Alternatively, you might provide time off for employees to get a flu shot as an incentive to be vaccinated.

Encourage workers to use sick leave. Remind employees about your sick leave policy, and strongly encourage them to use it when they aren't feeling well. Some employers have increased the amount of paid sick time available to employees or are relaxing attendance policies by eliminating any punitive effect for taking time off for an illness.

This should not be a winter when sick individuals muster up their strength and come to work even when they believe they have a cold or the flu rather than COVID-19. Healthcare and critical infrastructure employers that are challenged to sustain operations in flu-induced periods of even higher absenteeism may need to consider testing alternatives to sustain minimum staffing.

Don't ignore or downplay flu symptoms. Another area of concern is the fact that employees may initially ignore or downplay COVID-19 and flu symptoms because they are so similar to the common cold, allergies, or other ailments. The end result, however, is sick employees will come to work and infect coworkers.

Vigilant enforcement of the daily testing protocols for COVID-19 symptoms before an employee reports or starts work is critical. Reinforce the fact that if employees become symptomatic while at work, they should immediately isolate themselves and leave.

CDC offers quarantine options for employees exposed to COVID-19

On December 2, the CDC issued new guidance on quarantining: In certain circumstances, individuals potentially exposed to COVID-19 by being in "close contact" with a person who tested positive can take steps to reduce the length of the standard 14-day quarantine period. These new recommendations, however, come with significant caveats and stringent prerequisites.

Despite the simplified messaging contained in the media announcement, the CDC still maintains the safest course of action is for a close contact to quarantine for 14 days. The agency said it was issuing the new recommendations, in part, in recognition of the significant economic, physical, and mental health burdens associated with a 14-day quarantine.

If the agency offers options for people to shorten their quarantines, albeit with strict requirements (subject to local public health authority approval), it believes the public may be more willing to comply with the guidance. Also, the CDC hopes a less burdensome quarantine period will encourage more cooperation with local governments' contact tracing efforts. Employers must understand, however, the new recommendations come with increased risks for postquarantine transmission and were based on the best information available in November 2020. As a result, the CDC was reserving the right to monitor the evolving science and reconsider its advice over time.

Accordingly, you should be cautious in deciding whether to change your current COVID-19 policies because of the increased risk inherent in permitting employees to return to the workplace sooner than the 14-day quarantine period would allow.

It's also important to note the new advice has no impact on the agency's previously issued isolation guidance for people who test positive. The CDC generally recommends close contacts should quarantine for 14 days after their last interaction with the coronavirus-positive individual. During the period, potentially exposed individuals should watch for a fever (100.4 F), cough, shortness of breath, or other virus symptoms identified by the agency.

The CDC's 14-day quarantine period is based on the estimates of the upper bounds of the COVID-19 incubation period. The agency estimates the postquarantine transmission risk is between 0.1% and 3% for an individual who ends the isolation after 14 days. By advising close contacts to quarantine, the agency is seeking to reduce the risk that infected persons may unknowingly transmit the virus to others.

Options to reduce 14-day quarantine period

While stressing it still endorses 14 days of isolation, the CDC now provides for two additional options for close contacts to shorten their quarantine periods:

- 10-day quarantine, no testing. Close contacts can conclude their quarantine after 10 days without testing if they experience no COVID-19 symptoms during their daily monitoring. The CDC notes the approach still comes with risk, estimating the postquarantine transmission risk for an individual who quits quarantining after 10 days is between 1% and 10%.
- 7-day quarantine with testing. Close contacts can end their quarantine after only seven days if they receive a negative COVID-19 test result and haven't experienced any symptoms during daily monitoring. The specimen should be collected and tested within 48 hours before the time that an individual plans on concluding the quarantine. According to the CDC, the postquarantine transmission risk for a close contact who ends the isolation after seven days is between 5% and 12%.

Additional requirements to end quarantine early. According to the CDC, the following requirements also must be satisfied for quarantines to conclude before the 14th day:

- Close contacts must experience no symptoms during the entirety of the quarantine period;
- They must continue to monitor their symptoms through day 14; *and*
- They must be counseled to adhere strictly to all of the CDC's recommended nonpharmaceutical interventions (NPIs) through day 14.

The NPIs include (1) correct and consistent mask use, (2) social distancing, (3) hand and cough hygiene, (4) environment cleaning and disinfection, (5) crowd avoidance, and (6) locations with adequate indoor ventilation.

Should you change your current COVID-19 policies?

By this time, you should have a written COVID-19 policy that has been disseminated to the workforce. In addition to setting forth the basic infection prevention measures you've put in place, the policy should establish clear protocols for employees to follow if they need to quarantine based on close contact or because they've experienced symptoms and/or tested positive for the virus.

Before changing the length of the quarantine period for potentially exposed individuals, keep in mind a 14-day stint is still the safest option to minimize postquarantine transmission. If you want to lower the 14-day period, consider the potential risks. The primary risk is that by bringing employees back in after only 10 or as few as seven days, the risk of transmitting COVID-19 to coworkers and customers will be higher.

In addition, if you decide to permit a shorter quarantine period, you'll need to have confidence the employees will strictly adhere to all of the CDC's recommended additional requirements, such as socially distancing from other workers and wearing a face mask at all times. If you have concerns about their willingness to comply or your own ability to enforce the recommendations, you may want to delay making any changes and await further guidance from the agency.

Focus on safety, comfort when reopening the office

When bringing employees back to the office, the return shouldn't be as simple as just throwing open the doors. Social distancing, cleaning protocols, and air quality concerns need to be considered, health and office design experts say.

Check the building and employees

The CDC provides detailed information outlining steps employers should take as employees return to the office in *COVID-19 Employer Information for Office Buildings.*

Some of the points the CDC covers have become familiar during the pandemic, such as the importance of keeping at least six feet of distance between people, careful cleaning, and the importance of increasing the circulation of outdoor air into the building as much as possible. But other points may not be common knowledge.

For example, the CDC recommends checking for hazards associated with a prolonged building shutdown, such as mold growth, rodents or other pests, and issues with stagnant water systems. Employers also should conduct a hazard assessment to identify any potential increased risks for COVID-19 transmission.

A safe return to the office also means encouraging employees who have symptoms or sick people at home to notify their supervisor and stay home. Employees showing symptoms at work should be immediately separated from others and sent home with guidance on how to follow up with their healthcare provider.

Sick workers shouldn't return to work until they meet the criteria to come out of home isolation. Employers should carefully clean and disinfect after anyone suspected or confirmed to have COVID-19 has been in the workplace.

The CDC also suggests conducting daily in-person or virtual health checks of employees (temperature checks and/or a check of symptoms) before they enter the workplace.

Elevators and escalators present challenges for keeping distance between employees. The CDC says to encourage people to take stairs when possible and, where feasible, to designate certain stairwells or sides of stairwells as "up" and "down" to promote social distancing.

Floor markings in elevator lobbies and near the entrance to escalators can reinforce the need to keep distance between people. Also, decals inside elevators to show where passengers should stand can help.

Other suggestions include encouraging the use of face coverings by all elevator and escalator occupants and asking elevator occupants to avoid talking while inside. Elevator riders also should minimize surface touching by using an object such as a pen cap to push elevator buttons.

Helping employees deal with masks

More workers are returning to the office, but many are nervous about the continuing threat COVID-19 presents. Health professionals consistently tout masks as an effective way to reduce transmission of the virus. But masks are also seen by many as annoying and uncomfortable.

Office furniture maker Steelcase has posted a collection of articles on its website aimed at helping employers and employees manage the return to the workplace. One article offers tips on "mastering the mask" learned from essential employees who have been wearing masks in their workplaces throughout the pandemic. Suggestions include:

- **Finding a mask that works.** Those experienced in wearing a mask throughout the workday suggest shopping around for a style that works best. For example, some people prefer the kind that wrap around the face and neck instead of the kind that loop around the ears. Others like the kind that tie or have elastic going around the head.
- **Get ready.** The workers Steelcase polled suggested working up to wearing a mask all day by wearing it for a few hours at a time around home or while running errands before trying to wear it all day.

- **Take mask breaks.** The workers polled say finding a place outside or away from people to take a break from the mask can help. Frequently cleaning the skin covered by the mask and applying lotion can help prevent rashes and breakouts.
- **Be patient.** While some employees may worry they will be uncomfortable wearing a mask throughout the workday, the essential workers reported that wearing a mask may seem strange at first, but it will feel more normal after a few days.

Back to school

Teacher 'safety strikes' may create new hurdles for employers

In late July, the American Federation of Teachers (AFT) announced support of nationwide teacher "safety strikes" if health precautions aren't taken as schools reopen amid a coronavirus resurgence in some areas. The AFT, however, which represents more than 1.7 million school employees, is leaving the final decision to strike to local unions. In many states, the threat of impending teacher strikes carries a significant sting, as recent experience has demonstrated the teachers' union is prepared and willing to strike, and they enjoy ardent support by community and political officials alike.

The potential for massive teacher strikes could leave employers with difficult questions to address with respect to the FLSA, the FFCRA, and even bargaining-related issues for union employers.

Employers may find themselves asking the below questions in the coming months if schools begin to close due to teacher "safety strikes":

- **Is a teacher "safety strike" a school closure for "reasons related to COVID-19" such that working parents could be entitled to paid coverage under the FFCRA?** The FFCRA went into effect on April 1, with employee rights to the new leave policies carrying through 2020. Under the FFCRA, an employee of an organization covered by the Act (those with fewer than 500 employees) qualifies for 10 days of paid sick time if she is unable to work or telework due to a need for leave because she is caring for a child whose school or place of care is closed (or childcare provider is unavailable) "for reasons related to COVID-19." Additionally under the FFCRA, an employee of an organization covered by the Act qualifies for another 10 weeks of paid expanded family leave if she is caring for a child whose school or place of care is closed (or childcare provider is unavailable) for reasons related to COVID-19. Employers are able to receive tax credits for the paid leave provided.

  The answer to whether teacher "safety strikes" would be considered a school or place of care closure "for reasons related to COVID-19" is unclear at this time. For this reason, you should be mindful that providing your employees with paid leave under the FFCRA for caring for a minor due to a strike-related school closure may not be leave for which you can receive tax credit. It will be important to carefully track this information in the employer-required documentation under the FFCRA.

- **Even if the FFCRA applies, what if the employee already exhausted their 12 weeks of expanded family leave in the spring of 2020 due to nationwide school closures?** Even if paid leave provided to working parents and guardians under the FFCRA is applicable during teacher "safety strikes," it may not be a viable option for employees. The FFCRA operates on a calendar-year basis rather than on a school-year basis. Therefore, if one of your employees used all of her 12 weeks of expanded family leave in the spring of 2020 due to school closures related to COVID-19, she doesn't have access to any additional paid leave under the FFCRA for this school year.

For working parent employees who didn't have the benefit of the FFCRA leave, they were likely forced to take (and quite possibly exhaust) their other forms of leave in the spring of 2020. Now, widespread teacher strikes could again force you to reevaluate your attendance, leave, bring-your-child-to-work, and telework policies to determine how, if at all, they can be adapted (or even readapted) to meet the needs of your working parent employees amid an indefinite school closure due to strikes.

Employers that offer flexibility to employees by allowing working parents to change their responsibilities or duties must be mindful of how the changes do or do not affect their status as exempt or nonexempt under the FLSA and even healthcare coverage. Secondly, employers that allow employees to bring their children to work under normal circumstances may need to quickly amend a prior policy or draft a new one addressing COVID-19 protocols. Furthermore, you must be mindful to apply any new policies consistently across your workforce by neither denying nor granting working parents opportunities other employees do or do not enjoy.

Lastly, if the employer contemplating making policy changes to address the teacher strikes has a union, it can do one of two things: (1) it can enter collective bargaining with the union over the changes in attendance, leave, and other policies; or (2) it can exercise its right to make work rules to quickly create policies, knowing it will still have to bargain with the union over the effects of the changes. This will be the case regardless of whether the policies are favorable to employees.

Bottom line. Most importantly, as this year's 'back-to-school' events unfold either in the classroom or on the picket line, you should be carefully monitoring the DOL website and consulting with counsel for how any new legislation or corresponding regulations may affect you.

Vaccines

Employers that never had a vaccine policy before last year may now have or be considering implementing both flu and COVID-19 vaccine policies. Here are the issues to consider when creating, reviewing, and updating those policies.

What to consider before encouraging or requiring flu shots

While healthcare employers have long mandated flu shots for employees, many others are considering imposing vaccine requirements for the first time. Here are some issues to consider along with possible employee talking points if you decide to encourage or require the shots.

Federal law doesn't prohibit vaccine requirement

Under federal law, employers may impose reasonable vaccine requirements. In most situations, however, you should be prepared to provide exemptions or accommodations for bona fide religious or health objections under Title VII and the ADA. Employees asserting disability-related reasons have the highest level of protection.

Some states may permit employees to raise other reasons for being exempted from the vaccine requirement. Therefore, you should always consult with employment counsel about the state law's impact on your policy decisions.

Standard accommodation for vaccine-refusing employees

Healthcare employers have been requiring the flu vaccine for years now; in fact, some of them have been mandated to do so. You can expect the practices that have worked in the medical arena generally suffice for most other businesses.

When healthcare employers receive a valid religious or health-related request from an employee to avoid the flu vaccine, they generally accommodate the individual by requiring him to wear a face mask while working.

Factors to consider when pinning down your flu shot policy

Employers in nonhealthcare settings will need to decide if they will encourage or mandate flu vaccines. (For what it's worth, the EEOC prefers for employers to encourage the shots.) Factors to consider include:

- Current risk of transmission in the workplace (e.g., whether employees are working closely or interacting with consumers);
- Special business justifications beyond just weathering the flu season's likely attendance fallout in the midst of a pandemic (e.g., working with vulnerable populations or doing a job for which you would expect the rates of transmission to consumers or coworkers to be high);
- Whether health safety measures are in effect (e.g., face masks are already required);
- Your level of expertise to promptly evaluate religious, health, and personal requests for accommodations; *and*
- Risks of harming employee morale and/or losing valued workers if a flu vaccine is mandatory.

Work with legal counsel to assess how the factors line up for your particular work setting and population.

If you mandate flu shots, expect resistance

Nationally, a slight majority of U.S. adults don't receive the flu vaccine each year. For the 2018-19 flu season (the most recent season for which CDC statistics are available), only 45.3% of adults got the vaccine.

Because a healthy (or not-so-healthy) proportion of adults opt out of the flu vaccine each year, any employer mandating the shots should be prepared to tackle morale issues and a number of accommodation requests—many of them referencing a mix of religious, health-related, and "personal liberty"-related reasons.

Keep in mind the healthcare environment has established wearing masks to be a standard accommodation for refusing to get a shot. So, if you're already requiring face coverings, will you feel the damage to morale caused by mandatory vaccinations was worth it if a not insignificant number of employees remains unvaccinated for religious or medical reasons?

Whether you decide to encourage or mandate the flu shots, you should be able to articulate the importance of vaccinations and combat Internet-meme pseudoscience.

Finally, let your employees know about healthcare outlets providing free or reduced-cost flu vaccinations.

EEOC weighs in on employer COVID-19 vaccination policies

On December 16, 2020, the EEOC added a new section to its guidance on how employer COVID-19 vaccination policies interact with the ADA, Title VII, and the Genetic Information Nondiscrimination Act (GINA). The addition is to the "What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws" *publication*.

The key takeaway of the guidance is that employers can implement and enforce a mandatory COVID-19 vaccination policy for employees as a condition of returning to the workplace or remaining in the workplace, with certain exceptions or caveats. Specifically, employers have a duty to accommodate employees who seek an exception to the policy due to a disability or sincerely held religious belief, practice, or observance, unless doing so presents an undue hardship.

The new section points out that if an employer requires employees to be vaccinated, the prescreening questions that are asked before a vaccination is administered may present legal risk. To comply with the ADA, employers must ensure that any information they collect is job-related and consistent with business necessity.

If an employee refuses to answer the questions—and therefore doesn't receive the vaccination—the employer will need to have a reasonable belief, based on objective evidence, that the employee poses a direct threat to their own health or safety or that of others before removing the individual from the workplace. That's a very high standard since employers must show they have "a reasonable belief based on objective evidence that an employee who does not answer the questions and does not receive the vaccine will pose a direct threat to other employees." To avoid liability, a best practice is to have employees get vaccinations from their medical provider or through pharmacies.

If an employee receives an employer-required vaccination from a third party that doesn't have a contract with the employer—such as a pharmacy or other healthcare provider—then the ADA's "job-related and consistent with business necessity" restrictions on disability-related inquiries would not apply to the prevaccination screening questions. For that reason, it might make more sense to have a third party administer the test. In that case, the employer only needs to require an employee to show proof of receipt of a COVID-19 vaccination, which the guidance states is not a disability-related inquiry.

Legally required policy exceptions

Antidiscrimination laws require employers to grant exceptions to mandatory vaccinations when people have medical or religious reasons for not taking them. When employees refuse to become vaccinated for one of those above reasons, you must carefully analyze:

- Whether their job duties truly require them to be vaccinated;
- The extent to which the presence of an unvaccinated employee presents a safety risk in the context of the employer's business; *and*
- What measures—short of removing an employee from the workforce (or even the premises)—you can implement to reduce the risk of COVID-19 transmission.

Although the analysis is critical to helping you determine whether you must (1) return the employee to work, (2) allow her to work from home, or (3) find another potential accommodation, many of you will find the process to be no easy task.

There are two different standards for handling disability and religious accommodation requests. For disability-related requests, the employer should go through the interactive process to see if there is some reasonable accommodation that can be provided which is not an undue hardship, such as continuing to work from home. If no accommodation is available or the accommodation would be an undue hardship on the employer, the employer can bar the employee from the workplace if it can show the unvaccinated individual is a "direct threat."

The EEOC specifically states just because an employer can ban the employee from the workplace as a "direct threat" does not mean the employer can automatically terminate the employee. The direct-threat standard is a very high one, so employers should make sure that they work through the interactive process with any employees who have disability-related issues with the vaccine.

For religious objections, employers just need to provide an accommodation that doesn't create an undue hardship, which is defined as having less than a minimal cost or burden to the employer. The EEOC makes clear the employer can ban employees from the workplace but not automatically terminate them for refusing the vaccine.

Employers should be aware that the EEOC is currently very focused on religious rights and so should make sure to document any refusal to accommodate religious objections. The agency maintains that employers need to determine if any other rights apply under equal employment opportunity laws or other federal, state, and local authorities.

The new guidance from the EEOC also addresses how mandatory COVID-19 vaccination policies might implicate GINA. Employers should avoid asking questions about genetic information under any circumstances. If vaccines are given by the employee's own doctor, EEOC says employers should tell employees to make sure the doctors do not provide any genetic information as part of the proof of the vaccine.

Prevaccination screening questions such as inquiries about the immune systems of family members may present a problem. However, the guidance notes that it is unclear at this time what potential genetic conditions will be included in the screening checklists for vaccine contraindications.

Additional risks will arise if you require only certain segments of the workforce to become vaccinated. As the vaccine becomes more readily available, many anticipate it will first be offered to those who are most at risk (i.e., those with underlying medical conditions or above a certain age).

Although local health officials may prioritize certain individuals for vaccination, it doesn't follow that you should force the same segments of the population to get the shots as a job requirement. To do so could lead to discrimination claims since you'd be imposing a duty only on those in groups that, by law, are protected from discriminatory job requirements. The more cautious approach would be to delay any mandatory vaccination rule until the vaccine is available to the entire workforce.

EEOC guidance on vaccinations

Read on for the text from the Q&As of the updated EEOC guidance on how employer COVID-19 vaccination policies interact with the ADA, Title VII, and GINA.

ADA and Vaccinations

> *K.1. For any COVID-19 vaccine that has been approved or authorized by the Food and Drug Administration (FDA), is the administration of a COVID-19 vaccine to an employee by an employer (or by a third party with whom the employer contracts to administer a vaccine) a "medical examination" for purposes of the ADA? (12/16/20)*

No. The vaccination itself is not a medical examination. As the Commission explained in *guidance on disability-related inquiries and medical examinations*, a medical examination is "a procedure or test usually given by a health care professional or in a medical setting that seeks information about an individual's physical or mental impairments or health." Examples include "vision tests; blood, urine, and breath analyses; blood pressure screening and cholesterol testing; and diagnostic procedures, such as x-rays, CAT scans, and MRIs." If a vaccine is administered to an employee by an employer for protection against contracting COVID-19, the employer is not seeking information about an individual's impairments or current health status and, therefore, it is not a medical examination.

Although the administration of a vaccination is not a medical examination, pre-screening vaccination questions may implicate the ADA's provision on disability-related inquiries, which are inquiries likely to elicit information about a disability. If the employer administers the vaccine, it must show that such pre-screening questions it asks employees are "job-related and consistent with business necessity." *See Question K.2*.

> *K.2. According to the CDC, health care providers should ask certain questions before administering a vaccine to ensure that there is no medical reason that would prevent the person from receiving the vaccination. If the employer requires an employee to receive the vaccination from the employer (or a third party with whom the employer contracts to administer a vaccine) and asks these screening questions, are these questions subject to the ADA standards for disability-related inquiries? (12/16/20)*

Yes. Pre-vaccination medical screening questions are likely to elicit information about a disability. This means that such questions, if asked by the employer or a contractor on the employer's behalf, are "disability-related" under the ADA. Thus, if the employer requires an employee to receive the vaccination, administered by the employer, the employer must show that these disability-related screening inquiries are "job-related and consistent with business necessity." To meet this standard, an employer would need to have a reasonable belief, based on objective evidence, that an employee who does not answer the questions and, therefore, does not receive a vaccination, will pose a direct threat to the health or safety of her or himself or others. *See Question K.5.* below for a discussion of direct threat.

By contrast, there are two circumstances in which disability-related screening questions can be asked without needing to satisfy the "job-related and consistent with business necessity" requirement. First, if an employer has offered a vaccination to employees on a voluntary basis (i.e. employees choose whether to be vaccinated), the ADA requires that the employee's decision to answer pre-screening, disability-related questions also must be voluntary. *42 U.S.C. 12112(d)(4)(B)*; *29 C.F.R. 1630.14(d)*. If an employee chooses not to answer these questions, the employer may decline to administer the vaccine but may not retaliate against, intimidate, or threaten the employee for refusing to answer any questions. Second, if an employee receives an employer-required vaccination from a third party that does not have a contract with the employer, such as a pharmacy or other health care provider, the ADA "job-related and consistent with business necessity" restrictions on disability-related inquiries would not apply to the pre-vaccination medical screening questions.

The ADA requires employers to keep any employee medical information obtained in the course of the vaccination program *confidential*.

K.3. Is asking or requiring an employee to show proof of receipt of a COVID-19 vaccination a disability-related inquiry? (12/16/20)

No. There are many reasons that may explain why an employee has not been vaccinated, which may or may not be disability-related. Simply requesting proof of receipt of a COVID-19 vaccination is not likely to elicit information about a disability and, therefore, is not a disability-related inquiry. However, subsequent employer questions, such as asking why an individual did not receive a vaccination, may elicit information about a disability and would be subject to the pertinent ADA standard that they be "job-related and consistent with business necessity." If an employer requires employees to provide proof that they have received a COVID-19 vaccination from a pharmacy or their own health care provider, the employer may want to warn the employee not to provide any medical information as part of the proof in order to avoid implicating the ADA.

ADA and Title VII issues regarding mandatory vaccinations

K.4. Where can employers learn more about Emergency Use Authorizations (EUA) of COVID-19 vaccines? (12/16/20)

Some COVID-19 vaccines may only be available to the public for the foreseeable future under EUA granted by the FDA, which is different than approval under FDA vaccine licensure. The *FDA has an obligation* to:

[E]nsure that recipients of the vaccine under an EUA are informed, to the extent practicable under the applicable circumstances, that FDA has authorized the emergency use of the vaccine, of the known and potential benefits and risks, the extent to which such benefits and risks are unknown, that they have the option to accept or refuse the vaccine, and of any available alternatives to the product.

The FDA says that this information is typically conveyed in a patient fact sheet that is provided at the time of the vaccine administration and that it posts the fact sheets on its website. More information about EUA vaccines is available on the *FDA's EUA page*.

K.5. If an employer requires vaccinations when they are available, how should it respond to an employee who indicates that he or she is unable to receive a COVID-19 vaccination because of a disability? (12/16/20)

The ADA allows an employer to have a *qualification standard* that includes "a requirement that an individual shall not pose a direct threat to the health or safety of individuals in the workplace." However, if a safety-based qualification standard, such as a vaccination requirement, screens out or tends to screen out an individual with a disability, the employer must show that an unvaccinated employee would pose a direct threat due to a "significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation." *29 C.F.R. 1630.2(r)*. Employers should conduct an individualized assessment of four factors in determining whether a direct threat exists: the duration of the risk; the nature and severity of the potential harm; the likelihood that the potential harm will occur; and the imminence of the potential harm. A conclusion that there is a direct threat would include a determination that an unvaccinated individual will expose others to the virus at the worksite. If an employer determines that an individual who cannot be vaccinated due to disability poses a direct threat at the worksite, the employer cannot exclude the employee from the workplace—or take any other action—unless there is no way to provide a reasonable accommodation (absent *undue hardship*) that would eliminate or reduce this risk so the unvaccinated employee does not pose a direct threat.

If there is a direct threat that cannot be reduced to an acceptable level, the employer can exclude the employee from physically entering the workplace, but this does not mean the employer may automatically terminate the worker. Employers will need to determine if any other rights apply under the EEO laws or other federal, state, and local authorities. For example, if an employer excludes an employee based on an inability to accommodate a request to be exempt from a vaccination requirement, the employee may be entitled to accommodations such as performing the current position remotely. This is the same step that employers take when physically excluding employees from a worksite due to a current COVID-19 diagnosis or symptoms; some workers may be entitled to telework or, if not, may be eligible to take leave under the Families First Coronavirus Response Act, under the FMLA, or under the employer's policies. See also *Section J, EEO rights relating to pregnancy*.

Managers and supervisors responsible for communicating with employees about compliance with the employer's vaccination requirement should know how to recognize an accommodation request from an employee with a disability and know to whom the request should be referred for consideration. Employers and employees should engage in a flexible, interactive process to identify workplace accommodation options that do not constitute an undue hardship (significant difficulty or expense). This process should include determining whether it is necessary to obtain supporting documentation about the employee's disability and considering the possible options for accommodation given the nature of the workforce and the employee's position. The prevalence in the workplace of employees who already have received a COVID-19 vaccination and the amount of contact with others, whose vaccination status could be unknown, may impact the undue hardship consideration. In discussing accommodation requests, employers and employees also may find it helpful to consult the Job Accommodation Network (JAN) website as a resource for different types of accommodations, *www.askjan.org.*

JAN's materials specific to COVID-19 are at *https://askjan.org/topics/COVID-19.cfm*

Employers may rely on CDC recommendations when deciding whether an effective accommodation that would not pose an undue hardship is available, but as explained further in *Question K.7.*, there may be situations where an accommodation is not possible. When an employer makes this decision, the facts about particular job duties and workplaces may be relevant. Employers also should consult applicable Occupational Safety and Health Administration standards and guidance. Employers can find OSHA COVID-specific resources at: *www.osha.gov/SLTC/covid-19/*.

Managers and supervisors are reminded that it is unlawful to disclose that an employee is receiving a reasonable accommodation or retaliate against an employee for *requesting an accommodation*.

K.6. If an employer requires vaccinations when they are available, how should it respond to an employee who indicates that he or she is unable to receive a COVID-19 vaccination because of a sincerely held religious practice or belief? (12/16/20)

Once an employer is on notice that an employee's sincerely held religious belief, practice, or observance prevents the employee from receiving the vaccination, the employer must provide a reasonable accommodation for the religious belief, practice, or observance unless it would pose an undue hardship under Title VII of the Civil Rights Act. Courts have defined "undue hardship" under *Title VII* as having more than a de minimis cost or burden on the employer. EEOC guidance explains that because the definition of religion is broad and protects beliefs, practices, and observances with which the employer may be unfamiliar, the employer should ordinarily assume that an employee's request for religious accommodation is based on a sincerely held religious belief. If, however, an employee requests a religious accommodation, and an employer has an objective basis for questioning either the religious nature or the sincerity of a particular belief, practice, or observance, the employer would be justified in requesting additional supporting information.

K.7. What happens if an employer cannot exempt or provide a reasonable accommodation to an employee who cannot comply with a mandatory vaccine policy because of a disability or sincerely held religious practice or belief? (12/16/20)

If an employee cannot get vaccinated for COVID-19 because of a disability or sincerely held religious belief, practice, or observance, and there is no reasonable accommodation possible, then it would be lawful for the employer to *exclude* the employee from the workplace. This does not mean the employer may automatically terminate the worker. Employers will need to determine if any other rights apply under the EEO laws or other federal, state, and local authorities.

Title II of GINA and vaccinations

K.8. Is Title II of GINA implicated when an employer administers a COVID-19 vaccine to employees or requires employees to provide proof that they have received a COVID-19 vaccination? (12/16/20)

No. Administering a COVID-19 vaccination to employees or requiring employees to provide proof that they have received a COVID-19 vaccination does not implicate Title II of GINA because it does not involve the use of genetic information to make employment decisions, or the acquisition or disclosure of "genetic information" as defined by the statute. This includes vaccinations that use messenger RNA (mRNA) technology, which will be discussed more below. As noted in Question K.9. however, if administration of the vaccine requires pre-screening questions that ask about genetic information, the inquiries seeking genetic information, such as family members' medical histories, may violate GINA.

Under Title II of GINA, employers may not (1) use genetic information to make decisions related to the terms, conditions, and privileges of employment, (2) acquire genetic information except in six narrow circumstances, or (3) disclose genetic information except in six narrow circumstances.

Certain COVID-19 vaccines use mRNA technology. This raises questions about genetics and, specifically, about whether such vaccines modify a recipient's genetic makeup and, therefore, whether requiring an employee to get the vaccine as a condition of employment is an unlawful use of genetic information. The CDC has explained that the mRNA COVID-19 vaccines "do not interact with our DNA in any way" and "mRNA never enters the nucleus of the cell, which is where our DNA (genetic material) is kept." (See *https://www.cdc.gov/coronavirus/2019-ncov/vaccines/different-vaccines/mrna.html* for a detailed discussion about how mRNA vaccines work). Thus, requiring employees to get the vaccine, whether it uses mRNA technology or not, does not violate GINA's prohibitions on using, acquiring, or disclosing genetic information.

K.9. Does asking an employee the pre-vaccination screening questions before administering a COVID-19 vaccine implicate Title II of GINA? (12/16/20)

Pre-vaccination medical screening questions are likely to elicit information about disability, as discussed in *Question K.2.*, and may elicit information about genetic information, such as questions regarding the immune systems of family members. It is not yet clear what screening checklists for contraindications will be provided with COVID-19 vaccinations.

GINA defines "genetic information" to mean:

- Information about an individual's genetic tests;
- Information about the genetic tests of a family member;
- Information about the manifestation of disease or disorder in a family member (i.e., family medical history);
- Information about requests for, or receipt of, genetic services or the participation in clinical research that includes genetic services by the an individual or a family member of the individual; *and*
- Genetic information about a fetus carried by an individual or family member or of an embryo legally held by an individual or family member using assisted reproductive technology.

29 C.F.R. § 1635.3(c). If the pre-vaccination questions do not include any questions about genetic information (including family medical history), then asking them does not implicate GINA. However, if the pre-vaccination questions do include questions about genetic information, then employers who want to ensure that employees have been vaccinated may want to request proof of vaccination instead of administering the vaccine themselves.

GINA does not prohibit an individual employee's own health care provider from asking questions about genetic information, but it does prohibit an employer or a doctor working for the employer from asking questions about genetic information. If an employer requires employees to provide proof that they have received a COVID-19 vaccination from their own health care provider, the employer may want to warn the employee not to provide genetic information as part of the proof. As long as this warning is provided, any genetic information the employer receives in response to its request for proof of vaccination will be considered inadvertent and therefore not unlawful under GINA. See 29 CFR 1635.8(b)(1)(i) for model language that can be used for this warning.

COVID-19: Voluntary or mandatory?

During the early stages of the nation's vaccination program, employers should carefully consider whether they need a man¬datory policy or whether a voluntary policy would be better. Before mandating a vaccine, do your homework and establish a plan. At a minimum, the plan must include a reason for the mandate, any exceptions, and a process to accommodate employees with objections. Termination should be a last resort because even the best plan may not protect you from litigation over the discharge.

Legal considerations

Legal exceptions to mandatory vaccinations can arise under both the ADA and Title VII (for religious accommodations). Under the ADA, if an employee has a medical basis for refusing to get the vaccine, you may confirm the reason and then consider a reasonable accommodation. The possibilities include allowing the individual to wear PPE or determining if telework is appropriate. Ultimately, if an accommodation cannot occur, you may suspend or separate the employee.

Under Title VII, you may ask employees for confirmation of their religious belief, practice, or observance that precludes them from taking the vaccine. Note, however, the religious belief doesn't have to be associated with an organized religion—it need only be sincerely held and religious in nature. Then you would consider a reasonable accommodation, as under the ADA.

In both situations, the accommodation doesn't require you to create or find a job at the same pay rate. It may pay less.

Employers with a history of requiring flu vaccines in the workplace have likely already established a baseline for how they will approach the COVID-19 vaccination question. Most important, barring a state law prohibition on mandatory vaccines, you can require vaccines but must account for employees who need reasonable medical or religious accommodations. You may rely on the same framework you use for flu shots to assess whether to mandate a COVID-19 vaccine. In addition, state law may require some employers (notably, healthcare facilities) to mandate employee vaccinations to protect the pub¬lic. Many states require vaccinations for chickenpox, measles, tuberculosis, and other communicable diseases.

Implementing a mandatory vaccination policy

If you wish to make the shots mandatory, set a realistic date by when they must occur.

Employers that choose to require a COVID-19 vaccination as a condition of employment and/or to return to the workplace need to be careful about how they implement the vaccine requirements. Under the EEOC's guidance, administering the COVID-19 vaccine or asking whether an employee has been vaccinated isn't by itself a medical examination or a disability-related inquiry under the ADA.

The CDC, however, requires healthcare providers to ask certain prescreening questions before administering the vaccine to ensure there's no medical reason that would prevent an individual from being vaccinated. The prescreening questions may violate the ADA by eliciting an employee's disability-related information.

You can avoid the ADA restriction by (1) leaving it to employees to get their shots from a public or private entity and (2) simply asking them to provide proof of vaccination. You should obtain no more than the vaccination certification from employees. Don't ask for or accept any other medical information.

If you choose to administer a mandatory vaccine at your own facilities, you will be responsible for showing the prescreening questions are "job-related and consistent with business necessity."

Where the vaccine is offered in-house on a voluntary basis, you or your contractor may ask prescreening, disability-related questions without having to show business necessity if the employee's decision to answer them is voluntary. If employees choose not to answer, you may decline to administer the vaccine but must not retaliate against, intimidate, or threaten them for refusing to reply.

What if employees refuse vaccination?

What if an employee refuses to be vaccinated? Again, employers that require flu shots should use the same procedure for dealing with flu shot exemptions to determine whether an employee's refusal of a COVID-19 vaccine poses an undue safety burden on other workers and/or the public. In general, you may terminate at-will employees who refuse to comply with a mandatory vaccine requirement. First, however, be sure you clearly communicate:

- Information about the mandatory vaccine policy;
- How to request an exemption and the deadline for doing so;
- Date by which they must receive the vaccine; *and*
- Any ramifications for failing to get the shots.

Additionally, unionized employers may be required to bargain over the implementation of a mandatory vaccine policy depending on the terms of the labor contract.

What if a substantial number of employees refuse to get the vaccine for personal (but not religious or medical) reasons? Although you may fire them in most cases, that isn't necessarily a practical approach. If you anticipate a substantial portion of the employee population will reject the vaccine, you should promote education and demonstration and consider incentives (see more details in the following section).

You should also give thought to safety precautions to minimize any risk for, or created by, unvaccinated employees. Consider other actions taken to mitigate the spread of COVID-19. In addition to mandating the use of personal protective equipment PPE such as gloves or masks, you may be able to use social distancing measures or require telework for employees who refuse the vaccine.

Notwithstanding safety considerations for employees who refuse a vaccine, you also should expect and prepare to handle requests for exemptions and accommodations from employees with medical, religious, or social and political objections to a vaccine.

If you want employees to be vaccinated but don't wish to mandate it, you can consider the alternative of encouraging voluntary vaccinations through education, demonstration, access, and incentives detailed in the next section.

Encouraging vaccination: Education, demonstration access, and incentives

Many employers will choose not to require employees to receive a COVID-19 vaccine, at least in 2021, for a variety of reasons:

- General management beliefs and practices;
- Logistical challenges of determining who can reasonably receive the vaccine;
- Low impact or spread in the community;
- Ability to accommodate virus-related absences or continued alternate work arrangements;
- Worries (especially for public employers) about the legal impact of the vaccine's emergency use authorization status;
- Lack of will/desire/expertise to sift through the accommodation requests that a mandate might generate; *and*
- Concerns about how a mandate would affect employee morale. Instead of mandating vaccines, you can encourage voluntary vaccinations through education, demonstration, access, and incentives.

Education

Engage with employees at shift meetings, company-wide e-mails, bulletin boards, and newsletters about the vaccine's efficacy and safety and where they can receive it. Consider holding video conferences with healthcare professionals to answer questions about the pandemic and their experience with the vaccine.

Another approach: Gather questions from employees for a local doctor or public health expert to answer in writing or by recording. (Often, local voices and faces can be more persuasive than national experts and probably more available, too.)

Demonstration

Encourage management to get vaccinated with employees if you're able to provide on-site vaccination, or, if not, photograph their experience and post it on social media, the company intranet, bulletin boards, and so on. Leaders need to be out in front, putting their arms where their mouths are.

Access

If you have adequate facilities, reach out to local health authorities and pharmacies and ask to partner by hosting vaccination clinics.

Surveys suggest the majority of Americans don't have set-in-stone opinions about the vaccine. Removing the real (or perceived) barriers of having to request time off from work to go to a clinic/parking lot/convention hall across town twice over two or three weeks will almost certainly result in some choosing to get vaccinated if the shots come to them.

Incentives

You may incentivize employees to receive the COVID-19 vaccine. Unfortunately, federal guidance on the amount of incentive you may provide is stuck in limbo for now. We think $50 is an amount unlikely to be challenged as "so substantial that it makes an employee's participation less than voluntary." There are also psychological reasons to keep the incentives modest because studies have found large bounties communicate the idea a large risk is being undertaken.

In January, Blackhawk Network, a company providing employers with incentive solutions, announced results of its research on what kind of incentives are effective. The research found monetary incentives were the most preferred.

More than two-thirds of respondents said they would accept a monetary incentive ranging from as little as $10 to as much as $1,000 or more. One-third of the total respondents said they would complete the vaccination process for a $100 incentive or less. Most respondents said they would prefer to receive an incentive by direct deposit to their bank account, but 25 percent preferred a prepaid gift card in digital or physical form. About 10 percent of respondents preferred digital delivery via PayPal, Zelle, or Venmo.

One-third of respondents said money would not influence their decision to take the vaccine. Paid time off was a distant second choice for an incentive. Half of the survey respondents said an employer incentive would encourage them to also urge their family members to take the vaccine.

Caveat: Employees who can show they genuinely can't receive the vaccine because of a disability should still receive the incentive or have an alternative, nonstigmatizing way to participate in the program and get the prize. We don't know of an alternative other than the public health measures that should already be broadly implemented, so in most cases an employee with a disability would receive the incentive after substantiating their disabling reason for not receiving the vaccine.

Pros and cons of offering COVID-19 vaccine incentives

Heading into 2021, employers' optimism for an anticipated "return to normal" in the workplace was rising quickly thanks to the increasing availability of the COVID-19 vaccines. The positive outlook was soon tempered, however, as employers found many employees hesitant to get the shots even when they're offered at no cost.

With COVID-19's negative impact on employee staffing levels and companies' ability to operate, many employers have considered offering bonuses or other incentives to those who voluntarily receive the vaccine. Some of the country's largest employers, from hospitals to manufacturing to retail, are seeking to encourage workers to receive the COVID-19 vaccine by:

- Offering bonuses, cash payments, PTO, gift cards, or additional hours of pay;
- Setting up drawings for prizes in which employees' names are included when they receive the first dose of the vaccine and again for a second drawing upon getting the final shot; *and*
- Providing bonuses to employees in recognition of their efforts during the pandemic, but also making the prizes contingent upon getting the vaccine.

But are the incentives legal? As you decide whether to offer incentives for getting the vaccine, there are federal legal hurdles to consider, and other questions will arise as well.

Currently, the EEOC hasn't provided any direct guidance on the issue of offering incentives for employees to receive the COVID-19 vaccine. A number of large business groups recently asked the agency to issue guidance specific to the issue, and a spokesperson said it is "considering the issue carefully and will provide additional guidance as necessary."

In a related context, the EEOC recently proposed rules for employer-sponsored wellness plans that would limit employers—seeking to comply with ADA and other federal laws—to offering only de minimis (minimal) incentives as a way to encourage employees to voluntarily participate in such programs. The agency said the incentives could include, among other things, water bottles and gift cards of "modest value."

The wellness program guidance suggests COVID-19 vaccine incentives of more than modest value wouldn't pass the EEOC's muster. Throughout the pandemic's course, however, the agency has consistently recognized the unique threats posed by the virus and indicated federal laws allow more flexibility for employers than would normally be permitted under the ADA and other federal statutes.

With respect to antidiscrimination, some employees may have conditions recognized as disabilities under the ADA that prevent them from safely receiving the vaccine. Others may have religious objections needing to be accommodated under Title VII. Vaccine incentive programs that exclude such employees could expose companies to liability, so additional EEOC guidance would be useful.

In addition, beyond the antidiscrimination concerns, for nonexempt employees under the FLSA, bonuses and the value of other incentives would have to be included in the employees' regular pay rate when calculating the proper overtime rate. The payments or value of the given incentive also would be taxable income to employees.

Although employers offering COVID-19 vaccine incentives are entering somewhat uncharted territory, you can glean some direction from existing guidance and federal laws on related matters. Before offering the incentives, you should weigh the risk of the unknown liabilities versus the perceived benefit of returning employees to the workplace.

For example, if your company can continue remote work with minimal impact, you might not find the potential liability to be worth the risk. For other employers in industries requiring on-site work to resume operations, the risk may be outweighed by the ability to stay afloat and produce their products.

Regardless, you should tailor any incentive programs as much as possible to the existing state of the law regarding voluntary wellness programs, medical and religious accommodations, and overtime and tax implications.

First reported challenge to employer's vaccine mandate

A New Mexico detention center employee has filed what appears to be the first lawsuit in the country directly challenging an employer's right to require its workers to receive a COVID-19 vaccine. The lawsuit represents the hurdle employers will face in attempting to mandate employee vaccinations, particularly since the vaccines were granted only emergency use authorization (EUA) by the Food and Drug Administration (FDA) rather than formal approval, which requires a longer process. While clinical trial results and growing evidence show the various coronavirus vaccines are highly effective at preventing death or serious illness, the EUA approvals mean they are still experimental, which raises the risk of challenges.

First responder Isaac Legaretta filed the complaint in the U.S. District Court for the District of New Mexico on February 28, 2021. He works as a detention center officer in Las Cruces, where the county has issued a directive ordering all first responders to receive the COVID-19 vaccination as a condition of ongoing employment unless they have a documented exception granted by the county HR department under either the Americans with Disabilities Act (ADA) or equal employment opportunity (EEO) laws.

Legaretta refused to comply with the mandate, contending he can't be forced to be a "human guinea pig" for a vaccine that didn't go through the FDA's usual and more time-consuming approval process.

Legaretta further argued the county mandate violates the language of the EUAs under which the vaccines were approved. Specifically, the applicable statute says individuals receiving the vaccines must be informed of the known and potential benefits and risks of its use "and of the option to accept or refuse administration of the [vaccine]." His complaint doesn't cite the rest of the provision, which addresses "the consequences, if any, of refusing" the vaccine, though he admitted in the complaint he was informed of the consequences for his refusal. The language is included in the information provided to each recipient of an approved COVID-19 vaccine.

District Judge Martha Vázquez issued a March 4 order denying Legaretta's request for an immediate temporary restraining order (TRO) and a preliminary injunction enjoining the county from taking adverse action against him for refusing to take a "non-mandatory unapproved vaccine." The judge found it would be inappropriate to take the steps without allowing the county to respond.

In its later response, the county argued the preliminary injunction shouldn't be granted because Legaretta failed to show (1) he will suffer irreparable harm if the injunction isn't granted, (2) his arguments had a high likelihood of success on the merits, or (3) the potential injury he would suffer outweighed the harm to the county. He was given another deadline to file a reply.

Vaccine passports for new hires

COVID-19 vaccine passports seem to be the hot-button issue of the day. Most of the media coverage and remarks from politicians have focused on companies requiring customers, guests, or students having proof of vaccination before returning to school or entering the business. But what about employers? Can you require a new worker to present proof of vaccination as a condition of employment or provide a hiring preference to applicants who have been vaccinated?

The EEOC has made it clear that employers, with some exceptions, can require employees to be vaccinated for COVID-19. You need to make an accommodation for employees who have a disability or raise objections on the grounds of a sincerely held religious belief or practice.

The EEOC also has stated that requiring an employee to show proof of a COVID-19 vaccination isn't a disability-related inquiry. The agency, however, hasn't squarely addressed the issue of vaccines or proof of vaccination during the hiring process.

Logically, it would seem that if you can make COVID-19 vaccinations mandatory for employees, you also can require applicants to provide proof of vaccination as a condition of employment. I largely agree, but here are three factors you should consider before you require applicants to provide proof of vaccination or make getting the shots a hiring preference:

State law implications

First, you should ensure that there are no state laws that regulate a vaccine passport policy. For example, Florida Governor Ron DeSantis' *Executive Order 21-18* prohibits businesses from requiring patrons or customers to provide any documentation certifying a COVID-19 vaccination. As currently written, the order doesn't apply to employment, but that could change. Florida employers will need to monitor any changes to the order or legislation addressing vaccine passports as state lawmakers are considering a related statute.

Disparate impact

Federal and state antidiscrimination laws can make it unlawful to apply a neutral rule or policy that has a disproportionate impact on members of protected classes, such as minorities and women. Such neutral rules will be lawful if they're job-related and consistent with business necessity.

Employers implementing a hiring preference for those who have been vaccinated should monitor what impact, if any, the requirement has on protected groups.

Privacy and confidentiality

If you retain proof of a new hire's vaccination record, you should treat the data as confidential medical information and follow the requirements of the Americans with ADA. Also, be sure to let applicants know you simply need proof of the vaccination and not information about any underlying health conditions.

You may wish to take a wait-and-see approach on vaccine passports or vaccine hiring preferences. The government may issue guidance in the near future. Like everything else with COVID-19, there's still a lot of uncertainty.

Employer health plans must pay the cost of a COVID-19 vaccine

Employer-sponsored group health plans (whether fully or self-insured) will be required to pay the full cost of the vaccine for employees covered under the plan with no cost-sharing (copay, coinsurance, deductible) to the employee. To the extent you are going to mandate employees to become vaccinated before returning to the workplace, you will have to weigh the cost of requiring vaccination (when some employees might not have gotten the vaccine otherwise) against the costs of possible continued loss in productivity because of an ill workforce or employees working from home.

General preventive service rules

As employee benefits professionals and insiders are inevitably aware, the ACA already requires group health plans and insurers to cover certain "preventive care" items with no cost-sharing (also called first-dollar coverage), such as the flu vaccine. Such items are generally listed on the *HealthCare.gov website*.

The typical process for an item to be classified as a "preventive service" starts with certain governmental groups such as the CDC or the U.S. Preventive Services Task Force making a "recommendation" (although it isn't as much a recommendation as a requirement) that an item should be classified as a preventive service. It must then receive first-dollar coverage under a group health plan or policy starting with the first plan year that begins one year after the date the recommendation is made. Also, first-dollar coverage is generally required only when participants receive care from an in-network provider.

Accelerated coverage timeline for COVID-19 vaccine

Because of the ongoing pandemic, Congress found the timeline unacceptable. The CARES Act modified the preventive service rules for the COVID-19 vaccine in early March before any sign of a vaccine was in sight. The Act requires group health plans to provide first-dollar coverage of coronavirus vaccines within *15 business days* after the vaccine receives an "A" or "B" rating from the U.S. Preventive Services Task Force or receives a recommendation from the CDC's Advisory Committee on Immunization Practices.

Just to reemphasize, plans generally have at least a year after a new item is added to the preventive services list to provide first-dollar coverage. But now, first-dollar coverage for a COVID-19 vaccine is required within 15 business days after the applicable governmental recommendations are made. Therefore, plan sponsors need to keep an eye out for the recommendations to ensure their health plans are being administered properly (and are properly amended to reflect the requirement).

Full coverage required for out-of-network vaccine

Also distinct from the traditional ACA preventive care rules, group health plans and insurers must pay the full cost of COVID-19 vaccines regardless of whether administered in- or out-of-network.

In a joint interim final rule published by the U.S. Departments of Treasury, Labor, and Health and Human Services, plans and insurers are required to pay out-of-network providers a "reasonable" reimbursement rate to provide a "meaningful" benefit to participants and, presumably, to entice enough providers to administer the vaccine. A reasonable rate is generally the prevailing market rate, the departments say. They deem the amount paid under Medicare to be reasonable.

Finally, providers who are participating in the CDC COVID-19 Vaccination Program are prohibited from balance billing (also known as surprise billing) vaccine recipients.

With vaccine rollout, employers can expect deluge of time-off requests

As the weather turns warmer and COVID-19 vaccines become more available, employers shouldn't be surprised if their employees start scrambling to get on the vacation schedule. After all, they've been cooped up for better than a year. Now that restrictions are being eased and vaccinated people are making plans to catch up on what they've missed, pent-up demand for time off is likely to leave employers struggling to figure out how to maintain productivity while simultaneously helping employees recover from burnout.

For years, surveys have shown that many American workers don't take all the time off they earn. This year may be different, however. In February, travel booking website Expedia released its Annual Vacation Deprivation study, showing an uptick in travel plans for 2021.

The company noted that vacation deprivation levels have risen over the years, but this year's survey found that globally, 81% of people not only value time off more than they did before, they also plan to use more of their vacation days. The study also found that 92% of people believe regular vacations are important, but 53% say they have been too busy at work to use all their time.

Another finding from the study: Time between vacations has increased. The study found 26% of U.S. respondents said they haven't taken a vacation in over a year. That number was 16% in 2019. Also, 47% reported using at least one vacation day in 2020 to care for a sick family member or because childcare wasn't available.

Expedia also found that 42% of respondents canceled one or more trips in 2020 because of COVID-19. So, as Expedia said in announcing its study, "Bucket lists are calling."

And it's no wonder. A July 2020 report from the National Bureau of Economic Research, a private research organization, notes that the length of the average workday increased by 48.5 minutes during 2020.

A February 2021 survey from IPX 1031, a Fidelity National Financial Company, found that 48% of respondents plan to travel in 2021, 11% say they won't, and 31% aren't sure.

A few states have laws requiring some employers to provide at least some time off. In general, however, employers don't have to provide any kind of paid time, but many, especially large employers, do and reap the benefits of offering a valued employee benefit. Employees who take time off can return to work recharged and more productive. Allowing employees to schedule time off also makes planning easier for employers. In fact, when employees use less time off than usual, employers see a pent-up supply of time, creating uncertainty about when demand will return.

So it can be to an employer's advantage to encourage employees to use the time they have coming to them. That means supervisors and leaders must support employees when they request time. Employees also need see top leadership taking time off.

Even though employees should be encouraged to take a break, they also need to understand that time off will be given based on scheduling needs. Also, supervisors need to be held accountable for making sure staffing levels are sufficient.

In spite of progress, COVID-19 still poses a threat. So it is a best practice to advise employees to check the CDC guidance on travel restrictions.

Employers generally can set their own rules about how they allow employees to schedule time off as long as their policy is applied consistently and isn't discriminatory. The pandemic has prompted some employers to take a look at their policies on how time off is approved, capped, rolled over, or paid out.

Laws in most states allow employers to have a use-it-or-lose-it policy in which employees must take all their accrued time within a specified period (often a calendar year) or forfeit the time not taken. With so many employees canceling plans during the pandemic, employers may want to consider allowing employees to roll over accrued but unused time so that it will be available when people feel secure about traveling.

Adverse reaction to COVID-19 shots could be work injury for workers' comp purposes

Employers are faced with deciding whether to institute mandatory vaccination programs to protect employees, customers, and patients during the pandemic. Some may favor a mandatory program, but you should first consider the implications of requiring the shots and possibly facing workers' compensation liability if they cause an adverse reaction or a prolonged or serious illness.

The details of workers' comp liability vary from state to state, but the basic definition of a "workplace injury" is a personal injury arising out of and in the course of employment. Employees bear the burden to prove a work-related personal injury.

If you require employees to receive the COVID-19 vaccine as a condition of continued employment, a severe reaction is likely to be considered a compensable injury. In other words, by demanding employees get the vaccinations, you've turned the activity into a job requirement, and any resulting adverse reactions likely would be a covered work injury.

In some states there is no question about the compensability of a mandatory vaccination. For example, the Minnesota Workers' Compensation Act's (MWCA) definition of personal injury states:

> *An injury or disease resulting from a vaccine in response to a declaration by the Secretary of the [U.S.] Department of Health and Human Services under the Public Health Service Act to address an actual or potential health risk related to the employee's employment is an injury or disease arising out of and in the course of employment.*

Since COVID-19 has been declared a public health emergency, the mandatory administration of the vaccine as a requirement for employment would be a compensable work injury under the MCWA.

Even without such a specific definition, you'd have difficulty arguing adverse reactions to the COVID-19 vaccination didn't arise out of and in the course of employment if the employee had no choice but to be vaccinated. In that case, your company could be on the hook for:

- Medical treatment and lost time;
- Ongoing wage loss, permanent partial disability, and dependency benefits if the reaction results in long-term illness or death; *and*
- Exposure for additional conditions that may develop because of adverse reactions to the vaccine.

In states without such guidance, there are more questions.

Additionally, the outcome is less clear when the vaccination is encouraged and offered on a voluntary basis. In some instances, the arrangement could be considered a work-related situation arising out of and in the course and scope of employment. Several factors to consider in determining if an injury from encouraging employees to take the COVID-19 vaccine is work-related include whether:

- The vaccination directly or indirectly benefited the employer;
- The vaccine offering was within the terms, conditions, or customs of employment;
- The employer sponsored the vaccination event;
- The vaccine offering was unreasonably reckless or created excessive risk; *and*
- The offering occurred on the employer's premises.

You must balance your desire for a safe workplace (by requiring vaccinations) against the risk of mandating the shots and facing potential workers' comp implications if an employee experiences a serious reaction. At this time, it's difficult to quantify the exposure and cost of a workers' comp claim relative to exposure and communication of the disease as opposed to the exposure and cost for adverse reactions to the vaccination.

A key ingredient in the balancing approach is the realization that any directive you give to employees that they must vaccinate against COVID-19 will likely give rise to workers' comp liability in the event of an adverse reaction. As with all issues related to the coronavirus, the situation is fluid and could change if the legislature or the governor takes direct action to determine adverse reactions become compensable workers' comp injuries.

Q&A

This is a time of big changes for employers, to say the least. From new laws like the FFCRA to applying long-standing laws to an unusual set of circumstances, we are in uncharted waters. Federal agencies are weighing in, but often, the best way to learn is through the questions that others are asking. So, to help you navigate these uncharted waters, we will be adding new Q&As to the Employers Guide to COVID-19 often.

If you ask employees to self-quarantine, are they covered by the FFCRA?

If an employer sends employees home for 14 days because they worked closely with other employees who tests positive for COVID-19, do they qualify for paid sick leave under the FFCRA, or do they have to use available personal and vacation days?

An employer's request that an employee self-quarantine may qualify as a "substantially similar condition," but the Department of Health and Human Services (DHHS) has yet to issue guidance on this. Recent guidance does clarify,

however, that a shelter-in-place or stay-at-home order issued by any government authority *would* qualify as a federal, state, or local quarantine or isolation order. Therefore, at this time, an employee sent home would be eligible for FFCRA paid sick leave if her healthcare provider advised her to self-quarantine, if she experienced COVID-19 symptoms and pursued a medical diagnosis, or if there were an applicable shelter-in-place or stay-at-home order.

If the employee doesn't qualify for FFCRA paid sick leave, you should permit her to use accrued sick, personal, or vacation time. You may also consider putting her on paid administrative leave and should review leave options under state law.

Can an employer enforce the terms of its attendance policy or discipline employees for refusing to come to work due to fear of COVID-19 infection?

Depending on the circumstances, attendance policy enforcement or discipline for an employee's refusal to come to work might constitute unlawful retaliation. Under the OSH Act's antiretaliation provisions, an employee is protected if:

- She brought a dangerous situation to the employer's attention and it failed to correct it;
- Her refusal to work was based on a good-faith belief the situation was dangerous;
- A reasonable person would conclude there's danger of death or serious injury; *or*
- There's insufficient time, due to the urgency of the situation, to eliminate the danger through the regular enforcement channels.

Thus, employers that discipline employees for refusal to work due to fear of COVID-19 infection need to consider the risks of an OSH Act citation for retaliation if they had a reasonable belief that by working they would subject themselves to the virus.

What does the OSH Act require if an employee is diagnosed with COVID-19?

The Act's General Duty Clause mandates that employers maintain a workplace free of recognized hazards likely to cause death or serious physical harm. Clearly, if you become aware an employee has been diagnosed with COVID-19, you have an obligation to keep her out of the workplace. In addition to subjecting your other employees to the virus, you may receive a citation from OSHA for permitting an employee with COVID-19 to come to work.

What are the OSHA requirements if an employee only shows symptoms of COVID-19 but hasn't yet been diagnosed?

Even if an employee is only suspected of having COVID-19 but hasn't yet been diagnosed, you may be in violation of the General Duty Clause if you permit her to come to work. According to the CDC, if an employee has acute respiratory illness and a fever over 100.4, they should stay home. If you learn an employee has these symptoms when she is already at work, OSHA's guidance indicates you should immediately keep her separate from other employees, provide her with a face mask to wear (if feasible and available), and then contact local health authorities or the CDC for further instruction. Although this may seem extreme when she doesn't have a diagnosis, failure to comply with the steps could subject other employees to the virus and could subject you to an OSHA citation.

Do we have to pay exempt employees if we temporarily suspend operations?

The answer to that question is everybody's favorite response from lawyers: Maybe. If an exempt employee performs no work for an entire workweek, you don't have to pay his salary for that week. As a result, furloughing an exempt employee for an entire workweek relieves you of having to pay him for the week. On the other hand, if an exempt employee works part of a workweek and is furloughed for the rest of the week, he is generally entitled to his entire salary for that workweek.

That being said, there's a narrow exception to the rule that an exempt employee's salary cannot be reduced because of a lack of available work. The FLSA doesn't prohibit you from prospectively reducing an exempt employee's predetermined salary during an extended period of economic slowdown. Such a reduction in salary won't cause you to forfeit the employee's exempt status as long as his weekly predetermined salary is at least $684 per week.

The DOL has explained that reductions in salary due to a lack of work must be "bona fide and not used as a device to evade the salary basis requirements." It's also important to remember that once the employee's new salary is determined, it cannot fluctuate week to week based on the quantity or quality of work.

According to the DOL, prospective salary reductions are intended only to address long-term business needs. In other words, you cannot rely on the exception to change an exempt employee's salary on a regular basis, and you should take advantage of it only when you anticipate a prolonged economic downturn.

If, however, the employee doesn't come to work because of her reasons (e.g., her child's school is closed and she has no coverage; she or her child is home sick; she self-quarantines), then follow your sick leave/PTO policy. If your policy allows exempt employees to be docked for time away from work due to their own personal reasons or sickness or disability, then she can be docked in *full-day absences*. The catch here is the employee can be docked (1) only in full-day increments and (2) only for days during which she provided no work (including work from home).

At what point do we need to do new I-9s, background checks, and drug screens when bringing back laid off employees?

When employees have been temporarily laid off, generally this time period is considered "continuing employment," and employers do not have to complete a new Form I-9 or reverify the employee's current Form I-9. According to the U.S. Citizenship and Immigration Services (USCIS) Handbook for Employers, M-274 (available online at https://www.uscis.gov/i-9-central/70-rules-continuing-employment-and-other-special-rules, explaining employers obligations to complete and maintain the Form I-9), Section 7.0, Rules for Continuing Employment and Other Special Rules, "You must complete a new Form I-9 when a hire takes place, unless you are rehiring an employee within three years of the date of the employee's previous Form I-9. However, in certain situations, a hire is not considered to have taken place despite an interruption in employment. In case of an interruption in employment, you should determine whether the employee is continuing in his or her employment and has a reasonable expectation of employment at all times." A "temporary layoff for lack of work" is listed as one example of continuing employment, so you do not need to redo Form I-9s for these employees. The Handbook for Employers does not specify how long the temporary layoff may be to be considered continuing employment, but it is likely that as long as the employer does not terminate the employee and intends to bring employee back to work (for example, once state stay-at-home orders are lifted), the layoff likely would be considered continuing employment. Note, however, if an employee's employment authorization listed on the Form I-9 has expired, you would have to reverify his or her employment authorization as you would for any current employee. You should consult with your attorney on this matter to ensure compliance.

The ACA's reference to 13 weeks really only affects an employer's health insurance obligations and does not necessarily apply to other employment-related issues. Under the ACA, employers with 50 or more employees (referred to as applicable large employers or ALEs) must provide health insurance that provides minimum essential coverage to at least 95% of their "full-time" employees or pay a penalty. When an employer has a substantial layoff, compliance with the ACA can be challenging if the employer does not continue paying for the health insurance during the layoff. If an employer is an ALE, the employer must consider the ACA's "break in service" rule. An ALE may treat a returning employee as a new employee if he or she returns to work after at least 13 weeks during which no hours were credited

(26 weeks for educational employees). The same applies if the break in service is at least 4 weeks and is longer than the employee was previously employed.

If the break in service is shorter, the employee should be returned to the measurement and stability period that would have applied had the layoff/furlough not occurred and would not be considered new employees. So, if employees are laid off for longer than 13 weeks (or 4 weeks for newer employees), then they possibly could be considered like "new employees" under the employer's health care plan. Note, however, that the ACA rule refers specifically to "termination" and "rehire," so the health care plan might not be able to impose a new waiting period in the event of a furlough or layoff that does not involve an outright termination of employment. The ACA rules have not been updated or revised to address COVID-19 layoff scenarios. You should consult with an attorney or other health care benefits expert regarding the ACA requirements.

Regarding background checks and drug tests for returning employees, absent a collective bargaining agreement or other contract specifying when the checks and drug tests are conducted, an employer has discretion to conduct the checks and tests as it determines appropriate as long as it imposes the requirements consistently to help avoid discrimination claims. Most employers likely would not conduct a background check or drug tests after a short-term layoff, particularly given the nature of the COVID-19 stay-at-home orders severely limiting individuals' activities. However, if your organization normally conducts background checks or drug tests after layoffs, then it could do so after a COVID-19 layoff. This is a good question for your legal counsel, particularly for employees who drive on your behalf or enter customer homes. Drug tests also should comply with any state law restrictions on testing.

We have workers who must travel as an essential part of their jobs. Some are refusing to travel. We want a policy on what to do with such refusal to avoid any risk to the company. Is it safe to terminate employees if they won't travel, we have no other work for them, and there's no ADA issue?

Ultimately, yes, you may be able to legally terminate employees who refuse to do a part of their job. Before making that decision, you should consider whether their refusal to travel is protected activity under OSH Act regulations. The regulations recognize that employees may have a right to refuse to work due to safety concerns under some circumstances. If you terminate an employee for refusing to work, the OSHA can issue a citation against you and require reinstatement of the employee based on evidence that she:

- Had a reasonable apprehension of death or serious injury;
- Refused to perform the required work activity in good faith;
- Had no reasonable alternative;
- Had asked you to correct the dangerous condition and you declined or were unable to do so; *and*
- Didn't have the time to attempt to address the unsafe condition by complaining to OSHA before refusing to do the work activity.

As a result, we recommend you take a very proactive approach to exploring and addressing an employee's travel concerns before terminating the employment relationship. A generalized fear of catching COVID-19, or the fear of traveling to a particular city or region, is probably not a reasonable apprehension of death or serious injury. You should ask for and consider any suggestions an employee offers to resolve their concerns, however, and where reasonable, feasible, and potentially effective, consider giving the employee what she requests.

Company-provided face-coverings and hand sanitizer are the basics for air travel, and providing disinfectant wipes for cleaning seat armrests and trays might be a good idea. Allowing the employee to change the mode of transportation to a private vehicle might be another reasonable option. Also, to the extent possible, you can confirm the facility or location where the employee is going for work is following CDC guidelines for social distancing, etc.

Although termination of the reluctant traveler is likely to be a defensible decision, a "go slow" approach is probably best in such circumstances.

We're planning to allow employees with underlying health conditions to telecommute as a temporary reasonable accommodation during the COVID-19 pandemic. Based on our assessment, however, they could perform only 50 percent of their essential functions from home. Can we modify their pay rate accordingly?

Even though the answer is likely yes, employers should tread lightly and contact their employment attorney if this situation arises.

If an employee cannot perform a job function because of a disability, the employer must make "reasonable accommodations" for her. An employer never has to provide an accommodation, however, that would cause undue hardship (significant difficulty or expense), which includes removing an essential function of the job.

If an employee cannot meet a specific qualification standard because of a disability, the ADA requires the employer to demonstrate the importance of the function by showing it is "job-related and consistent with business necessity." This requirement ensures the qualification standard is a legitimate measure of an individual's ability to perform an essential function of the specific position she holds or desires. If an employer cannot show a particular standard is "job-related and consistent with business necessity," it cannot use the standard to take adverse action against an individual with a disability.

Are there any HR implications for randomized COVID-19 testing (something like random drug testing)?

In response, HR Hotline provides the following information. COVID-19 virus testing is currently allowed and may even be required in the workplace, according to the EEOC. However, although the EEOC guidance does not specifically address COVID-19 random testing, as long as the random testing is performed in the same manner as other COVID-19 testing, the testing should be acceptable.

Many employers faced with trying to keep their workplaces as free of COVID-19 as possible have implemented COVID-19 testing of employees. The EEOC has specifically approved COVID-19 viral testing at work in its "What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws," online at *https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws*. Specifically, the EEOC guidance states:

> **A.6. May an employer administer a COVID-19 test (a test to detect the presence of the COVID-19 virus) before permitting employees to enter the workplace?** *(4/23/20)*
>
> The ADA requires that any mandatory medical test of employees be "job related and consistent with business necessity." Applying this standard to the current circumstances of the COVID-19 pandemic, employers may take steps to determine if *employees entering the workplace have COVID-19* because *an individual with the virus will pose a direct threat* to the health of others. Therefore an employer may choose to administer COVID-19 testing to employees before they enter the workplace to determine if they have the virus.
>
> Consistent with the ADA standard, employers should ensure that the tests are accurate and reliable. For example, employers may review *guidance* from the U.S. Food and Drug Administration about what may or may not be considered safe and accurate testing, as well as *guidance from CDC* or other public health authorities, and check for updates. Employers may wish to consider the incidence of false-positives or false-negatives

associated with a particular test. Finally, note that accurate testing only reveals if the virus is currently present; a negative test does not mean the employee will not acquire the virus later.

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

So, although the EEOC guidance does not address random COVID-19 testing, as long as the testing meets the above standards, it should be considered appropriate.

Note, though that not all COVID-19 testing is approved by the EEOC, and specifically blood antibody testing which tests for past infection not current infection should not be used. The EEOC updated this guidance last month to indicate that COVID-19 antibody testing should not be used. Specifically, the EEOC states:

A.7. CDC said in its *Interim Guidelines* that antibody test results "should not be used to make decisions about returning persons to the workplace." In light of this CDC guidance, under the ADA may an employer require antibody testing before permitting employees to re-enter the workplace? *(6/17/20)*

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

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

Some employers perform viral COVID-19 tests on all employees prior to their initial return to work, while others (particularly in healthcare settings or employers with workers in close proximity such as meatpackers and warehouse workers) test employee repeatedly in the workplace. Fewer employers are testing employees randomly, referred to as "sentinel testing," to help limit the number of tests but also still try to identify areas of concern and potential hot spots in the workplace. As an example of sentinel testing, the University of Alabama at Birmingham has instituted both mandatory campus entry COVID-19 testing for employees and students as well as sentinel testing on a voluntary basis, discussed online at *https://www.uab.edu/coronavirus/reentry/covid-19-testing*. The sentinel testing will be performed on between 2.5 and 5% of on-campus population weekly to try to determine how much COVID-19 virus is circulating at the University.

COVID-19 testing by itself, of course, is not sufficient to help a workplace limit its COVID-19 exposure. Testing only provides a snapshot of whether an employee is positive on the day of the test and does not predict future infection. Accordingly, testing should be part of a larger process requiring such protective measures as proper hygiene and sanitizing in the workplace, social distancing, masks worn indoors, COVID-19 symptom screening, and requiring sick employees to stay home.

One of our employees has used up his Emergency Family and Medical Leave Expansion Act (EFMLEA) leave and is requesting leave until school reopens in late September. Is he eligible for benefits under the Pandemic Unemployment Assistance (PUA) program?

In short, it depends. The DOL, which administers the PUA program, states "primary caregivers" may be eligible for PUA benefits when they are caring for children who must stay home due to COVID-19-related emergency school or summer childcare closures. On the other hand, if the child's school is closed for summer break, it's unlikely the individual will qualify for PUA benefits.

Additionally, to qualify as a primary caregiver, the employee's children must require "ongoing and constant" attention, leaving him unable to provide childcare and work from home. Therefore, individuals who are parents or guardians of older children who don't require close supervision, and therefore can work from home, probably won't qualify for PUA benefits.

The PUA program and other unemployment programs established by the CARES Act are set to expire at the end of the year. For more information, contact your state unemployment office or visit the DOL website.

Our organization has an employee working remotely from home. She tested positive for COVID-19 and has a doctor's note stating she can return to work in two weeks. She is asymptomatic and doesn't want to use EPSL—she is hoping to continue working because she isn't feeling ill. (She wants to save her EPSL time in case her elderly mother gets sick and she needs to take care of her.) Can we let her work from home during the self-quarantine period?

Yes. If the employee is still able to telework, she can continue to work from home while under a quarantine order.

Under the Families FFCRA, one qualifying reason for EPSL is that the employee has been advised by a healthcare provider to self-quarantine due to concerns related to COVID-19. The FFCRA regulations clarify that an employee may only take EPSL if the healthcare provider advises her to self-quarantine and the advice prevents her from being able to work or telework. She is able to telework if the employer has work for her, the employer permits her to work from home, and there are no extenuating circumstances (such as severe COVID-19 symptoms) that prevent her from teleworking. Since this particular employee has no symptoms, was already working from home, and it seems the doctor's note only prevents her from coming into the office, but not from continuing to work from home, she wouldn't be eligible for EPSL at this time, even if requested.

If the employee's mother contracts COVID-19, she may then be eligible for EPSL. Another qualifying reason for EPSL under the FFCRA is that an employee is caring for an individual who has been advised to self-quarantine by a healthcare provider. An "individual" is defined in the regulations to include an immediate family member, a person who regularly resides in the employee's home, or a similar person for whom the employee is expected to care. Again, to be eligible for this leave, she must be unable to perform work for the employer because of the need to care for the individual. Assuming she cannot telework when caring for her mother, EPSL should be provided.

An employer with 45 employees has an employee who is out of work pending COVID-19 test results. If the results come back negative and the employee doesn't have COVID-19, does the employer have to pay the employee for the time he was off work?

In response, HR Hotline provides the following information. The employer is covered by the FFCRA and so likely should pay employees for time spent waiting for a COVID-19 test result if the employee has symptoms of COVID-19. Under the FFCRA, which applies to employers with fewer than 499 employees, covered employers must provide eligible

employees up to 80 hours/two weeks of paid sick leave at full pay (up to a specified cap) for various reasons related to COVID-19. Specifically, an employee experiencing COVID-19 symptoms may take FFCRA paid sick leave for time spent making, waiting for, or attending an appointment for a test for COVID-19. The employee does not have to receive a positive test result in order to be paid under the FFCRA. Further, an employee may continue to take leave while experiencing any of the common COVID-19 symptoms or after testing positive for COVID-19 (regardless of symptoms experienced), provided that the health care provider advises the employee to self-quarantine. See comments to FFCRA regulations at 26 C.F.R. sect. 826.20.

The paid FFCRA leave must be provided by the covered employers, but employers will receive tax credits for payments to employees under the FFCRA, and the Internal Revenue Service (IRS) issued guidance addressing how those credits would be provided. For information on the tax credits, see *https://www.irs.gov/forms-pubs/about-form-7200* see also *https://www.irs.gov/pub/irs-drop/n-20-21.pdf*.

If the employee was not experiencing symptoms of COVID-19, however, and still went for a test, the time spent away from work waiting for the test result is not covered under the FFCRA. In this situation, the employee should be allowed to use any available employer-provided paid leave.

What can I do when my employee keeps exposing herself to COVID-19?

As the COVID-19 pandemic has gone on for a longer period than many anticipated, some employers are experiencing a problem with employees who simply don't care or don't believe the pandemic is a significant safety issue. This includes employees who routinely meet or interact with others they know have tested positive for COVID-19, employees intentionally exposing themselves as part of a "COVID-19 party," and similar issues.

Employees who intentionally expose themselves to COVID-19, particularly if it's in the hope of receiving PTO, unemployment compensation, or something similar, are subject to counseling and review of their conduct and in certain egregious circumstances could be disciplined or terminated.

Is an employee eligible to take paid leave under the FFCRA when a child's school is operating on a hybrid-attendance basis, such as having students alternate between days attending school in person and days participating in remote learning?

Yes, the employee is eligible to take paid leave under the FFCRA on the days when the child isn't permitted to attend school in person and, instead, must engage in remote learning. There's a key limitation here, though: The employee must need the leave to actually care for the child during that time, and there must be no other suitable person available to do so.

Is an employee eligible to take paid leave under the FFCRA when a child's school gives the option of attending in person or participating in remote learning and the child is signed up for the remote learning option?

No. The child's school isn't "closed" due to COVID-19-related reasons. Because the school is open for in-person attendance, FFCRA paid leave isn't available to care for the child—regardless of whether the employee is given the remote learning option.

Is an employee eligible to take paid leave under the FFCRA when a child's school is starting the school year remotely but continuing to evaluate reopening for in-person attendance later?

Yes—at least, while the child's school remains closed. If the school reopens and the child can return in-person, the availability of paid leave will depend on how the school reopens (e.g., whether there is staggered in-person attendance or the option to continue remote learning).

We are an employer with approximately 400 employees, and we are aware a couple of our workers have tested positive for COVID-19. Are we required to notify all employees about the coworkers who have tested positive for the virus?

To satisfy the OSH Act general duty clause (i.e., to provide a safe work environment), as well as to conform to the CDC guidance regarding actions to take to limit exposure and spread in the workplace, informing employees about a positive test and potential exposure is recommended. But this comes with a very significant caveat. A positive test result would be considered private medical information under the ADA and cannot be shared with others without violating the Act. For this reason, and others, the identity of the employee shouldn't be disclosed.

You should, however, identify locations the employee visited when last in your facility and the last day she worked. Then identify which coworkers may have come in contact with and/or been in close proximity to her. They should be notified, without providing identifying information of the employee who tested positive, that they may have been exposed to someone in the workplace who has tested positive. They should be told to report if they begin experiencing any symptoms, encouraged to seek medical treatment and/or testing if they have exposure concerns, and possibly even to self-quarantine for a 14-day period.

In addition, depending on the layout of your facility and the nature of the work performed, a general notice to all employees may also be warranted. The notice can inform them that it isn't believe they were exposed, but they also should seek whatever medical treatment and/or testing they deem appropriate.

Is it a violation of employees' Constitutional rights to require them to wear a facemask?

No. If you are a private employer, the Constitution doesn't even come into play. Private employers can impose safety rules and regulations within your company without any Constitutional issue or concern. The Constitution could potentially apply to public employers, but reasonable safety requirements and restrictions aren't considered to violate a constitutional principle even when there may be other factors at play such as religious or disability accommodations.

Reasonable rules and requirements are commonly imposed by governments and employers, even when the employee may or may not recognize the risk. Under state law, you are required to stop at a stop sign even if no other traffic is coming. Failure to do so will result in a fine and citation—masking isn't all that different.

An employee has tested positive for COVID-19. Her doctor says she can return to work in two weeks. She is asymptomatic and wants to continue to work so she can save her EPSL in case her elderly mother gets sick. Can we allow her to continue working?

Under the FFCRA, employers with no more than 500 employees must provide the EPSL in certain situations. There are six qualifying reasons an employee may be eligible for the leave, including:

- A healthcare provider has advised the individual to self-quarantine because of COVID-19; *and*
- The employee is experiencing coronavirus symptoms and seeking a medical diagnosis.

Additionally, the employee is eligible for the leave to care for an individual who is quarantining or experiencing coronavirus symptoms and seeking a diagnosis.

To that end, your employee is certainly eligible for the EPSL whether she takes it to care for herself or her mother, should she fall ill. As the employer, however, you are obligated to provide the leave only if she applies for it. Given that your employee won't be applying for the leave, you don't need to classify her time off as EPSL time. If she must take time off to care for her COVID-19 symptoms, she could use other accrued sick time, PTO, or unpaid time if your company permits such an arrangement.

Can she continue to work? The second part of your question regards whether your employee is permitted to continue working. Given that your office is operating in a remote environment, it's certainly feasible for her to continue teleworking if she feels physically able to do so. Of course, given that she has a positive COVID-19 diagnosis, she cannot perform tasks requiring her to interact with coworkers or customers in a face-to-face manner. Similarly, if your company transitions back to an in-person workplace in the next 10 to14 days, she will have to continue quarantining at home.

In a similar vein, as your company transitions to an in-person return to work, you must consider whether certain jobs can continue to be performed remotely in instances where an employee tests positive but is asymptomatic, or whether your company requires in-person attendance. If it's the latter, your employee in this example may be forced to use her EPSL if there's no room for a reasonable accommodation.

Our employees complete COVID-19 screening forms on a daily basis. We also take employee temperatures each day and record the results on a form. What are the retention guidelines for these screening forms?

Employee COVID-19 screening forms are considered medical records and should be kept according to the confidentiality and record retention requirements of the federal ADA as well as applicable state laws and regulations.

Although the federal ADA normally restricts most employee medical inquiries and examinations, the EEOC has indicated employers may screen for COVID-19 symptoms in the workplace. According to the EEOC's guidance "What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws," online at *https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws*, employers may screen employees for COVID-19 symptoms and take temperatures when they enter the workplace. See Q&As A2 and A3. However, employers also must treat medical records from these screens as confidential as required by the ADA. As explained in Q&A B1, the ADA requires that all medical information about a particular employee be stored separately from the employee's personnel file and limit access to this confidential information. An employer may store all medical information related to COVID-19 in existing medical files.

Regarding how to store confidential medical information in compliance with the ADA, additional EEOC guidance suggests that employers should take the following steps to secure their employees' medical information: (1) keep the information in a medical file in a separate locked cabinet, apart from the personnel files; and (2) designate a specific person or persons to have access to the medical file. See EEOC Technical Assistance Manual, 6.5. Further, according to the ADA regulations, access to medical records must be limited to certain need-to-know situations, including that: (1) supervisors and managers may be informed about necessary restrictions on the work or duties of an employee and necessary accommodations; (2) first-aid and safety personnel may be informed, when appropriate; (3) government officials may be given relevant information when investigating compliance with the ADA and other federal and state laws prohibiting discrimination on the basis of disability; (4) state workers' compensation offices, or "second injury" funds may be provided relevant information; and (5) insurance companies may be provided relevant information if a

medical examination is required to provide health or life insurance for employees. See 29 C.F.R. §1630.14(c) and (d); EEOC Technical Assistance Manual, 6.5. In limited circumstances, employers may be required to report certain medical information regarding infectious diseases (such as COVID-19) to local health authorities.

Note that states may have different medical record confidentiality requirements.

Regarding how long you must keep the medical records, the ADA requires that medical records (as well as all employee records related to the ADA) be kept for one year from the date of entry or the personnel action involved, whichever is later. See 29 C.F.R. §1602.14(a). States may have different requirements for how long the records must be kept.

Because of the complex record retention and medical confidentiality requirements, employers should consult with an attorney regarding how to maintain COVID-19 employee records.

DOL FAQ #16 says that an employee does not need to provide written documentation prior to taking FFCRA paid leave. However, both the DOL and the IRS state that the employee must eventually provide written documentation. The DOL states the employee must provide the written documentation as soon as practicable. Additionally, the IRS FAQ #44 states that an employer may choose to ask for additional information than what is listed in the IRS FAQ (which mirrors the DOL FAQ).

We struggle with gathering the required documentation from an employee when they request EPSL. This is especially true when an employee claims they were exposed away from work (a Thanksgiving gathering, for example) and they need to quarantine.

Often, the employee only provides a copy of their COVID-19 test results from the county drive-through testing site, and no other documentation. Some local counties will not provide a certification that the employee must quarantine because they were not notified timely about the exposure. Medical providers will not review the employee's case and provide a note because they did not conduct the COVID test.

Based on the information from the DOL and IRS, is a copy of COVID-19 test results sufficient documentation to take the tax credits for the employee's paid FFCRA leave?

A copy of an employee's COVID-19 test result alone likely is not sufficient documentation to support the IRS tax credits available for paid leave provided under the FFCRA. You should discuss this matter with an attorney or other tax professional who is familiar with the FFCRA tax credits provisions to ensure you have adequate documentation to receive the tax credits. There seems to be some conflict between the DOL FFCRA documentation requirements to support the need for leave that require only an oral statement from an employee and the IRS documentation requirement that asks for a written statement from the employee. For documentation for either case, though, I don't think confirmation from a health care provider is specifically necessary or even that a positive COVID-19 is necessary.

Regarding documentation required by the DOL to take paid leave under the FFCRA, employees do not have to provide written documentation but can provide the information orally. The employee also only has to provide the name of the government entity or health care provider that requires quarantine. You do not need information directly from the government entity or the health care provider supporting the need for leave. Specifically, the regulations implementing the FFCRA, found at 29 C.F.R. sect. 826.100 state:

Documentation of need for leave.

(a) An Employee is required to provide the Employer documentation containing the following information as soon as practicable, which in most cases will be when the Employee provides notice under § 826.90:

(1) Employee's name;

(2) Date(s) for which leave is requested;

(3) Qualifying reason for the leave; *and*

(4) Oral or written statement that the Employee is unable to work because of the qualified reason for leave.

(b) To take Paid Sick Leave for a qualifying COVID-19 related reason under § 826.20(a)(1)(i), an Employee must additionally provide the Employer with the name of the government entity that issued the Quarantine or Isolation Order.

(c) To take Paid Sick Leave for a qualifying COVID-19 related reason under § 826.20(a)(1)(ii) an Employee must additionally provide the Employer with the name of the health care provider who advised the Employee to self-quarantine due to concerns related to COVID-19.

(d) To take Paid Sick Leave for a qualifying COVID-19 related reason under § 826.20(a)(1)(iii) an Employee must additionally provide the Employer with either:

(1) The name of the government entity that issued the Quarantine or Isolation Order to which the individual being care for is subject; *or*

(2) The name of the health care provider who advised the individual being cared for to self-quarantine due to concerns related to COVID-19.

(e) To take Paid Sick Leave for a qualifying COVID-19 related reason under § 826.20(a)(1)(v) or Expanded Family and Medical Leave, an Employee must additionally provide:

(1) The name of the Son or Daughter being cared for;

(2) The name of the School, Place of Care, or Child Care Provider that has closed or become unavailable; *and*

(3) A representation that no other suitable person will be caring for the Son or Daughter during the period for which the Employee takes Paid Sick Leave or Expanded Family and Medical Leave.

(f) The Employer may also request an Employee to provide such additional material as needed for the Employer to support a request for tax credits pursuant to the FFCRA. The Employer is not required to provide leave if materials sufficient to support the applicable tax credit have not been provided. For more information, please consult *https://www.irs.gov/newsroom/covid-19-related-tax-credits-for-required-paid-leave-provided-by-small-and-midsize-businesses-faqs*."

Accordingly, if employees do not provide the above documentation, you do not have to provide paid FFCRA leave, but you only need an oral statement from the employee that includes the above information to satisfy the DOL documentation requirements. You do not need any direct information from a health care provider or documentation of a positive test. For example, you may have a phone conversation with the employee about the need for FFCRA leave and then should document in writing the answers to the above notice requirements for your records.

The IRS tax credit requirements, however, do require a "written request" from the employee. According to FAQ 44 provided by the IRS to address the IRS substantiation/documentation requirements for the FFCRA tax credit, online at https://www.irs.gov/newsroom/how-should-an-employer-substantiate-eligibility-for-tax-credits-for-qualified-leave-wages:

> *44. What information should an Eligible Employer receive from an employee and maintain to substantiate eligibility for the sick leave or family leave credits? (Updated November 25, 2020)*
>
> An Eligible Employer will substantiate eligibility for the sick leave or family leave credits if the employer receives a written request [emphasis mine] for such leave from the employee in which the employee provides:
>
> - The employee's name;
> - The date or dates for which leave is requested;
> - A statement of the COVID-19 related reason the employee is requesting leave and *written support* [emphasis mine] for such reason; *and*
> - A statement that the employee is unable to work, including by means of telework, for such reason.
>
> In the case of a leave request based on a quarantine order or self-quarantine advice, the statement from the employee should include the name of the government entity ordering quarantine or the name of the health care professional advising self-quarantine, and, if the person subject to quarantine or advised to self-quarantine is not the employee, that person's name and relation to the employee.
>
> In the case of a leave request based on a school closing or child care provider unavailability, the statement from the employee should include the name and age of the child (or children) to be cared for, the name of the school (or summer camp, summer enrichment program, or other summer program) that has closed or place of care that is unavailable, and a representation that no other person will be providing care for the child during the period for which the employee is receiving family medical leave and, with respect to the employee's inability to work or telework because of a need to provide care for a child older than fourteen during daylight hours, a statement that special circumstances exist requiring the employee to provide care.

Except for the reference to "written request" and "written statement," the IRS and DOL documentation requirements are the same. Even the reference to a "written statement" ("A statement of the COVID-19 related reason the employee is requesting leave and *written support* [emphasis mine] for such reason") arguably could refer to a written statement prepared by the employer that reflects the employee's oral statement as required by the DOL regulations discussed above. Accordingly, it may be sufficient for the employer to have the information provided orally by the employee and documented in writing by the employer to claim the tax credits and arguably complies with the purpose of the FFCRA's documentation requirements and the intention to provide paid leave as quickly and easily as possible. However, because the IRS still refers to a "written request from the employee in which the employee provides …" you should consult with a tax attorney or other tax professional about this matter.

Note that neither the DOL regulations nor the IRS guidance discusses using COVID-19 test results as documentation. Thus, it is unlikely that the COVID-19 test results would be considered sufficient documentation without the other required information discussed above.

I have an employee that has tested positive for COVID. Our company size is 28 employees. He has 104 hours of PTO available to him. Are we required to pay him for 10 days of staying home without him using his PTO, or does he need to use his PTO first?

You are not required to provide the employee with emergency paid sick leave under the federal FFCRA, which applies to employers with 499 or fewer employees. The law's paid leave requirements expired on December 31, 2020, and the current Congress did not pass an extension to the FFCRA leave requirements. However, the FFCRA provisions providing 100% tax credits for employers that provide the paid leave were extended until March 31, 2021 under the latest COVID-19 package passed by Congress and signed by the President last week. So, employers that choose to provide the FFCRA paid leave may also apply for the tax credits for the leave.

Accordingly, your organization may voluntarily provide the emergency paid sick leave and emergency FMLA leave for school and childcare closures to employees and can receive tax credits for doing so through March 31, 2021. Or, you may discontinue the FFCRA paid leave program since it is no longer required as of December 31, 2020. If you do not want to provide the FFCRA paid leave voluntarily using the tax credits, you can require the employee to use his available PTO to cover his absence because he is positive for COVID-19.

One of our nursing home employees who was exposed to a COVID-19-positive resident just returned to work from a 14-day quarantine after testing negative. Do we have to record it in the OSH Act logs?

At the most basic level, the OSH Act requires you to keep records of all work-related injuries and illnesses. This record keeping requirement has remained in effect throughout the COVID-19 pandemic, although the Occupational Safety and Health Administration (OSHA) is currently operating under temporary guidelines while the pandemic continues. Currently, OSHA guidelines require recording only positive cases of COVID-19 contracted at work. As that isn't the case here, there's no requirement to disclose the exposure.

Had the employee tested positive, even under the additional factors, the temporary guidelines (which could be updated at any time) would require reporting the COVID-19 illness as being contracted at work. The extra factors have been developed due to the nature of the illness and the difficulty in determining, conclusively in most cases, whether transmission is truly work-related given that most individuals have the potential to be exposed both in and out of the workplace.

The interim guidelines do provide some latitude to update records, should additional information about contracting the illness surface later. Recording an occurrence of the illness doesn't of itself mean an employer has violated OSHA standards. The main concern continues to be that employers are responding appropriately under all circumstances to protect others.

An employee that received his vaccine and experienced symptoms, so he stayed home. We know that the FFCRA was extended as part of the ARPA. Additional reasons were added and that they take effect after 03/31/2021, which included time off to get the vaccine and any complications as a result of the vaccine. Since the employee took the leave before 3/31/21, can we update the FFCRA forms and pay him for being out that day due to his reaction to the vaccine, or does it need to wait until after 03/31/2021 before adding and paying out for that reason?

The extended FFCRA benefits related to immunization reactions do not take effect until April 1, 2021, so this employee is not eligible for paid leave under the FFCRA, but other employees will be starting April 1, 2021.

The provisions of the federal FFCRA employers to provide paid emergency sick leave and emergency FMLA leave expired on December 31, 2020. Employers were required to provide the paid leave but also qualified for 100% tax

credits for the payments. So, as of January 1, 2021, employers are no longer required to provide protected, paid leave under the FFCRA.

President Trump signed an extension of the tax credits as part of the COVID-19 stimulus package passed in late December 2020, but the provisions requiring paid sick leave were not extended. So, effective January 1, 2021, employers could provide the paid sick voluntarily and receive the 100% tax credits through March 31, 2021.

On March 11, 2021, President Biden signed the ARPA (see Public Law No. 117-2) to provide $1.9 trillion dollars in COVID-19 aid and stimulus as well as an extension of the FFCRA tax credits for paid sick leave. Like the previous extension of tax credits, ARPA does not mandate that employers provide COVID-19-related leave but does continue to provide the tax credit to employers covered by the FFCRA who voluntarily provide the paid FFCRA leave. ARPA extends the date employers can receive tax credits until September 30, 2021, provides additional use of paid leave for employees, and also includes tax credits for paid leave related to COVID-19 vaccinations.

Specifically, ARPA establishes that beginning April 1, 2021, the employee limit of 80 hours for paid sick leave will reset so that employees who have already used up their FFCRA paid sick leave will be eligible to again take the paid leave if the employer provides it. The 80 hours of paid sick leave also is available for an employee who "is seeking or awaiting the results of a diagnostic test for, or a medical diagnosis of, COVID–19 and such employee has been exposed to COVID–19 or the employee's employer has requested such test or diagnosis, or the employee is obtaining immunization related to COVID–19 or recovering from any injury, disability, illness, or condition related to such immunization."

In addition, the 10-week-per-employee paid family leave limit will also reset on April 1, 2021 and is extended to cover 12 weeks of emergency paid FMLA leave. The emergency FMLA leave also has been extended to include periods when an employee "is seeking or awaiting the results of a diagnostic test for, or a medical diagnosis of, COVID–19 and such employee has been exposed to COVID–19 or the employee's employer has requested such test or diagnosis, or the employee is obtaining immunization related to COVID–19 or recovering from any injury, disability, illness, or condition related to such immunization."

So, employers that voluntarily allow employees to take such additional FFCRA-qualifying paid sick leave or paid family leave can still receive a tax credit for any additional leave taken from April 1, 2021 through September 30, 2021.

Can we ask employees if they have received the COVID-19 vaccine?

The short answer is: Yes. According to the EEOC, you can ask employees if they have received a COVID-19 vaccine. You can also require individuals to provide proof they were vaccinated.

The EEOC explains such requests aren't disability-related inquiries, and as a result, they don't implicate an employee's rights under the ADA. You must be cautious, however, about asking follow-up questions. For example, it might be tempting to ask an individual why he hasn't been vaccinated. But doing so implicates the ADA because the question could elicit information about a disability (e.g., he might explain he has a medical impairment that creates additional risks with respect to the vaccine). Therefore, at a minimum, such requests must be job-related and consistent with business necessity. Similarly, when asking for proof of vaccination, you should instruct individuals not to provide any extraneous medical information because that too might implicate the ADA.

As organizations evaluate options for employees' return to the office, it's natural to want to know your employees are vaccinated. Although state law may vary, the EEOC's guidance provides some reassurance on this question. But you

should consider whether you need to ask follow-up questions and be cautious when seeking proof from employees that they have been vaccinated.

We asked an employee who was working from home to return to the office because he failed to perform his job duties. Now, in the midst of a disciplinary process, he has submitted a request to work from home as a reasonable accommodation to prevent exposure to COVID-19. Are we required to grant his request?

Fear of exposure to COVID-19 is not a disability. If he has an underlying disability that causes him to be at higher risk from the virus or that has been exacerbated by the outbreak, however, the EEOC has stated you should consider whether continued telework might be a reasonable accommodation. You should engage in the interactive process with him to:

- Understand the basis of his concern;
- Determine whether he has a disability; *and*
- If so, explore possible accommodations that would minimize his potential for exposure.

Through discussions with the employee and his healthcare provider, you may determine you can adequately reduce the potential for exposure through accommodations that permit him to work safely in the office.

Whether he returns to work or continues to telework, you're entitled to (1) hold him to the workload and quality standards you apply to others in his position and (2) continue with the disciplinary process you have begun.

Under ARPA, if an employee willfully and knowingly disregards company policy, is she not voluntarily terminating her employment? Also, in that same vein, when does misconduct move from violating company policy and arrive at "gross misconduct"?

A federal COBRA premium assistance program is available under the ARPA to AEIs who didn't previously elect the continued health care benefit coverage under COBRA. AEIs are generally defined as employees who involuntarily terminated or experienced a reduction in hours between November 1, 2019, and September 30, 2021, and including their covered dependents. Others eligible for the COBRA subsidy are those who elected COBRA continuation coverage but are no longer enrolled because they were unable to continue paying the premium.

The agency guidance released the first week of April minimally clarified the scope of beneficiaries who qualify as AEIs and, unfortunately, has yet to provide a clear meaning of "involuntary" for terminated workers. Indications are that additional clarifying guidance may be issued by the DOL and the IRS.

The initial agency guidance doesn't shed much light on the meaning of "involuntary" but does confirm, consistent with COBRA provisions, an individual terminated for "gross misconduct" cannot qualify as an AEI. Looking back on previous IRS interpretations of involuntary termination in relation to COBRA suggests termination for cause has been considered involuntary termination. Thus, termination for violation of company policy would likely be interpreted as termination for cause and an involuntary termination under the current provision.

To meet the undefined "gross misconduct" standard for COBRA purposes, the DOL has taken the position it depends on specific facts and circumstances, noting excessive absences or generally poor performance don't meet the standard.

Courts interpretating COBRA gross misconduct determinations have generally ruled in favor of employees, requiring flagrant and extreme misconduct to meet the standard. Thus, a willful violation of company policy would have to be a substantial deviation from the standards and obligations under your policies to support a gross misconduct determination.

Helpful links

Throughout this booklet, we've embedded links to outside resources wherever we thought they may be helpful. We've also provided them below:

- CDC's Duration of Isolation and Precautions for Adults with COVID-19 *https://www.cdc.gov/coronavirus/2019-ncov/hcp/duration-isolation.html*
- CDC Guidance for Disinfecting Facilities *https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/cleaning-disinfection.html*
- CDC Travel Recommendations and Restrictions https://wwwnc.cdc.gov/travel/notices and *https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html*
- CDC Website on COVID-19 *https://www.cdc.gov/coronavirus/2019-ncov/index.html*
- DHS Extension of the REAL ID Enforcement Deadline *https://www.dhs.gov/news/2020/03/26/acting-secretary-chad-wolf-statement-real-id-enforcement-deadline*
- DHS Response to Coronavirus Disease 2019 *https://www.dhs.gov/coronavirus*
- DOL's Families First Coronavirus Response Act: Questions and Answers *https://www.dol.gov/agencies/whd/pandemic/ffcra-questions*
- DOL FFCRA Poster *https://www.dol.gov/sites/dolgov/files/WHD/posters/FFCRA_Poster_WH1422_Non-Federal.pdf*
- DOL Unemployment Insurance Program Letters *15-20 on Federal Pandemic Unemployment Compensation (https://wdr.doleta.gov/directives/attach/UIPL/UIPL_15-20.pdf)*, *16-20 on Pandemic Unemployment Insurance (https://wdr.doleta.gov/directives/attach/UIPL/UIPL_16-20.pdf)*, and *17-20 on Pandemic Emergency Unemployment Compensatio (https://wdr.doleta.gov/directives/attach/UIPL/UIPL_17-20.pdf)*. The FPUC, PUA, and PEUC programs, along with other CARES Act provisions applicable to unemployment insurance, were summarized by the DOL in *UIPL 14-20 (https://wdr.doleta.gov/directives/attach/UIPL/UIPL_14-20.pdf)*.
- E- Verify Guidance *https://www.e-verify.gov/about-e-verify/whats-new/e-verify-extends-timeframe-for-taking-action-to-resolve-tentative*
- Federal Government Website on COVID-19 *https://www.coronavirus.gov/*
- Government Response to COVID-19 *https://www.usa.gov/coronavirus*
- IRS Revised Requirements for Form I-9 Document Review *https://www.ice.gov/news/releases/dhs-announces-flexibility-requirements-related-form-i-9-compliance*.
- IRS Website on Tax Relief Related to COVID-19 *https://www.irs.gov/coronavirus-tax-relief-and-economic-impact-payments*
- IRS Notice on High Deductible Health Plans and Expenses Related to COVID-19 *Notice 2020-15 https://www.irs.gov/pub/irs-drop/n-20-15.pdf*
- OSHA's Guidance on Preparing Workplaces for COVID-19 *https://www.osha.gov/Publications/OSHA3990.pdf*
- OSHA Website with COVID-19 Resources *https://www.osha.gov/SLTC/covid-19/*
- USCIS Response to COVID-19 *https://www.uscis.gov/about-us/uscis-response-covid-19*

State resources for employers

Many states are creating websites dedicated solely to COVID-19 resources. Others are adding COVID-19-related information to various state agency websites. Below is a list of the most valuable, relevant sites we could identify based on our research. Some are state-run/government agency sites, others are Chamber of Commerce sites and other state business organizations. This section will be updated as we find additional resources.

Alabama

- Altogether Alabama *Resources for Businesses and Nonprofits*

Alaska

- Department of Commerce, Community and Economic Development *COVID-19 Economic Recovery Resource Portal for Business*

Arkansas

- Economic Development Commission *COVID-19 Resources for Businesses and Employees*

Arizona:

- Commerce Authority *COVID-10 Arizona Business Resources*
- Arizona Together *Business Resources*

California

- California Coronavirus (COVID-19) Response *Business and employers page*
- Labor & Workforce Development Agency *Coronavirus 2019 (COVID-19) Resources for Employers and Workers*

Colorado

- Chamber of Commerce *Coronavirus (COVID-19) page*

Connecticut

- CT.gov *Coronavirus Disease 2019 (COVID-19) Business Resources page*

Delaware

- Deleware.gov *COVID-19 Resources for Businesses page*
- Division of Small Business *COVID-19 Information for DE Small Business*

District of Columbia

- DC Government's *COVID-19 Business and Non-Profits Resources page*

Florida

- Florida Health *2019 Novel Coronavirus Response (COVID-19) Businesses and Employers page*
- SBDC Florida *COVID-19 Business Disaster Recovery Assistance*

Georgia

- Georgia.gov *COVID-19 Support for Businesses*
- Department of Health *COVID-19: Businesses and Employers*

Hawaii

- Department of Business, Economic Development & Tourism *COVID-19 Hawaii Business Resources*

Idaho

- Idaho Commerce *COVID-19 Resources and Information*

Illinois

- Department of Commerce and Economic Opportunity (DCEO) *Flowchart to determine if Illinois employers are an 'essential business'*
- DCEO *COVID-19 Information for Small Business*

Indiana

- Indiana Economic Development Corporation (IDEC) *COVID-19 Business Resource Center*

Iowa

- Workforce Development *COVID-19 Information Page*

Kansas

- Department of Commerce *COVID-19 Response Business Resources page*
- Department of Labor *COVID-19 Response Resources*

Kentucky

- Team Kentucky Cabinet for Economic Development *Business-related COVID-19 guidance, resources and FAQs*

Louisiana

- Workforce Commission *Louisiana Response to COVID-19*
- Department of Health *Interim Guidance for Businesses and Employers to Plan and Respond to Coronavirus Disease 2019*

Maine

- Department of Labor *Resources for Workers and Businesses on COVID-19*

Maryland

- Maryland.gov *COVID-19 Information for Business*

Massachusetts

- Mass.gov *COVID-19 Business & Employment Resources*

Michigan

- Michigan.gov *Coronavirus Resources for Employers & Workers*

Minnesota

- Department of Health *Businesses and Employers: COVID-19 page*
- Chamber of Commerce *COVID-19 Business Toolkit*

Mississippi

- Department of Employment Security *Resources for Workers and Businesses on COVID-19*

Missouri

- Department of Labor *FAQ for Businesses & Workers*
- Missouri Chamber *Coronavirus Resources for Missouri Employers*

Montana

- Department of Labor & Industry *Resource Guide for Employers and Employees*

Nebraska

- Department of Economic Development (DED) *COVID-19 Information*

Nevada

- Department of Business & Industry *COVID-19 Announcements*

New Hampshire

- Department of Business and Economic Affairs *COVID-19 Business Resources*

New Jersey

- *NJDOL and the Coronavirus (COVID-19): What Employers & Businesses Should Know*

New Mexico

- Economic Development Department *COVID-19Information, Resources, and Tips for Businesses, Organizations and Workers*

New York

- Empire State Development *COVID-19-Related Resources*

North Carolina

- Department of Health and Human Services *COVID19: Businesses and Employers*

North Dakota

- North Dakota Commerce *COVID-19 Business and Employer Resources*

Ohio

- Chamber of Commerce *COVID-19 Business Resources*

Oklahoma

- Oklahoma Commerce *COVID-19 Resources*

Oregon

- SBDC Oregon *COVID-19 Business Resources*

Rhode Island

- Rhode Island Commerce *COVID-19 FAQ*

Pennsylvania

- PA.gov *Responding to COVID-19 in Pennsylvania*

South Carolina

- Chamber of Commerce *COVID-19 Information & Resources Hub*
- Department of Health and Environmental Control *Businesses & Employers (COVID-19)*

South Dakota

- Department of Labor & Regulation *COVID-19 Resources*
- Governor's Office of Economic Development *COVID-19 page*

Tennessee

- Department of Economic & Community Development *COVID-19 Small Business Resources*

Texas

- Texas Economic Development *COVID-19 page*

Utah

- Utah.gov *Coronavirus Resources for Business*

Vermont

- Agency of Commerce and Community Development *COVID-19 Recovery and Resource Center: Business Resources*

Virginia

- Chamber of Commerce *COVID-19 Resource Center*

Washington

- Business.WA.gov *COVID-19 Business Resources for Washington State*

West Virginia

- Development Office *COVID-19 Business Relief Resources and Information*

Wisconsin

- Department of Health Services *COVID-19: Businesses and Employers*
- Economic Development Corporation *COVID-19 Business Resources*

Wyoming

- Legislative Service Office *COVID-19 State and Federal Resources: Emergency Assistance to Individuals, Families and Small Businesses*
- Wyoming Small Business Development Center Network *COVID-19 Resources for Small Businesses*