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.

Exploring paid sick leave options

The rapid spread of the novel coronavirus and the disease it causes—COVID-19—is sparking new calls for paid sick leave, and employers are beginning to heed the call.

Public health experts urge people to stay away from work if they experience symptoms, but that means time without pay for many workers. Faced with the choice of going to work sick and possibly spreading the virus or not being able to pay their bills, some workers feel they have no choice.

Now some major employers are responding to the dilemma with paid time off (PTO) for workers who come down with COVID-19 as well as those who don't get sick but whose jobs are disrupted because of what world health authorities are now calling a pandemic. In addition, the new coronavirus is driving momentum for national legislation to provide paid sick time.

The largest employer in the country—Walmart—has responded to the coronavirus by offering paid time for both full- and part-time employees who are quarantined either by the government or the company after exposure to the virus. Those employees will receive up to two weeks of paid leave. Employees who test positive for the illness also will get PTO up to 26 weeks.

The retailer also is waiving its attendance policies through the end of April so that employees can stay home without being penalized if they are unable to work or feel uncomfortable at work because of fears about the virus. That time won't be paid.

In its response, Microsoft notes how hard the coronavirus outbreak has hit the Puget Sound area of Washington and northern California, where the company has major operations. Early in March, the company asked its employees who can work from home to do so. That move has reduced the need for many hourly workers who drive shuttles, work in company cafes, and provide other services on the company's campuses. So, the company has responded by paying those workers even when they're not needed on-site.

"We recognize the hardship that lost work can mean for hourly employees," an announcement from the company says. "As a result, we've decided that Microsoft will continue to pay all our vendor hourly service providers their regular pay during this period of reduced service needs. This is independent of whether their full services are needed. This will ensure that, in Puget Sound for example, the 4,500 hourly employees who work in our facilities will continue to receive their regular wages even if their work hours are reduced."

The company's announcement also spoke of the need for other businesses to step up as the virus spreads. "We're committed as a company to making public health our first priority and doing what we can to address the economic and societal impact of

COVID-19," the announcement says. "We appreciate that what's affordable for a large employer may not be affordable for a small business, but we believe that large employers who can afford to take this type of step should consider doing so."

Another company responding to the coronavirus—Darden Restaurants—also has announced a plan for paid sick leave for hourly employees. The company, which operates Olive Garden, Longhorn Steakhouse, The Capital Grille, Eddie V's, Cheddar's Scratch Kitchen, Yard House, Seasons 52, and Bahama Breeze restaurants, says it was already working on a policy, but the coronavirus outbreak pushed it forward.

When considering paid sick time policies, employers must be sure to treat similarly situated employees similarly to avoid discrimination claims. You may want to implement a paid leave policy in response to the public health emergency without making it permanent, and employers generally can do that, but it's important need to keep abreast of legal developments that could affect such a decision.

Remember, employers that decide to introduce paid leave because of the coronavirus to offer it to all employees and craft a written policy specifying exactly how much paid coronavirus leave is available, for what purposes it can be used (treatment, care, preventive care, etc.), and what notice and documentation will be required.

Employers also need to think about whether they want to end coronavirus-related paid leave if a vaccine or treatment becomes available. A written policy must specify when the paid leave will no longer be available and why. "Without the specific and written 'why' from the employer, employees deprived of coronavirus paid leave can attribute the deprivation to unlawful reasons, such as their belonging to a certain protected class," she says.

An employer that does *not* make provisions for paying employees who are quarantined or otherwise not willing or able to work won't face liability unless a state or local law requires paid leave.

What if an employer allows sick employees to come to the workplace? Could it face liability? But arguably there could be liability under the U.S. Occupational Safety and Health Act's (OSH Act) General Duty Clause to maintain a safe workplace.

Families First Coronavirus Response Act

The Families First Coronavirus Response Act (FFCRA) provides various forms of relief, including emergency paid sick leave (EPSL) and emergency family and medical leave (EFML) for certain employees, free COVID-19 testing, expanded food assistance and unemployment benefits, and employment protections for healthcare workers. More bills providing additional relief are likely to be passed.

Significantly, under the FFCRA, the Emergency Paid Sick Leave Act (EPSLA) requires 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 are not subject to those requirements. The key employment-related provisions of the bill were effective as of April 2, 2020.

In addition to the new paid sick leave obligations, under the FFCRA, the Emergency Family and Medical Leave Expansion Act (EFMLEA) amends 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 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*.

New 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*.

Safety concerns under OSH Act

Section 11(c) of the 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 (i.e., within 6 feet of) 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.

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 Centers for Disease Control and Prevention (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 personal protective equipment (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.

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.).

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 (see *https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/cleaning-disinfection.html*).

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.

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.

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 consider 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.

Unemployment insurance

The unemployment compensation system is a cooperative state and federal program, administered jointly by the DOL and each individual state. A *central piece of the CARES Act expands existing unemployment insurance programs, making far more individuals eligible and providing greater benefits than existing programs.* In granting expanded jobless benefits, the CARES Act takes the shared structure into account and authorizes the states to provide the additional benefits.

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.

This expansion of benefits eligibility is retroactive to losses commencing on or after January 27, 2020, and continues until December 31, 2020, with a maximum duration of Pandemic Unemployment Assistance (PUA) benefits of 39 weeks.

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. Once available, the money will be available as a supplement to regular unemployment insurance benefits for the duration of the worker's eligibility, up to July 31, 2020.

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.

The 13-week extension is available through December 31, 2020.

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 CARES Act specifies that FPUC benefit payments will end after payments for the last week of unemployment before July 31, 2020.

"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. Benefit payments under PUA are retroactive for weeks of unemployment, partial employment, or inability to work due to COVID-19 reasons from January 27 through December 31, 2020. For weeks of unemployment between March 27 and July 31, 2020, individuals eligible to receive PUA may also receive FPUC.

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.

The up to 13 weeks of extra benefits available as PEUC under Section 2107 apply to weeks of unemployment beginning when the state enters into an agreement with the DOL and ending December 31, 2020. 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 nunder 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.

Changes to Unemployment Compensation by State Due to COVID-19

Alabama. Waived 1-week waiting period and "able and available" and work search requirements for individuals who are diagnosed with COVID-19, quarantined by a medical professional or a government agency, laid off or sent home without pay for

an extended period by their employer due to COVID-19 concerns, or caring for an immediate family member who is diagnosed with COVID-19. The state is urging employers to file partial claims on their employees' behalf and will not charge these claims to the employer's experience rating. https://www.labor.alabama.gov/covid19resources.aspx

Alaska. Legislation signed March 26 relaxed restrictions on unemployment aid for Alaskans laid off or seeing reduced hours because of the coronavirus pandemic. https://labor.alaska.gov/unemployment/COVID-19.htm

Arizona. Executive Order 2020-11 waived the 1-week waiting period, "able and available," and work search requirements for those receiving unemployment benefits. Eligible individuals include people who work at a business that has been temporarily closed or has reduced hours because of COVID-19, who have to quarantine because of COVID-19, or who have to care for a family member with COVID-19 on the list of people eligible for unemployment insurance. The order also waived any increase in employer payments to the unemployment insurance fund for businesses whose employees receive benefits under this provision. https://des.az.gov/services/coronavirus

Arkansas. Governor Asa Hutchinson has directed the Arkansas Department of Commerce to waive the 1-week waiting period. https://govstatus.egov.com/ar-covid-19

California. Waived the 1-week waiting period so unemployed workers may collect benefits for the first week they are out of work, and the California Employment Development Department has indicated that reduced hours because of COVID-19 will qualify for partial wage replacement benefits, too. https://www.edd.ca.gov/about_edd/coronavirus-2019.htm

Colorado. Executive Order 2020-012 waived the 1-week waiting period and the 12-day period for interested parties to respond to a proposed award of benefits. Claims related to COVID-19 will be charged to the fund rather than the employer. https://drive.google.com/file/d/1K8_Aty6RPqUPsic_Z2hqKwf17661hPnp/view

Connecticut. Waived work search requirements. Individuals still must be physically able and available for full time work, unless the individual has a note from a physician stating that the individual is only available for part time work. If business has slowed, the Connecticut DOL (CTDOL) offers a SharedWork program as an alternative to a layoff. The CTDOL is encouraging anyone in need of unemployment insurance to apply, including independent contractors and self-employed workers. http://www.ctdol.state.ct.us/DOLCOVIDFAQ.PDF

Delaware. New guidelines enhance the flexibility of Delaware's unemployment insurance program to provide cash assistance to many Delaware workers whose employment has been impacted directly by the coronavirus and who would not typically qualify for benefits. https://news.delaware.gov/2020/03/17/the-delaware-department-of-labor-expands-unemployment-benefits-to-workers-affected-by-the-covid-19-pandemic/

District of Columbia. Employee eligibility for unemployment insurance benefits has been expanded while the Mayor's declaration of a public health emergency is in effect. https://dccouncil.us/covid-19-response-emergency-amendment-act-of-2020/

Florida. The state has indicated that reemployment assistance may be available for those who are quarantined by a medical professional or a government agency, laid off or sent home without pay for an extended period by their employer due to COVID-19 concerns, or caring for an immediate family member who is diagnosed with COVID-19. Work registration and work search requirements are waived until May 2. http://www.floridajobs.org/docs/default-source/reemployment-assistance-center/ra-covid-19-faqs-eng.pdf

Georgia. Work search requirements waived. Employers must file partial claims online on behalf of their employees whenever it is necessary to temporarily reduce work hours or there is no work available for a short period. Employers' accounts will not be charged for certain benefits paid for unemployment due to the COVID-19 public health emergency, including partial claims. *https://dol.georgia.gov/gdol-covid-19-information*

Hawaii. The 1-week waiting period and work search requirement for unemployment insurance benefits are waived for those unemployed because of COVID-19. *https://labor.hawaii.gov/ui/files/2020/03/COVID-19-Labor-Benefits-Fact-Sheet_20200319.pdf http://labor.hawaii.gov/blog/news/covid-19-unemployment-law-changes/*

Idaho. A March 27 proclamation waived the 1-week waiting period for all applicants who are otherwise eligible, and made it easier for claimants to be considered as job-attached if they have been laid off due to COVID-19 related reasons. An employer must provide reasonable assurance of a return to work and the claimant must be able and available for suitable work. Claimants also have met the available-for-work criteria if they are isolated and unavailable to work at the request of a medical professional, their employer, or their local health district and they will be returning to their employer. Unemployment claims based on these provisions will not be charged to the employer's account. *https://labor.idaho.gov/dnn/COVID-19*

Illinois. Under emergency rules the Illinois Department of Employment Security (IDES) recently adopted, individuals temporarily laid off due to COVID-19 do not have to register with the employment service. They are considered to be actively seeking work as long as they are prepared to return to the job as soon as the employer reopens. Those confined to their homes because of a COVID-19 diagnosis, or a quarantine, or to care for a family member with COVID-19 are considered to meet the requirement to be unemployed through "no fault of their own." *https://www2.illinois.gov/ides/Pages/COVID-19-and-Unemployment-Benefits.aspx*

Indiana. Under Executive Order 20-05, the Department of Workforce Development will:

- Interpret, consistent with federal law, state unemployment laws to provide benefits to claimants displaced by COVID-19;
- Not assess certain experience rate penalties against employers whose employees receive unemployment benefits as a result of COVID-19;
- Not deny a claimant's benefits because of a late filing due in part to COVID-19;
- Let individuals keep accruing unemployment eligibility if they take leave due to COVID-19; *and*
- Seek federal authorization to provide unemployment benefits to short-term employees who might not otherwise be eligible. *https://www.in.gov/dwd/19.htm*

Iowa. Individuals are eligible if ill with COVID-19 and unable to work due to sickness or quarantine, or out of work due to: caring for a family member with COVID-19 exposure/illness; loss of childcare or school closures; employer shutdown (temporary layoffs have always qualified), or a need to self-quarantine need. The work search requirement is waived for these circumstances. Employers will not be charged for benefits relating to COVID-19.*https://www.iowaworkforcedevelopment.gov/COVID-19*

Kansas. Waived 1-week waiting period. Requirements to be able and available for work and to look for work may be waived as well. Employers forced to lay off employees temporarily may make a "spreadsheet filing" on their behalf. *https://www.dol.ks.gov/covid19response https://www.dol.ks.gov/docs/default-source/default-document-library/ui-covid19-faqs.pdf?sfvrsn=3b4c881f_12*

Kentucky. Waived 1-week waiting period. Discretion to waive standards for ability to work, availability to work, work search activities and suitability for work. Any employer with at least 50 employees that is laying off at least 15 employees is encouraged to file a claim on their behalf through the E-Claims process. *https://governor.ky.gov/attachments/20200316_Executive-Order_2020-235.pdf*

Louisiana. Waived 1-week waiting period and work search requirements. *http://www.laworks.net/Downloads/PR/COVID_19_Information.pdf*

Maine. Emergency legislation (LD 2167) temporarily revised eligibility requirements to include situations not typically covered, such as an employer that temporarily ceases operation due to COVID-19, or an individual quarantined with the expectation of returning to work once the quarantine is over. The legislation also waived the 1-week waiting period, along with the work search requirement for individuals still connected to their employer. In addition, any benefits paid under these provisions would not affect the employer's experience rating record. *https://www.maine.gov/labor/covid19/*

Maryland. Individuals are eligible if their employer temporarily ceases operations due to COVID-19, they are quarantined due to COVID-19 with the expectation of returning to work after the quarantine is over, or they leave employment due to a risk of COVID-19 or to care for a family member due to COVID–19. *https://www.dllr.state.md.us/employment/uicovidfaqs.shtml*

Massachusetts. Waived 1-week waiting period. Deadlines missed by employers and claimants due to effects of COVID-19 may be excused under the Department of Unemployment Assistance's good cause provision. Employers whose businesses are severely impacted by COVID-19 can request extensions for filing and paying unemployment contributions. Work search requirements will be interpreted to appropriately permit claimants affected by COVID-19 to collect benefits. *https://www.mass.gov/info-details/massachusetts-covid-19-unemployment-information*

Michigan. Benefits were increased from 20 to 26 weeks, the application eligibility period was increased from 14 to 28 days, and the normal in-person registration and work search requirements were suspended. Unemployment benefits are extended to workers who have an unanticipated family care responsibility, and those who are sick, quarantined, or immunocompromised and who do not have access to paid family and medical leave or are laid off. *https://content.govdelivery.com/attachments/MIEOG/2020/03/16/file_attachments/1401944/EO%202020-10.pdf*

Minnesota. Waived 1-week waiting period. Individuals are eligible if a healthcare professional or health authority recommended or ordered them to avoid contact with others, they have been ordered not to come to their workplace due to an outbreak of a communicable disease, or child care is unavailable due to school or daycare closures. *https://www.uimn.org/applicants/needtoknow/news-updates/covid-19.jsp*

Mississippi. Executive Order No. 1462 suspended 1-week waiting period, work search requirements, and Department of Employment Security collection activities until June 27. *https://mdes.ms.gov/unemployment-claims/covid19*

Missouri. If there is a layoff or temporary shutdown, individuals may be eligible for unemployment benefits if they meet the eligibility criteria. Weekly work search requirements are not required when there is a recall date within 8 weeks of the temporary layoff. Employers may be able to avoid a layoff with a partial shutdown by applying for the Missouri Shared Work program. *https://labor.mo.gov/coronavirus*

Montana. Workers instructed by employers to leave work or not report to work due to COVID-19, workers who must quarantine, and workers who need to take care of a family member due to COVID-19 are eligible for benefits. Emergency rules allow the Department of Labor and Energy to waive the 1-week waiting period. *http://dli.mt.gov/employer-covid-19*

Nebraska. Waived 1-week waiting period and work search requirements. The DOL will temporarily waive charges incurred by employers when employees file claims related to COVID-19. *https://dol.nebraska.gov/PressRelease/Details/141*

Nevada. Waived 1-week waiting period and work search requirement. *https://detr.nv.gov/Page/COVID-19_(Coronavirus)_Information_for_Claimants_and_Employers*

New Hampshire. Waived 1-week waiting period. Certain other requirements are waived for individuals diagnosed with COVID-19, quarantined, caring for a diagnosed or quarantined family member, or caring for a family member due to a school or daycare closing. These benefits are not charged to employers' accounts. *https://www.governor.nh.gov/news-media/emergency-orders/documents/emergency-order-5.pdf*

New Jersey. Individuals are eligible if their employer closes or workers have fewer hours due to low demand. Employees who have COVID-19, were exposed and quarantined, or can't work because school or daycare is closed may use earned sick leave. *https://www.nj.gov/labor/worker-protections/earnedsick/covid.shtml*

New Mexico. Waived able, available, and work search requirements for up to 4 weeks for employees who are laid off, whose hours are reduced, who are quarantined, or whose family member is quarantined. *https://www.dws.state.nm.us/COVID-19-Info*

New York. Waived the 1-week waiting period for people out of work due to COVID-19 closures or quarantines. The state has expanded eligibility for paid sick leave and disability benefits. *https://labor.ny.gov/ui/how_to_file_claim.shtm*

North Carolina. Waived the 1-week waiting period. Discretion to waive "able and available" to work, work search, actively seeking work, and "lack of work" requirements. Employers' accounts will not be charged for benefits related to COVID-19. *https://des.nc.gov/need-help/covid-19-information*

North Dakota. If an employer shuts down or lays off employees due to a lack of work caused by the impact of COVID-19 on the business, its employees will generally be eligible for unemployment insurance benefits. *https://www.jobsnd.com/news/unemployment-insurance-and-covid-19-frequently-asked-questions*

Ohio. Waived the 1-week waiting period for all eligible individuals. Unemployment benefits are available for eligible individuals who are requested by a medical professional, a local health authority, or an employer to be isolated or quarantined due to COVID-19, even if not actually diagnosed with COVID-19. *http://jfs.ohio.gov/ouio/CoronavirusAndUI.stm*

Oklahoma. Waived 1-week waiting period. Employees given a return-to-work date do not have to search for other work during the layoff period. Employers may file a mass claim for a temporary shutdown involving 25 or more employees. *https://www.ok.gov/oesc/Claimants/COVID-19_Message.html*

Oregon. Enacted temporary rules to give more flexibility in providing unemployment benefits to COVID-19 affected workers. Unemployment insurance benefits are available during temporary layoffs related to COVID-19 situations. These benefits occur for employees whose employer stops operation for a short period of time, such as cleaning following a coronavirus exposure or by government requirement. *https://www.oregon.gov/employ/Pages/COVID-19.aspx*

Pennsylvania. The 1-week waiting period has been suspended, and work search ad work registration requirements have been waived for all claimants. *https://www.uc.pa.gov/COVID-19/Pages/UC-COVID19-FAQs.aspx*

Rhode Island. Waived the 1-week waiting period. Individuals under quarantine qualify for temporary disability insurance. *http://www.dlt.ri.gov/pdfs/COVID-19%20Workplace%20Fact%20Sheet.pdf*

South Carolina. If an employer must shut down operations, lay off employees, or reduce hours, individuals may be eligible for unemployment benefits. Employers that have a temporary shutdown or are experiencing a slow or smaller workload than normal can request permission to file claims on their workers' behalf for up to 6 weeks of benefits, during which the work search requirement is waived. *https://dew.sc.gov/covid-hub*

South Dakota. Workers who are temporarily unemployed (up to 10 weeks) and expected to return to work with their employer are eligible and not required to actively seek work each week. Workers sent home because they are considered a risk also are likely eligible. *https://dlr.sd.gov/ra/covid_19_ra_eligibility.aspx*

Tennessee. An individual who is quarantined or ordered to isolate by a medical professional or health authority may receive unemployment benefits if all other eligibility requirements are met and the individual intends to return to the job. Employers closing temporarily should file a mass claim. *https://www.tn.gov/workforce/covid-19.html*

Texas. Waived work search requirements for all claimants and the waiting week for those claimants affected by COVID-19. *https://twc.texas.gov/news/covid-19-resources-employers*

Utah. Employees may be eligible if:

- Their employer temporarily ceased operations with the expectation they will return to work;
- They are quarantined but not showing symptoms and will return to work; *or*
- They are able and available (not showing any symptoms of COVID-19) but cannot go to work because their place of employment has been quarantined.

https://jobs.utah.gov/covid19

Vermont. Waived "able and available" requirements when a claimant is isolated or quarantined at the direction of a healthcare official due to potential or verified COVID-19 exposure. Waived work search requirements for employees affected by a temporary closure of a business who were provided with a return-to-work date within 10 weeks and for individuals in isolation/quarantine. *https://labor.vermont.gov/covid19*

Virginia. Waived the 1-week waiting period and weekly job search requirement. *http://www.vec.virginia.gov/* *http://www.vec.virginia.gov/qa-coronavirus*

Washington. An individual may be eligible if following guidance issued by a medical professional or public health official to self-isolate or quarantine due to COVID-19 exposure, and the individual is not receiving paid sick leave from the employer. Employees who are laid off, or whose hours are reduced, temporarily may request "standby" status. Employers may request a relief of benefit charges due to a business closure that is directly related to possible contamination at the business site. *https://esd.wa.gov/newsroom/covid-19*

West Virginia. Discretion to waive 1-week waiting period, "able and available" requirement, and work search requirement. Benefits are available to eligible individuals who are requested by a medical professional, local health authority, or an employer to be isolated or quarantined due to COVID-19, even if they are not actually diagnosed. *https://workforcewv.org/covid19*

Wisconsin. Waived work search and availability requirements. *https://dwd.wisconsin.gov/covid19/public/ui.htm*

Wyoming. If an employer must shut down operations or lay off employees, individuals may be eligible for unemployment benefits if they meet the monetary criteria and the federal weekly eligibility criteria. If a layoff is temporary, the employer may request that employees be job-attached for up to 12 weeks so they can collect unemployment benefits without having to look for other work. *http://wyomingworkforce.org/data/epidemiology/coronavirus/*

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. The first step is establishing clear expectations for whatever policy you choose to adopt. You must have well-defined standards so that both supervisors and workers understand the rules, including the hours you expect them to work and the work options that will be available (e.g., phone or video conferencing).

Another minefield that needs attention is the recording of hours. Just because an employee is working from home doesn't mean he won't be paid his normal wages. Separate issues may arise for workers with exempt positions and those with hourly positions.

Finally, compensation for business expenses can be a particularly sensitive subject for employees working remotely. When you're developing a policy, you should consider things like employees' use of data on their personal cell phone plans in connection with work or their purchase of a computer compatible with your network.

Technical concerns

There will be many technical concerns. Here are a few to consider:

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.

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.

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.

We now have software that can monitor employees remotely to see when they log in and log out and what they are doing on the firm's systems. Mahtani wrote in her *Post* article, "In Hong Kong, some businesses are enforcing morning video chats to deter workers from lounging around in their pajamas."

Having followed this trend for a long time, if I were a manager, I would not get too worked up over my team's adhering to a strict schedule (or hanging out in their pajamas). 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, I think that's fine.

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.

Cybersecurity

As employees started to spend a lot of time attending virtual meetings—especially using platforms like Zoom—a disturbing phenomenon developed that attracted the attention of the U.S. Federal Bureau of Investigation (FBI). On March 30, the FBI announced, "As large numbers of people turn to video-teleconferencing (VTC) platforms to stay connected in the wake of the COVID-19 crisis, reports of VTC hijacking (also called "Zoom-bombing") are emerging nationwide. The FBI has received multiple reports of conferences being disrupted by pornographic and/or hate images and threatening language."

Zoom's privacy protocols received criticism in the media and attracted lawsuits. The CEO of the company responded, "We recognize that we have fallen short of the community's—and our own—privacy and security expectations. For that, I am deeply sorry, and I want to share what we are doing about it."

They are stopping work on new features of the platform and putting all their efforts into privacy. But Zoombombing is just one example of the privacy and data security challenges that our new virtual world of work and work from home have brought us. "When employees take their machines home or use their home machines for work, those machines now sit in a physical and digital space unlike any within the office. Between routers, printers, foreign machines, devices, gaming consoles and home

automation, the average home has a more complex and diverse communication and processing system than some small companies," Sam Curry wrote in *Entrepreneur.* Even the number of people who can overhear your conversations at home can be problematic.

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.

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

Employers should check the CDC's website regularly to ensure they have the latest on *travel restrictions* and *recommendations* about best practices for avoiding transmission. Employers should follow the CDC's recommendations, but if journeying to an area on the restricted travel list is mission-critical, employers will need to set up a proper protocol for the trips.

Employers may consider requiring employees to report any travel to affected areas or exposure to the virus. They also may consider asking employees returning from areas of significant exposure risk and those who have had contact with a contagious person to refrain from coming to the workplace for a period.

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.

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

The Occupational Safety and Health Administration (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 U.S. Centers for Disease Control and Prevention (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.*

Be mindful of permissible health questions, screening

To reduce COVID-19's spread in your workplace, employees who are (or may be) sick must stay at home. What are your options to make sure that happens? Keep in mind you're normally limited from making certain disability-related inquiries or requiring medical exams under the ADA, which applies to employers with 15 or more employees, and applicable state laws.

To assist employers in navigating disability-related issues during the pandemic, however, the EEOC has issued detailed guidance on what questions you may (and may not) ask of employees and what other steps you can take to ensure workplace safety. The ADA permits employers to make disability-related inquiries and conduct medical exams if they're job-related and consistent with business necessity. You may exclude employees with medical conditions that pose a direct threat to the health or safety of others and cannot be reduced with a reasonable accommodation. As a result, you may:

- Ask employees entering your facilities if they're experiencing COVID-19 symptoms. You may rely on the U.S. Centers for Disease Control and Prevention (CDC) or other health authority guidance on what symptoms are associated with the disease. The list of indicators is growing.
- Take employees' temperature.
- If you have the resources, administer a COVID-19 test to employees returning to work, provided the exam is accurate and reliable.

If you take those steps, apply them consistently to avoid any argument of disparate treatment against a particular protected class.

If an employee tests positive for COVID-19, you should inform coworkers of their possible exposure. *It is unlawful, however, to disclose the name of the positive employee.*

Employers carrying out the inquiries and exams are required to maintain the confidentiality of any medical information they receive about employees. If the information has been documented, you must keep it separate from their personnel files to ensure its confidentiality.

If an employee is showing symptoms of COVID-19, the employer can direct that employee to go home. You have a duty to protect all employees and, given the risks associated with COVID-19, you may send employees with COVID-19 symptoms home.

Also, you shouldn't require employees to present a positive COVID-19 test to be eligible for leave or excused absences. Considering that COVID-19 tests are still limited in many places and the delay in testing results—coupled with how quickly the virus can spread throughout the workplace—employers should allow employees to take leave if they have COVID-19 symptoms or have been exposed to someone with COVID-19, even if they have not tested positive.

Be ready to continue flexible work arrangements and schedules

When your business reopens, you likely won't be able to bring your entire workforce into the office all at once for a number of reasons:

- A fully operational workforce may not be able to maintain the proper space between employees (six feet apart, according to the CDC's guidance on social distancing).
- Employees may be hesitant to return, given the fear of possibly exposing themselves because of (1) an underlying condition or (2) vulnerable family members in their household.
- They may have continuing obligations at home to care for others who are sick or unable to attend school or daycare.

Consequently, you should consider continuing to allow flexible work arrangements for employees. The flexibility could allow them to continue working from home or follow an alternative schedule (e.g., after hours or on weekends) to avoid contact with others in the office. If the arrangement makes sense, you and the employee should discuss and document it.

Under some circumstances, a flexible work arrangement may be necessary as a reasonable accommodation for an individual with a disability. For instance, if an employee has a mental illness that COVID-19 has exacerbated, allowing the individual to continue working from home may be a reasonable accommodation. If you're faced with accommodation inquiries, you should engage in the interactive process to determine whether the request is reasonable and whether it would accommodate the employee's disability.

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.

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).

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 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*