COVID-19 FAQs for employers with U.S. employees

April 6, 2020

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Contents

The worldwide COVID-19 pandemic has had, and will continue to have, a substantial impact on the U.S. workplace. Below is a series of FAQs we have compiled based on some of the more common questions that clients with U.S.-based employees have posed to us within the past few weeks.

These FAQs are general and high-level in nature, and should not be used as a substitute for speaking with a Reed Smith employment lawyer. This is true especially because the COVID-19 situation is a fluid, rapidly evolving one, and there are many considerations that are unique to particular circumstances, industries, and jurisdictions (e.g., California and New York each have a bevy of state and local rules and regulations that far exceed the requirements of federal workplace law).

To that end, the information contained in this memorandum is current as of April 6, 2020 at 5:00 pm EDT. Federal, state, and local agencies continue to issue regular updates and implement new laws, regulations, and guidance in response to CV that may impact these FAQs in the future. This edition of the FAQs contains updated responses throughout, as well as newly-added FAQs concerning burgeoning issues starting at FAQ #35.

Please note that this is not legal advice. To speak with a Reed Smith employment lawyer concerning any issue related to COVID-19, please contact us at rsCoronavirusEmploymentTeam@ReedSmith.com.

1 Am I required or allowed to have my employees work remotely? [Answer updated as of March 29]

Remote work is becoming mandatory in an increasing number of jurisdictions every day. Additionally, the vast majority of employers have moved to maximized remote work arrangements to facilitate an orderly transition out of the workplace. We recommend that employers strongly encourage remote work and exercise flexibility in facilitating remote work to the greatest extent possible.

This recommendation is also in line with the U.S. Department of Labor's (U.S. DOL) position that encouraging or requiring employees to work remotely can be a useful means to control infection or as a prevention strategy. Employers have broad discretion to permit and even require remote work under these circumstances. If employers opt for this approach, they nevertheless can and should hold their employees to the same standards of performance while they work remotely.

If there is a legitimate business reason why an employee needs to be physically present in a company's offices, then the employer may be permitted to require that the employee come into the office. **However**, a rapidly growing number of jurisdictions – like New York, Pennsylvania, Illinois, New Jersey, Vermont, Virginia, Connecticut, California, and several large Texas counties – have levied restrictions on "in-office" work requirements. In these localities, requiring employees to be physically present at the workplace – in violation of a government decree – could expose a business to substantial and unanticipated liability. Where continued in-person work is permitted and necessary, employers will be required to implement maximized social distancing and hygiene requirements and should evaluate supplemental screening and protection standards.

Balancing the need to remain in compliance with applicable law and maintain operations is exceedingly difficult. Employers should take steps to ensure constant monitoring of federal, state, and local directives that may require shut downs and remote work.

2 What are the principal ways in which my business can expose itself to workplace-related liability as it relates to COVID-19? [Answer updated as of March 29]

At present, in addition to violating a government order barring "in-person" work requirements, the following four scenarios represent several of the more likely ways in which employers may expose themselves to workplace-related liability as it relates to COVID-19 if they do not take prompt and appropriate action.

- If you know or have reason to know that an employee has a confirmed case of the virus.
- If you know or have reason to know that a family member or an immediate contact of an employee has a confirmed case of the virus.
- If you know or have reason to know that an employee has symptoms consistent with the virus.
- If you know or have reason to know that an employee has recently traveled to high-risk areas.

Each of these scenarios will be addressed in turn below.

Employee has a confirmed case

If there has been a confirmed case of COVID-19, as a starting point the infected employee should be advised not to come to work (or should be instructed to leave the business premises if they learn of such diagnoses while at work). The employee should be instructed not to return to work unless and until they are cleared to do so.

In accordance with questions number 22 and 23 below, you should inform everyone who has had direct, continuous contact with that employee that they have been exposed (but do **not** disclose the employee's name or any other identifying information), and send such employees home immediately for at least 14 days. Also strongly consider undertaking a deep cleaning and closing portions or all of the office. Failure to do any of the foregoing could constitute exposing employees to a dangerous work environment, resulting in liability.

Office closure here is **not** mandatory in most circumstances; however, if anyone says they do not feel safe at work following a positive on-site occurrence, strongly consider letting them work from home to the greatest extent possible. Failure to accommodate people's **reasonable** fears could also result in liability.

Lastly, under these circumstances, we also recommend contacting the local health authorities or reviewing such authorities' official websites and COVID-19 guidance to confirm determine you have a duty to report the case.

Employee's family member or intimate contact has a confirmed case

If you learn of an employee with a family member or intimate contact with a confirmed case of COVID-19, inform everyone who has had direct, continuous contact with that employee (as defined above) that they may have been exposed. Consider sending all employees who had direct, continuous contact with the affected employee home for 14 days out of an abundance of caution. Again, do **not** disclose the employee's name or other identifying information. Strongly consider undertaking a deep cleaning and closing portions or all of the office. Office closure here is **not** mandatory; however, if anyone says they do not feel safe at work, strongly consider letting them work from home. Failure to accommodate people's **reasonable** fears could result in liability.

Employee is exhibiting symptoms consistent with COVID-19

If an employee is exhibiting symptoms consistent with COVID-19, we recommend that you send the person home immediately, encourage them to consult with medical professionals, and implement and communicate clear parameters for when and how they can return to work (which parameters the company can set by, among other things, consulting with counsel as well as guidance issued by the U.S. Centers for Disease Control and Prevention (CDC) and local health authorities). If the employee seeks treatment and subsequently discloses to the company that they have been diagnosed with COVID-19, take the steps laid out in (a) above.

Employee recently traveled to a high-risk area

Any employee who has been in any high-risk area as identified by the CDC, or an area with community transition of COVID-19, in the past 14 days – whether for personal or business reasons – should be excluded from the office for 14 days. If such a person has been in the office within 14 days after returning from their travels, consider taking the steps laid out in (b) above

(except for office closure and removal of direct, close contacts) and immediately exclude the person who has traveled from the office for the rest of the 14-day period following the return from their travels.

3 Should I create a business continuity plan and what should it entail? [FAQ added on March 15]

Given the many questions still surrounding the spread and effects of COVID-19, it is important for employers to create a business continuity plan for employees. Best practices include:

- Forming a response team to serve as the focal point of all COVID-19-related communications and decisions.
- Categorizing essential and nonessential employees.
- Begin having employees test a work-from-home setup to determine what, if any, equipment is needed to achieve a temporary remote working policy. This may include providing company-issued laptops, monitors, licenses for video-conferencing software, and so forth.
- If applicable, allowing employees to work remotely from offices in their local state (for example, New Jersey residents can work in New Jersey offices instead of commuting to a New York office).

The more detailed a business continuity plan, the better.

4 What can I do if an employee refuses to travel for business reasons? [Answer updated as of March 22]

Domestic and international travel is becoming increasingly restricted, and the spread of the virus likely has made such refusals much more legally "reasonable" than even just a few days ago. The CDC states that crowded travel settings, like airports, may increase chances of getting COVID-19. In addition, certain jurisdictions, such as California, currently have "shelter-in-place" orders, with other states to likely follow. If an employee, therefore, refuses to undertake business travel, employers should work with the employee to find alternative ways of accomplishing the same ends as the travel or inquire whether another employee will travel (voluntarily and without coercion). Compelling travel or punishing for refusal to travel stemming from COVID-19-related fears may lead to employer liability. Consequently, we recommend that employers accommodate employees' COVID-19-related travel concerns as much as possible and refrain from punishing employees who are unwilling to travel.

5 What are some of the legal considerations that have or might come up as it relates to COVID-19 in the workplace? [Answer updated as of March 29]

The COVID-19 pandemic implicates an extensive list of workplace-related legal considerations that cannot all be covered in this memo. Nevertheless, following are some of the more common legal considerations that have or might come up in this regard (please consult with a Reed Smith employment lawyer for further information on these considerations):

- Impact on the workplace of the newly enacted Coronavirus Aid, Relief, and Economic Security Act (CARES Act), including the unprecedented expansion of the unemployment benefits scheme (including, for the first time, to independent contractors) and a novel small business loan program.
- Requests for leave pursuant to applicable leave laws (e.g., state and local paid sick, safe, and/or family leave laws, and the newly enacted Families First Coronavirus Response Act (FFCRA), which amends the federal Family and Medical Leave Act (FMLA) and the federal Fair Labor Standards Act (FLSA)).
- Issues related to disability discrimination statutes, including requests for reasonable accommodations.
- Employers' ability to request or require that their employees undergo medical testing or screenings, or are vaccinated.
- Employers' ability to take their employees' temperatures.
- Employers' ability to implement special travel rules and other restrictions for some or all employees.
- Privacy- and confidentiality-related concerns arising from the disclosure of medical information, including a confirmed COVID-19 diagnosis.
- The implication of wage and hour laws, including paying nonexempt and exempt employees while they work remotely or if they cannot work due to illness, how to record nonexempt employees' time while working remotely, the ability to furlough

employees, whether any laws are triggered by a temporary or permanent mass layoff or other reduction in force (e.g., WARN Act).

- Whether employees who are permitted or required to work remotely should be required, to the extent they have not already done so, to sign a telecommuting agreement or acknowledge a telecommuting policy.
- Employers' obligations under applicable health and safety laws (e.g., OSHA) and workers' compensation laws.
- Employers' obligations if local schools are closed (including under the FFCRA).
- Special considerations for unionized workforces, including under the National Labor Relations Act.
- Any particular and unique considerations raised by the laws of the jurisdiction(s) in which the employer operates, or by the employer's specific industry.

This, of course, is not an exhaustive list and will likely continue to evolve in the coming days and weeks.

6 Are there any other commonsense guidelines for operating the workplace in the COVID-19 era? [Answer updated as of March 29]

Aside from permitting remote working to the extent possible, we recommend:

- Using videoconferencing for meetings when possible (instead of in-person meetings).
- When videoconferencing is not possible, holding meetings in open, well-ventilated spaces.
- Considering adjusting or postponing large meetings or gatherings.
- Reducing, modifying, or staggering working hours.
- Staggering shift times to avoid large groups of employees, or swapping to an A-Team/B-Team staffing operation.
- Permitting only one person at time to use the restroom or to be present in kitchen areas.
- Increasing cleaning of the workplace.
- Increasing the presence of facial tissue, hand sanitizer, disinfecting wipes, and the like.
- Increasing ventilation by opening windows or adjusting air conditioning.
- Implementing social distancing (maintaining a distance of six feet between individuals at all times).
- Staggering breaks and lunches.
- Expanding lunchrooms and moving tables such that individuals do not have as much of an opportunity to sit close to each other.
- Reducing headcount to minimal operations, and trying to use consistent crews such that individuals do not frequently move between crews.
- Considering using temperature and respiratory screening.

The appropriate response in this regard will depend on the particulars of the workplace. Additionally, continuous communication with employees about these issues is paramount.

7 What do you anticipate to be the next wave of workplace-related issues arising out of the COVID-19 pandemic? **[Answer updated as of April 6]**

We anticipate that the next wave of workplace-related issues will focus on, among other things:

- Implementing the CARES Act, including its impact on the unemployment benefits process, on the FFCRA leave process on April 1, and on small business finances.
- Implementing the FFCRA, a federal law that took effect April 1 and that requires paid and partially-paid leave to employees of businesses with less than 500 employees for certain COVID-19-related reasons. Our prior blog post here on the FFCRA provides further detail as to the statute's respective paid sick leave benefits under the Emergency Paid Sick Leave Act (EPSLA) and expanded, emergency FMLA leave benefits. Like the CARES Act, it is vital that private employers – particularly those with fewer than 500 employees – become well acquainted with the FFCRA.
- Assessing and, if necessary, implementing mass layoffs, furloughs, and other permanent or temporary cost-saving measures.
- Privacy and cybersecurity-related concerns arising from remote working arrangements.
- The impact of school and childcare facility closures on the workforce, including as it relates to school-provided meals and a potentially adverse impact on morale for parent-employees who may be distracted due to concern for their children's nutritional well-being in addition to childcare concerns.
- Adverse impact on worker productivity, efficiency, and morale.
- Sick employees attempting to return to work before they are medically cleared to do so.
- An influx of claims for unemployment insurance benefits (particularly in light of the unemployment expansion contemplated by the CARES Act).
- Workers' compensation claims, both from employees who claim to have contracted COVID-19 through their workplace and also from employees working remotely.
- Employees failing to self-disclose – to either their existing employer or a prospective one – for fear of losing wages.

This, too, is not an exhaustive list and will likely change.

8 If I'm hiring new employees – to either work remotely or have a physical presence in my office – do I still need to conduct certain portions of the I-9 process in person? **[FAQ added on March 22]**

Perhaps. On March 20, the Department of Homeland Security (DHS) announced that, in limited circumstances, it would temporarily suspend the Form I-9 physical presence requirements for employers who are implementing remote working arrangements due to COVID-19. The suspension will last for 60 days after the notice (that is, May 19, 2020), or until three business days after the termination of a national emergency designation, whichever comes first. During this period, employers may review a new hire's identity and employment authorization documents via video chat, email, or other electronic means, so long as the review is completed within three business days from the start date.

Notably, this modification does not alleviate the requirement to review documents in person once normal operations resume. For the time being, employers should enter "COVID-19" as the reason for delay in the "Additional Information" field of section 2. Once the documents are physically inspected, the employer should add "documents physically examined" and the date of inspection to this field.

9 What are some options for employers who want to implement workplace-related cost savings but are looking for non-termination-related options? **[Answer updated as of April 6]**

Employers who are looking to reduce workplace-related costs without terminating employees have several options they may want to consider. These include furloughing some or all employees (explained in further detail below), or placing some or all employees on reduced, modified, or staggered work schedules (these latter approaches have been particularly popular for manufacturers). Salary or wage reductions may be another option as well.

In each instance, however, be sure to consider federal, and particularly state and local, regulations that may affect your decision. Salary reductions, for example, may implicate wage notice and pay equity laws. Additionally, salary reductions and other adjustments to pay must be assessed carefully to ensure that they do not violate the general rules governing exempt classification under the FLSA.

Beyond this, the FFCRA provides a refundable payroll tax credit equal to 100% of the amount the employer pays in emergency paid sick leave and emergency paid medical leave to employees, up to a per-employee cap depending on the reason for leave. To that end, if an employee takes emergency paid sick leave because:

- The employee is subject to a government quarantine or isolation order related to COVID-19,
- The employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19, or
- The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis,

then the tax credit is equal to the employee's regular rate of pay, up to $511 per day, for up to 10 days, or $5,110 in the aggregate per employee.

And if the employee takes emergency FMLA leave because the employee is unable to work because he or she must care for a child whose school or place of care has been closed, or the child's childcare provider is unavailable due to COVID-19, then the tax credit is equal to the employee's regular rate of pay, up to $200 per day for up to 10 weeks, or $10,000 in the aggregate per employee. Employers are also entitled to an additional credit based on the costs to maintain health insurance during the childcare leave period.

Because an employee may take both emergency paid sick leave and emergency FMLA leave to care for a child whose school or childcare provider is closed due to COVID-19, the total tax credit cap for such an employee is $12,000 in the aggregate.

This tax credit is designed to offset the cost of paying employees for leave taken under the FFCRA, and is another option to consider when thinking about non-termination-related cost-saving options.

Employers must retain all documentation provided in support of a request for leave under the FFCRA. If an employee provides oral statements to support a request for paid sick leave or expanded FMLA, the employer is required to document and retain such information as well.

As of April 3, 2020, small businesses with less than 500 employees may be eligible under the CARES Act Payroll Protection Program to receive a loan of up to $10 million to cover the costs of payroll for full and part-time employees (up to $100,000 for any individual employee), certain benefits, state and local employer taxes, mortgage interest, rent, and utilities. The Payroll Protection Program is a loan forgiveness program intended to encourage employers to retain their workforces. The CARES Act forgives up to 100 percent of loans used for payroll costs, pre-loan mortgage interest, rent for a pre-loan tenancy, and utility payments. The percentage of loan forgiveness decreases if an employer reduces its employee headcount or reduces its employees' wages. Employers should consult their attorneys to determine if they are eligible for a loan under the Payroll Protection Program and to discuss the benefits or their concerns of taking a loan out under the program.

10 What is the difference between a furlough and a termination? [FAQ added on March 22]

A furlough is generally defined as a period of unpaid leave from work, whereas a termination is a permanent cessation of the employment relationship. The primary distinction between a furlough and a termination, therefore, is that a furlough may allow workers to be recalled and to return to their jobs.

Furloughs offer several advantages to terminations, including that they can be implemented incrementally and for varying periods of time. They therefore offer flexibility to both the employer and employee alike. In addition, during a furlough, employees may remain eligible to receive health and certain other benefits.

Having said that, if an employer is selecting only a portion of its workforce for a furlough (or for a reduced/modified/staggered work schedule), to avoid an appearance of discrimination, it is recommended that selection be done based upon bona fide criteria such as seniority or loss of significant work in a given location, or by department or business line. Additionally, furlough decisions should be reviewed to make sure they do not impose a statistically significant disparate impact on any protected class of employees.

11 Are employees eligible for unemployment benefits if they are furloughed? [Answer updated as of April 6]

Perhaps, depending on the state in which they work. In many states, furloughed employees, as well as employees whose hours are fully or partially reduced, are eligible to receive at least a portion of benefits so long as they satisfy the other eligibility criteria for benefits. Various states have also waived or modified eligibility criteria due to COVID-19. Nevertheless, this will vary from state to state.

Having said that, the CARES Act creates a temporary Pandemic Unemployment Assistance program through December 31, 2020 that expands unemployment benefits to individuals who would not otherwise qualify for unemployment benefits, and who are unemployed, partially unemployed, or unable or unavailable to work due to COVID-19. Accordingly, even in states that have not expanded their unemployment benefits programs to cover furloughed employees, the Pandemic Unemployment Assistance program created by the CARES Act does.

The CARES Act has also authorized additional federally financed unemployment benefits that augment or extend state unemployment benefits. This includes Federal Pandemic Unemployment Compensation, which provides an additional $600 of weekly federal unemployment compensation payable for weeks of unemployment ending on or before July 31, 2020. The CARES Act also creates Pandemic Emergency Unemployment Compensation, which authorizes up to 13 additional weeks of federally financed unemployment benefits for individuals who exhaust other state and federal unemployment benefits. Additionally, the CARES Act incentivizes states to waive any one-week waiting period for unemployment benefits so furloughed or employees who have been laid off do not have to wait to receive benefits.

12 What else should I think about before proceeding with a furlough? [Answer updated as of April 6]

Furloughs present a complicated mix of business planning and legal issues that are not always apparent. Two issues stand out as particularly important to bear in mind:

First, the costs and cost-savings of a furlough are not always obvious. While it is easy to measure the reduction in salary expenditure, several other items should also be considered. For instance, will the employer pay employee-side premiums for benefits given the lack of available payroll deduction? If not, how does the employer anticipate securing those premiums? Similarly, employers may encounter hidden costs that could influence a termination versus furlough decision. For example, does the employer have any severance or PTO policies that require payouts for terminations or furloughs? Right now, employers must also consider an additional cost. Beyond this, the FFCRA and other emergency legislation has created paid leave protections for a large number of employees. However, terminated employees will not have a right to further payments under the FFCRA. Additionally, employees are not entitled to FFCRA paid leave benefits for time in which they would not otherwise be working, such as during period in which their worksite is closed or they have been furloughed. Because FFCRA's mandatory benefits can be costly, the cost of such benefits is a significant factor in any exploratory furlough analysis.

On the other hand, both the FFCRA and the CARES Act provide payroll tax credits, which may help offset costs and are therefore an element to consider when making a furlough decision. The FFCRA payroll tax credit provides a refundable payroll tax credit equal to 100 percent of the amount the employer pays in FFCRA benefits up to a per-employee cap. The CARES Act provides a payroll tax credit for 50 percent of wages paid by small and mid-size employers to certain employees, if the employer's operations have been fully or partially suspended because of a government order related to COVID-19, or if the employer has experienced a greater than 50 percent reduction in quarterly receipts. The CARES Act tax credit does not apply to those wages taken into account for the wage or tax credits for paid leave under the FFCRA.

Second, the distinction between being an unpaid employee and being terminated may have a very strong psychological impact on your employees. Employers likely will find that furloughed employees will be easier to recall and more likely to return with a more positive approach than employees who were terminated. Implementation strategies and careful messaging will be crucial to laying the groundwork for recall regardless of whether an employer chooses between termination or furlough, but recall from furlough should be easier. As a result, employers should account for this benefit when weighing the relative cost savings of a furlough versus terminations.

13 What are the notice requirements if an employer is conducting a mass layoff that triggers WARN and/or a mini-WARN Act? [FAQ added on March 22]

The federal WARN Act applies to employers with more than 100 employees, and requires at least 60 days' advance written notice of two scenarios at a single worksite: (1) a plant closing that will affect 50 or more employees, or (2) a mass layoff that will affect at least 50 employees and 33 percent of all employees, or at least 500 employees. Affected workers, union representatives, state dislocated worker units, and local government units are all entitled to notice. A layoff of less than six months does not trigger the notice requirement, but a reduction in hours by more than 50 percent does.

The WARN Act has an exception for plant closings or mass layoffs due to "business circumstances that were not reasonably foreseeable." It is yet not clear whether COVID-19 would qualify for this exception.

The federal WARN Act, however, is only the starting point in many states. A number of states, including California, Illinois, Maryland, Massachusetts, New Jersey, New York, and Wisconsin, have state-specific WARN Acts (commonly known as "mini" or "baby" WARN Acts). For employers in these states, key aspects of WARN – including but not limited to the advance notice and employee-threshold requirements – are often more restrictive than federal law.

14 Are there any legal protections if an employee cannot work because they have to care for a child whose school was closed or whose day care provider cannot provide services? [Answer updated as of March 29]

As many schools and daycares close across the country and offices shift to a remote work setup, employees are faced with the challenge of either working from home, or working onsite with little or no childcare. In response to this issue, Congress enacted the FFCRA. This law applies to all employers with less than 500 employees, and serves to expand the FMLA and create the EPSLA, among other things. Under the expanded FMLA and the EPSLA, employees who are unable to work or telework may use this leave to care for a child whose school, daycare, or other childcare is unavailable. The USDOL has published guidance on how to implement the FFCRA here. However, an employee on expanded FMLA or EPSLA leave is not protected from employment actions, such as layoff or furlough, that would have affected the employee regardless of whether the leave was taken. Employers should keep in mind that they must be able to demonstrate that the employee would have been laid off even if he or she had not taken leave under the FFCRA. It remains the employer's burden of proof to show that an employee would not have otherwise been employed at the time reinstatement is requested in order to deny restoration to employment.

For those employees not covered by FFCRA, employers may choose to allow employees to use accrued paid time off or other available leaves of absence at the state or local level, in order to address this issue.

Many state and local governments are also promulgating similar legislation or allowing for partially paid leave benefits for those who have to provide care to a child or dependent subject to a mandatory quarantine order. Employers should stay apprised of any developments in jurisdictions where they currently have employees.

15 If a municipality where my employees live or work issues a shelter-in-place order, what does that mean generally, and what considerations will I need to bear in mind? [Answer updated as of April 6]

A shelter-in-place order is a command by the government to find a safe location and remain there until those under the order are given an "all clear." In the context of COVID-19, a shelter-in-place order is a command to stay at home. As of now, states like California and New Jersey, among several other jurisdictions, are under shelter-in-place orders. Shelter-in-place orders have the potential to last for several weeks or longer, and may also set forth mandatory curfews. In addition, shelter-in-place orders may close down certain types of establishments (for examples, bars, nightclubs, gyms, recreational centers) or may allow certain establishments to remain open in a limited fashion (for example, restaurants and cafes for takeout and delivery).

Shelter-in-place orders may prohibit gatherings of individuals outside the home with exceptions for "essential" activities or travel, as defined by the particular locality. To date, jurisdictions implementing shelter-in-place orders or similar restrictions have found the following to be "essential": (1) tasks essential to maintain health and safety (e.g. obtaining medicine or seeing a doctor); (2) healthcare operations (e.g. hospitals, pharmacies); (3) public works construction, construction for housing, airport operations, key services (e.g., water, sewer, gas, and electric), oil refining, and roads; (4) services needed to ensure the continuing operation of the government agencies and provide for the health, safety, and welfare of the public; and (5) grocery stores and stores that sell products necessary to maintaining the safety, sanitation, and essential operation of residences.

Should a municipality enter a shelter-in-place order, either in the municipality where the employee lives or works, employers must consider how the order impacts the employee and the employer's operations. Employers should be aware, of not only any potential order in the municipality in which the employer is situated, but also any potential orders of surrounding municipalities. Employers should not rely on their employees to report shelter-in-place orders and should keep apprised of such developments in the areas surrounding their offices or worksites.

If an employee works in a municipality with a shelter-in-place order, employers must determine – based on the applicable government order or guidance – whether the employer's work is "essential." If it is not, the employer's operations may be severely limited. Should an employer's operations be severely limited, the employer should consider alternative ways to continue the business operations without having employees present at the employer's location (for example, remote work arrangements).

16 If an employer remains open, but their employees are unable to work due to a federal, state or local shelter-in-place order, those employees may be entitled to EPSLA. However, if a business is closed due to being "non-essential" under a shelter-in-place, its employees will not be entitled to EPSLA. How does COVID-19 impact my obligations under the ADA and the Rehabilitation Act? [Answer updated as of April 6]

While disability discrimination laws like the Americans with Disabilities Act (ADA) and Rehabilitation Act continue to apply to employers across the country, the laws do not interfere with or prevent employers from following guidelines and suggestions issued by the CDC or state and local health authorities. The U.S. Equal Employment Opportunity Commission (EEOC) has standing guidance on handling pandemics, such as COVID-19, in the workplace. Applying this guidance, the EEOC has provided the following clarifications on the interplay of COVID-19 and federal disability law:

- Employers covered by the ADA may ask employees who call in sick if they are experiencing symptoms of COVID-19. Any information obtained by the employer as a result of such inquiry must be maintained as a confidential medical record in compliance with the ADA.
- Due to the risk of community spread, the CDC and state and local health authorities permit employers to take the body temperature of employees. (Typically, such practice would constitute an unlawful medical examination under the ADA.) It is important to note, however, that some individuals infected with COVID-19 do not have a fever.
- An employer may bar an employee from being physically present in the workplace based on a refusal to have body temperature taken or answer COVID-19 questions. However, an employer should first make an effort to gain employee cooperation by asking the employee the reason for the employee's refusal to cooperate. The employer should also provide reassurance that broad disclosure of personal medical information in the workplace is prohibited by the ADA.
- The CDC states that employees who become ill with symptoms of COVID-19 should leave the workplace. The ADA does not interfere with employers following this advice.
- When employees return to work, employers may require doctors' notes certifying their fitness to return to work. However, as a practical matter, doctors and other health care providers may be too busy during and immediately after the pandemic to provide fitness-for-duty documentation. Alternative means of obtaining certification might need to be considered.
- Employers may screen applicants for symptoms of COVID-19 after making a conditional job offer, as long as this practice is done for all employees entering the same type of job.
- Employers may administer medical exams after a conditional offer of employment (for example, taking temperatures).
- Employers may delay the start date of, or withdraw a job offer to, an applicant who has COVID-19 or symptoms associated with it.

We expect the EEOC to update its guidance as further developments play out.

17 During the COVID-19 pandemic, must an employer continue to provide reasonable accommodations for employees with known disabilities that are unrelated to the pandemic, barring undue hardship? [Answer updated as of April 6]

Yes, an employer's ADA responsibilities to individuals with disabilities continue during the COVID-19 pandemic. Only when an employer can demonstrate that a person with a disability poses a direct threat, even after reasonable accommodation, can it lawfully exclude him from employment or employment-related activities. If an employee with a disability needs the same

reasonable accommodation at a telework site that he had at the workplace, the employer should provide that accommodation, absent undue hardship. In the event of undue hardship, the employer and employee should confer to address whether an alternative reasonable accommodation is available.

18 Can my employees take FFCRA-qualifying sick leave or expanded, emergency FMLA on an *intermittent* basis? [Answer updated as of April 6]

If you, as their employer, allow it, then yes. If use of intermittent leave is agreed upon, the increments of time in which the leave may be taken must also be agreed upon. If employees are teleworking and are unable to work their regularly scheduled hours due to one of the qualifying reasons, employers may allow employees to take paid sick leave intermittently. Similarly, if an employee is prevented from teleworking their normal schedule of hours because they need to care for their child whose school or place of care is closed, or whose childcare provider is unavailable because of COVID-19-related reasons, you and the employee may agree that the employee can take expanded family medical leave intermittently while teleworking.

If the employee is working at the usual worksite, paid sick leave can only be taken in full-day increments. Additionally, employees cannot use intermittent paid sick leave when the leave is due to a quarantine, the employee experiencing symptoms of COVID-19, or the employee caring for someone who is either subject to a quarantine or isolation order related to COVID-19 or has been advised by a health care provider to self-quarantine due to concerns related to COVID-19.

In contrast, if you and your employee agree, the employee may take paid sick leave or expanded FMLA intermittently if they are taking the leave to care for their child whose school or place of care is closed, or whose childcare provider is unavailable for COVID-19-related reasons. For example, if the employee's child is at home because their school or place of care is closed, or their childcare provider is unavailable for COVID-19-related reasons, you may allow the employee to leave on Mondays, Wednesdays, and Fridays to care for their child, but work at their normal worksite on Tuesdays and Thursdays.

19 Can I require my employees to use their existing PTO before using FFCRA leave? [Answer updated as of April 6]

During the first two weeks of leave under the FFCRA, only the employee may decide whether to use existing paid vacation, personal, medical, or sick leave from their paid leave policy prior to using any FFCRA leave. Employees may choose to use existing employer-provided leave to supplement or adjust the paid leave under the FFCRA, up to the employee's regular earnings.

After the first two weeks (usually 10 workdays) of expanded family and medical leave under the EFMLEA, employers may require employees to concurrently use any accrued leave that would also be available under the employer's policies under the circumstances. For example, this might include vacation, personal days or paid time off. However, it may not include paid sick time benefits if the employee or covered family member is not ill.

If an employer requires employees to use other accrued paid leave concurrently with EFMLEA-covered leave, the employer must pay the employee the full amount to which the employee is entitled under the employer's paid leave policy, even though the EFMLEA might require pay for only third-thirds of the employee's regular earnings. Additionally, the employer's paid leave policy must provide at least the same level of paid leave benefits available under the EFMLEA, meaning the employer-provided benefits must provide pay for at least two-thirds of the employee's regular earnings, up to $200 per workday and $10,000 in the aggregate, for the leave period also covered by the EFMLEA. Furthermore, if the employee exhausts all preexisting paid leave benefits during a period covered by the EFMLEA, the employer must nevertheless provide the employee with the paid leave benefits available under the EFMLEA, i.e., two-thirds of their regular earnings, up to $200 per day and $10,000 in the aggregate. Employers may amend existing policies to the extent consistent with the FFCRA and other applicable law.

20 Is COVID-19 a disability under the ADA? [Answer updated as of April 6]

The EEOC has acknowledged that, because this is a new virus, experts are still determining whether COVID-19 is or could be a disability under the ADA and analogous state and local laws. Despite this, an employer may still bar an employee with COVID-19 from the workplace because such an employee poses a direct threat in the workplace.

21 Can I ask an employee who is physically coming in to the workplace whether they have family members who have COVID-19 or symptoms associated with COVID-19? [FAQ added on March 29]

Employers are prohibited from asking employees medical questions about family members under the Genetic Information Nondiscrimination Act. The EEOC states that a better question to ask is whether an individual has had contact with anyone known by the employee to have been diagnosed with, or had symptoms of, COVID-19.

22 Can I *require* employees to report if they have been diagnosed with COVID-19? [FAQ added on March 29]

Most likely yes. Recent guidance issued by the EEOC suggests that it is likely permissible for employers to **require** employees to report a positive COVID-19 diagnosis.

23 How does my business identify everyone who has had continuous or close contact with a COVID-19-infected employee? [FAQ added on March 29]

Further to question #2 above, if an employee has been diagnosed with COVID-19, that employee should be asked to identify all other individuals (e.g., colleagues, clients, vendors, guests) with whom the infected employees has had continuous and close contact within the preceding 14 days. “Continuous” means working in the same space or having in-person meetings together. And “close contact” is defined by the CDC as (1) being within approximately six feet of a COVID-19 case for a prolonged period of time, or (2) having direct contact with infectious secretions (e.g., being coughed on).

To determine whether and to what extent additional employees may need to be notified, the employer should consider the following information to the extent feasible:

- Establish when the employee tested positive for COVID-19, and the circumstances leading to the test.
- Identify, to the extent applicable, the “production area” – for example, the proximity within which the infected employee worked with others (and who those others were), the number of shifts (for example, three per day), the equipment used during shifts and the cleaning of the “production area” after each shift (if possible, without shutting down the production line).
- Check schedules to try to determine the identity of the co-workers with whom the individual worked.
- Determine the location of all places in the facility the employee accessed in the 14-day period preceding diagnosis, such as rest rooms, break rooms, common areas, lockers, etc.
- Determine the company’s current procedures and policies for complying with federal, state and local COVID-19 guidance and what it has communicated to its employees in that regard.

Other steps may be appropriate or warranted depending on the individual circumstances.

24 How should my business notify colleagues and others who had or may have had contact with an employee who has been diagnosed with COVID-19? [FAQ added on March 29]

Once you have identified the individuals with whom the employee had or may have had continuous or close contact, you should notify such individuals that they may have been exposed to COVID-19. If feasible, inform the identified individuals via phone – versus written communication – and, ideally, separately.

Instruct these individuals that they are required to exclude themselves from the company’s premises for 14 days and recommend that they self-quarantine out of an abundance of caution. Employers should also consider notifying other co-workers who, although not identified, were reasonably likely to be in the identified affected areas.

Critically, and as noted above, you should not disclose the name or other identifying information of the infected employee.

25 What is my company's potential risk exposure if we fail to take appropriate remedial measures upon discovering that an employee has been diagnosed with COVID-19? [FAQ added on March 29]

Employers that fail to take appropriate remedial measures upon discovering that an employee has been diagnosed with COVID-19, run the risk of, among other things:

- More employees being diagnosed with COVID-19, thereby disrupting operations to a much larger extent.
- Public health authorities getting involved and shutting operations down more broadly.
- Employees refusing to work in the space because of a lack of adequate precautions, which might, depending on the circumstances, be considered protected, concerted activity under the National Labor Relations Act.
- Unfavorable press coverage.
- Litigation based on exposure of employees to a known risk of serious harm.
- Violation of OSHA's General Duty Clause, which requires every employer to provide a workplace free from recognized hazards.

On top of this certainly non-exhaustive list, employers may also have potential tort liability for negligent, reckless, and willful conduct related to the presence or interjection of COVID-19 in the workplace.

26 I've read that the FFCRA applies to private employers with fewer than 500 employees. How is that threshold calculated for broader business networks of separate but related entities? [FAQ added on March 29]

There are numerous factors to consider in deciding whether to aggregate the employee headcounts of separate but related entities for purposes of the FFCRA. We have detailed some of these issues in a prior blog post.

Suffice it to say, however, that the considerations in this regard are wide-ranging and may have potential long-term significance. They range from potential "joint employer" implications (for both pending and future litigations, as well a union organizing) to the ability to procure a small business loan under the CARES Act. A business network that, in the aggregate, has 500 or more employees, should not make this decision in a vacuum, and, *in consultation with counsel*, should consider both near- and long-term impacts.

27 Is an employee eligible for expanded, emergency FMLA leave under the FFCRA even if they have previously used 12 weeks of FMLA leave in the past 12 months? [FAQ added on March 29]

If, prior to requesting emergency FMLA leave, an employee has taken 12 weeks of FMLA-qualifying leave within the past 12 months, then they may not be entitled to take emergency FMLA leave under the FFCRA. This is because an employee may only take a total of 12 workweeks of leave during a 12-month period under the FMLA, including the emergency provisions enacted by the FFCRA.

28 If an employee can telework/work remotely, are they eligible for leave under the FFCRA? [FAQ added on March 29]

Employees are only eligible for the leave benefits provided by the FFCRA if they are unable to work or telework. If an employer, therefore, permits teleworking and an employee is able to perform their tasks and work the required hours (even despite one of the qualifying reasons for FFCRA leave), then they are likely not entitled to take FFCRA leave.

29 Do I have a right to return to work if I take paid sick leave or expanded FMLA leave under the FFCRA? [FAQ added on March 29]

General speaking, yes. However, employees are not protected from employment actions that would have affected them regardless of whether they took leave. This means an employer can, for instance, terminate or furlough employees while on FFCRA leave (e.g., as part of eliminating an entire department) – again, so long as the employer would have taken such action even if the employee had not been on leave.

30 I understand that "heath care providers" and "emergency responders" may be excluded from the FFCRA's leave entitlements. Are these terms defined anywhere? [FAQ added on March 29]

The USDOL recently provided definitions for these terms. They can be found at FAQs # 55-57 on this resource page.

31 Are furloughed employees entitled to FFCRA leave? [Answer updated as of April 6]

No, the USDOL has made clear that they are not. This applies even if an employee is currently on leave under the FFCRA at the scheduled commencement of the furlough period. This is true whether the worksite is operating, the worksite is closed due to lack of business or the worksite is required to be closed pursuant to a government order. However, furloughed employees may be eligible for unemployment benefits, which have been enhanced and expanded under the CARES Act.

32 Are furloughed employees entitled to payout of accrued but unused vacation and PTO upon commencement of the furlough period?

This varies from state to state, but the Massachusetts Attorney General, for instance, has already stated that furloughed employees are due their accrued but unused vacation and PTO balances when the furlough period begins.

33 If I operate a small business with fewer than 50 employees, am I exempt from the FFCRA's requirement? [Answer updated as of April 6]

A small business – i.e., fewer than 50 employees – may be exempt from the FFCRA's leave requirements if providing FFCRA-protected leave to its employees would jeopardize the viability of the business as a going concern. The USDOL has identified three situations where a small business is exempt from the requirement to provide FFCRA leave. However, under those three situations, FFCRA may only be denied to those employees whose absence would cause the small business's expenses and financial obligations to exceed available business revenue, pose a substantial risk, or prevent the small business from operation at minimum capacity.

34 Can the two weeks of paid sick leave pursuant to the EPSLA run concurrently with the first two weeks of the expanded, emergency FMLA leave (the first two weeks of which are *unpaid*)? [Answer updated as of April 6]

Yes. However, each individual is only entitled to 10 days of paid sick leave pursuant to the EPSLA. This allotment is not per employer so if an employee takes the full 80 hours of EPSLA with one employer, they are not entitled to additional leave with a subsequent employer.

35 Can an employer use the paid sick leave mandated under the FFCRA to satisfy paid leave entitlements that an employee may have under the company's separate paid leave policy? [FAQ added on April 6]

No, unless the employee agrees. Paid sick leave under the FFCRA must be provided in addition to the other paid leave benefits offered to your employees. You may not require your employees to use available paid vacation, personal, medical, or sick leave benefits before or concurrently with the paid sick leave under the FFCRA. However, your employee may request to use such paid leave entitlements to supplement the sick leave pay provided under the FFCRA, up to the employee's regular earnings. You are not entitled to a tax credit for any paid sick leave that is not required to be paid or exceeds the limits set forth under the FFCRA.

36 Is all leave under the FMLA now paid leave? [FAQ added on April 6]

No, the only type of FMLA leave that is paid is expanded family and medical leave under the Emergency Family and Medical Leave Expansion Act when such leave exceeds 10 days. This includes only leave taken because the employee must care for a child whose school or place of care is closed, or childcare provider is unavailable, due to COVID-19 related reasons. An employee might have an entitlement to other types of FMLA leave depending on the circumstances; however, leave for such other reasons continues to be unpaid under the FMLA.

37 Can an employer require its employees to wear personal protective equipment (for example, facemasks, gloves, or gowns) designed to reduce the transmission of COVID-19? [FAQ added on April 6]

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

38 Are employers required to provide employees with masks to combat the spread of COVID-19? [FAQ added on April 6]

The CDC has recommended wearing face coverings in public settings, particularly where social distancing measures are difficult to maintain (e.g., grocery stores and pharmacies) and "especially in areas of significant community-based transmissions." Based on this recommendation, employers should consider providing employees who are required to be physically present in the workplace with masks or other face covering during business operation. Provided face coverings may not be the surgical type or N-95 respirators, which are limited in availability and are critical for health care workers and other medical first responders. Rather, the CDC recommends that, in most public settings, cloth face coverings should be used. Employers who have questions about whether more protective face covering should be used in light of their particular operations or circumstances should confer with legal counsel.

39 An employee has a suspected but unconfirmed case of COVID-19. What should the employer do? [FAQ added on April 6]

Employers should treat a situation of a suspected but unconfirmed case of COVID-19 in a manner consistent with a confirmed case. An employer should send the potentially infected employee home and interview the employee to determine the persons and physical locations with whom they came into close contact during the relevant period (following the process laid out in question #23 above). It should then communicate with all affected workers to notify them that the employee has not tested positive for the virus, but has shown symptoms that cause the employer to believe that a positive result is possible.

40 What steps can employers take with regard to job applicants to protect their existing workforce? [FAQ added on April 6]

The EEOC has issued an opinion stating that employers may screen applicants for symptoms of COVID-19 after the employer makes a conditional job offer, as long as all employees are treated in a consistent manner. The EEOC has also stated that employers may take a job applicant's temperature during the post-offer, pre-employment medical examination after such conditional offer of employment.

According to the EEOC, employers may delay the start date of an applicant who has tested positive for COVID-19 or has exhibited associated symptoms. According to the CDC, an individual who has COVID-19 or associated symptoms should not be in the workplace. The EEOC has stated that an employer may withdraw a job offer when it needs an applicant to start immediately, but the individual cannot start due to a diagnosis of COVID-19 or related symptoms.

41 Can an employee take emergency FMLA leave after their child's school year ends (or would have ended but for COVID-19)? [FAQ added on April 6]

Under the FFCRA, employees are eligible for emergency FMLA leave to care for a child whose school or place of care is closed, or childcare provider is unavailable, due to COVID-19-related reasons. While neither the plain language of the FFCRA itself, nor subsequent USDOL guidance, specifically addresses this issue, the USDOL's definitions of "place of care" and "childcare provider" are broad (according to the USDOL, "place of care," for instance, includes "day care facilities, preschools, before and after school care programs, schools, homes, summer camps, summer enrichment programs, and respite care programs").

Accordingly, if an employee can show that their intended post-school-year childcare is unavailable due to COVID-19, then the FFCRA may still apply.

42 My company is subject to the FFCRA – should we consider developing written forms for when employees need to request leave under the statute? [FAQ added on April 6]

Yes, as this should help streamline the process and increase consistency between leave requests and responses. Reed Smith's employment lawyers have prepared model FFCRA leave request forms that can be adapted to any workplace situation.

43 If my company obtains a potentially forgivable loan under the CARES Act's Payroll Protection Program, can we still implement potentially cost-saving workplace-related measures, such as terminations, furloughs, and pay cuts? [FAQ added on April 6]

Many small- and mid-size businesses are currently in the process of applying, or considering whether to apply, for loans under the CARES Act's Payroll Protection Program (PPP). While the PPP provides for loan forgiveness depending on how the loan proceeds are used in the eight weeks following its issuance, a reduction in employee headcount and/or pay could decrease the amount that the government will forgive. Additional details can be found in our blog post here.

44 Can an employer reduce employee pay as a cost-saving measure during this time? [FAQ added on April 6]

Generally speaking, U.S. businesses can legally reduce the compensation paid to their employees, so long as it is done within certain parameters.

First, if you are going to reduce the compensation paid to an exempt employee, then, assuming such employee falls within the executive, administrative, or professional exemptions, such reduction would likely be permissible so long as:

- the employee's reduced salary is at or above the minimum exempt salary threshold in the applicable jurisdiction (e.g., for the executive and administrative exemptions for most New York City employers, this threshold is $1,125/week or $58,500/year);
- the employee is given a notice informing them of their reduced salary to the extent required by law (e.g., by New York's Wage Theft Prevention Act); and
- the employee does not have an employment agreement that permits the employee to resign with good reason – and thereby trigger severance pay – if the company materially reduces their salary (the same holds true if the company has a severance plan/policy).

If, on the other hand, you are going to reduce the compensation paid to a non-exempt employee, such reduction would likely be permissible so long as the second and third items above are again satisfied and, also, so long as the employee's reduced regular rate of pay is at or above the minimum wage in the applicable jurisdiction. Lastly, if any of the employees are subject to a collective bargaining agreement, additional actions may be necessary before undertaking the pay reduction.

Notwithstanding, you should still consult with counsel before implementing any pay reductions, so as to ensure that there are no other factors to consider or laws or contractual provisions at play.

45 Can I pro-rate my *exempt* employees' pay if they are working reduced hours during this time? [FAQ Added on April 6]

Generally speaking, no. For the so-called "white collar" exemptions – executive, administrative, and professional – the employee must be paid on a salary basis. Being paid on a salary basis means that an employee is generally paid the same, predetermined amount of compensation every workweek, regardless of the quantity or quality of work performed (except for weeks in which absolutely no work is performed). Fluctuations in salary may forfeit an employer's right to claim that an employee is exempt.

Because of this, if, for instance, an exempt executive, administrative, or professional employee makes $2,000 per week and, in a given workweek, they only work 50 percent of their schedule (whether in-person or remotely), you cannot reduce their salary by 50 percent for that week. You must still pay them their full weekly salary.

Having said that, you may nevertheless be permitted to implement longer-term reductions in exempt employees' pay so long as you follow the steps outlined in question #44 above (*and, again, consult with counsel prior to implementing such pay reductions*).

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