Labor and Employment

COVID-19 Response

COVID-19 FAQs for Employers with U.S. Employees

April 18, 2020

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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 over roughly the past six 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 18, 2020 at 2:00 pm EDT.** Federal, state, and local agencies continue to issue regular updates and implement new laws, regulations, and guidance in response to COVID-19 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 #46.

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 18]**

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 percent 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 they 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, there is a total tax credit cap for such an employee of $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 fewer than 500 employees may be eligible under the CARES Act's Paycheck Protection Program (PPP) 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 PPP 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. However, recent guidance from the Department of Treasury indicates that 75 percent of the loan must go to payroll costs. 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 PPP and to discuss the benefits of or their concerns about 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 (PEUC), 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? [Answer updated April 18]

This varies from state to state. Generally, the majority of states do not require payout of unused, accrued vacation or PTO during a furlough. Payout of unused, accrued vacation or PTO may be required when, under applicable law, the furlough is deemed to be a termination of the employment relationship. For example, California Department of Labor Standards Enforcement has, through two past opinion letters, indicated that a furlough will be deemed a termination, which triggers final wage pay obligations, including unused, accrued vacation and PTO, when the employee is not returned within the same pay period.

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 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.

44 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*).

45 Can my company's PPP loan be forgiven? **[FAQ Added on April 18]**

Yes. You are eligible for forgiveness of the PPP loan in an amount up to the sum of the following expenses, which are incurred and paid during the **eight-week period** beginning on the date of loan disbursement (the Covered Period):

- Payroll costs
- Interest payments on mortgage obligations that are incurred before February 15, 2020
- Rent payments under leases in force before February 15, 2020
- Utility payments where service began prior to February 15, 2020
- Additional wages paid to tipped employees

Due to likely high subscription, at least 75 percent of the forgiven amount must have been used for payroll.

46 Are there limits on PPP loan forgivness? **[FAQ Added on April 18]**

Yes. Forgiveness will only be granted if the loan is used for the items identified in the prior question. Additionally, to incentivize small businesses to retain employees and maintain employee compensation, the forgiveness amount may be reduced if the business reduces (1) employee wages and/or (2) employee headcount.

47 How do wage reductions affect PPP debt forgiveness? **[FAQ Added on April 18]**

Generally speaking, the forgivable amount of the PPP loan will be reduced by the amount of any reduction – in excess of 25 percent – in an employee's pay. This only applies to employees who earned $100,000 or less during 2019.

48 How do reductions in employee headcount affect PPP debt forgiveness? **[FAQ Added on April 18]**

The forgivable amount of the PPP loan will also generally be reduced by (1) the average number of your full-time employee equivalents (FTEs) per month during the Covered Period, divided by (2) the average number of FTEs per month employed from February 15, 2019 to June 30, 2019 or January 1, 2020 to February 29, 2020 (you may elect which period to use). For example, if you have an average of 85 FTEs during the Covered Period and had an average of 100 FTEs during the reference period, you would only be entitled to 85 percent of the loan forgiveness of the total eligible forgivable amount.

49 Does this mean that, if my business has implemented workplace-related cost-saving measures – e.g., terminations, furloughs/temporary layoffs, or wage reductions – or is considering doing so, this could reduce the forgivable amount of our PPP loan? **[FAQ Added on April 18]**

Yes.

50 Can modifying or reversing these workplace-related cost-saving measures lessen potential reductions in the forgivable amount of my company's loan? **[FAQ Added on April 18]**

Yes, if certain criteria are satisfied by June 30, 2020.

51 How do I apply for loan forgiveness? **[FAQ Added on April 18]**

You must apply and be approved for PPP loan forgiveness by the lender that issued the loan.

52 Does an employee have to provide the company with notification of a COVID-19 diagnosis and, if so, is that a HIPAA violation? [FAQ Added on April 18]

There is no statutory requirement forcing an employee to provide you with a notification of a COVID-19 diagnosis. However, employers may inquire with employees and encourage, or even require, employees to disclose when they test positive or show symptoms associated with COVID-19 to allow the employer to take appropriate precautions to protect the safety and well-being of not only the affected employee, but also any other employees who may have been exposed. Such a notification would not constitute a HIPAA violation. Additionally, you may ask any employees entering the workplace if they have been diagnosed with COVID-19.

53 If an employee calls in sick, should the company's regular policy of asking for a doctor's note before allowing a sick employee back into the workplace, be enforced during the pandemic? [FAQ Added on April 18]

The CDC suggests that employers do not require a health care provider's note for employees who are sick to validate their illness. However, if you do decide to enforce the company's regular policy you should consider accepting a stamp, form, or email from urgent care facilities or clinics in place of a traditional doctor's note. Alternatively, your company could waive the requirement until such time as the employee can reasonably obtain such documentation.

54 Are employees who elect to stay home on unpaid leave – and choose not to work – considered furloughed and can they apply for unemployment? [FAQ Added on April 18]

An employee who elects to stay home on unpaid leave may be considered to be voluntarily furloughed. However, under many state unemployment laws, such individuals may not be eligible for unemployment benefits since they have chosen not to participate in available work. The DOL's guidance on the CARES Act Pandemic Unemployment Assistance indicates that an employee who quits because they are afraid of getting COVID-19 does not qualify for unemployment benefits under the CARES Act.

55 Are business owners who have had to close their businesses during the pandemic eligible for unemployment? [FAQ Added on April 18]

Business owners whose businesses have closed due to the COVID-19 pandemic may be eligible for unemployment benefits if they have paid themselves a salary or a wage. Small business owners should consult their state's unemployment laws to determine their full eligibility.

56 Are individuals who began receiving unemployment benefits prior to when the pandemic began, eligible for the $600 per week in additional federal benefits? [FAQ Added on April 18]

In states participating in the federal Pandemic Unemployment Compensation (PUC) program, individuals who began receiving unemployment benefits prior to the onset of the COVID-19 pandemic, may be eligible for an additional $600 weekly payment. However, they will receive the additional federal benefits only for the weeks following the time at which the state has executed the agreement required for its participation in the federal PUC program. This benefit will then last through July 31, 2020.

57 Will individuals applying for unemployment benefits going forward automatically receive the $600 per week in additional federal benefits? [FAQ Added on April 18]

Generally speaking, yes. Individuals are automatically eligible for the additional $600 weekly benefit under the federal Pandemic Unemployment Compensation program as long as they are eligible for unemployment benefits under applicable state law.

58 Will employees who have exhausted their regular state unemployment compensation benefits still qualify for additional unemployment benefits under the CARES Act? [FAQ Added on April 18]

Under the CARES Act, states are permitted to extend unemployment benefits by up to 13 weeks under the PEUC program. In addition, employees who have exhausted the 13 weeks of additional benefits under the PEUC program may be eligible to continue receiving benefits under the Pandemic Unemployment Assistance (PUA) program. PUA benefits are available for a period of unemployment of up to 39 weeks. If an employee has exhausted regular unemployment compensation benefits and PEUC benefits in fewer than 39 weeks, they may be eligible to receive assistance under the PUA program for the remaining weeks within the 39-week period.

59 Will employees who have exhausted their unemployment benefits still qualify for Disaster Unemployment Assistance? [FAQ Added on April 18]

To qualify under the federal Disaster Unemployment Assistance program, an individual must have lost their job as a direct result of a major disaster declared by the president of the United States. Accordingly, any individual who was already unemployed prior to the disaster declaration would not qualify. Whether the individual qualifies under a state's unemployment compensation program will depend on the law of the state in which they are applying for unemployment benefits.

60 Will all unemployment benefits awarded to my former employees be charged against my employer account? [FAQ Added on April 18]

Ordinarily, unemployment benefits paid to former employees are charged against the employer's account. However, some state laws identify situations where benefits are not charged to the employer's account, such as where the benefits are fully funded by the federal government. The expanded unemployment benefits offered through the PUA, PUC, and PEUC programs are fully funded by the federal government. Additionally, the DOL has issued guidance prohibiting states from charging employers for any CARES Act unemployment benefits paid. In short, unemployment benefits related to COVID-19 should not impact an employer's experience rating.

61 What if I am not set up to have my employees work from home? [FAQ Added on April 18]

State or local shelter-in-place orders have defined what are considered essential and non-essential businesses during the pandemic and govern how those businesses may continue to operate. Essential businesses may remain in operation and essential employees may continue to work from your worksite, if necessary. Non-essential businesses that are not set up to allow their employees to work from home may have to close, unless permitted to conduct minimum business operations as defined by the applicable shelter-in-place order and/or the business establishes the systems necessary to provide for remote work opportunities.

62 Are off-shore workers included in my employee total to determine coverage under the FFCRA? [FAQ Added on April 18]

Though the DOL has not provided any specific guidance on off-shore employees, for purposes of FFCRA coverage, all full-time, part-time, and jointly employed temporary employees and day laborers supplied by a temporary agency are included in an employer's employee total. Provided that the off-shore employees are considered within the U.S., they will be included in your employee total. Off-shore employees located outside the U.S., including those overseas, would not be counted in the employee total.

63 Does an employee qualify for emergency paid sick leave under the FFCRA if they are simply fearful of contracting COVID-19, or must the employee actually have symptoms or a diagnosis? [FAQ Added on April 18]

Fear of contracting COVID-19 is not one of the qualifying reasons for emergency paid sick leave under the FFCRA. Such qualifying reasons are limited to those employees who: (1) are unable to work because they are subject to a federal, state or local quarantine or isolation order related to COVID-19; (2) have been advised by a health care provider to self-quarantine; (3) are experiencing symptoms and are seeking a medical diagnosis; (4) are caring for an individual subject to an order described in (1) or (2) above; (5) are caring for a child whose school or place of care is closed for COVID-19-related reasons; or (6) are experiencing any other substantially similar conditions specified by the Secretary of Health and Human Services.

64 Do emergency paid sick leave and extended family and medical leave apply retroactively? [FAQ Added on April 18]

No.

65 What do I have to provide to the IRS to get reimbursed – i.e., a tax credit – for the monies I pay to employees who are on leave under the FFCRA? [FAQ Added on April 18]

You should consult applicable IRS forms for the procedures that must be followed to claim a tax credit. Employers should retain documentation the employee submitted in support of the request for EPSLA or EFMLEA or any documentation created when determining whether such leave should be granted or denied.

66 How much do I have to pay an employee if they spend a portion of the day teleworking and the remainder of the day caring for their child – and taking leave – under the FFCRA? [FAQ Added on April 18]

You will need to pay employees their full rate for the portion of the day they spend teleworking. If you agree to allow employees to take intermittent leave under the FFCRA, the time they spend caring for their child under the EPSLA or EFMLEA provisions of the FFCRA will need to be paid at two-thirds (2/3) of the greater of their regular rate, the federal minimum wage, or applicable state or local minimum wage, up to $200 per day.

67 What employee benefits, such as group health care premiums, can a PPP loan be used to cover? [FAQ Added on April 18]

PPP loans may cover employee benefits such as company-provided vacation, parental, family, medical, or sick leave. They may also cover the payments required for the provisions of group health care benefits, including insurance premiums. As the CARES Act is intended to keep small businesses operating as normal as possible, it is likely that all insurance premiums, including health, dental, and vision, would be included.

68 What counts as payroll costs under the PPP? [FAQ Added on April 18]

"Payroll costs" includes salaries, wages, payment of a cash tip or its equivalent, allowance for separation, payment of employee benefits, payment of retirement benefits, and payment of state or local tax assessed on the compensation of employees.

69 If an employee resigned or retired prior to the pandemic and I either did not plan to replace that employee or am having a hard time doing so due to shelter-in-place orders, will that employee be counted against me for purposes of loan forgiveness under the PPP? [FAQ Added on April 18]

For purposes of calculating any reduction in loan forgiveness under the PPP, the average number of full-time equivalent employees you have during the eight-week period beginning on the date of the origination of the covered loan is divided by the average number of full-time equivalent employees in one of the two following periods, which you may select: either between February 15, 2019 and June 30, 2019, or between January 1, 2020 and February 29, 2020.

70 Can a small business apply for both an Economic Injury Disaster Loan and a loan under the PPP? [FAQ Added on April 18]

Yes, provided that the Economic Injury Disaster Loan (EIDL) is not used for payroll costs. If you received an EIDL loan between January 31, 2020 and April 3, 2020 that was used to cover payroll costs, any subsequent PPP loan must be used to refinance the EIDL loan.

71 Where can self-employed individuals apply for loans under the CARES Act? [FAQ Added on April 18]

Beginning April 10, 2020, self-employed individuals and independent contractors can apply for and receive loans to cover payroll and other certain expenses through existing Small Business Administration lenders. Other lenders will be available to make PPP loans once they are approved.

72 Does a business that has been shut down by a stay-at-home order qualify for the payroll tax credit? [FAQ Added on April 18]

Yes. Businesses whose operations have been fully or partially suspended as a result of a government order related to COVID-19 may qualify for the CARES Act payroll tax credit. However, employers are ineligible for the payroll tax credit if they receive a loan under the PPP.

73 How will the SBA confirm loans under the PPP were spent for proper purposes? [FAQ Added on April 18]

The SBA's interim final rule on the PPP states SBA lenders do not need to conduct any verification if a borrower submits documentation supporting its request for loan forgiveness and attests that it has accurately verified the payments for eligible costs. If funds are used for an unauthorized purpose, the SBA will direct their repayment; and if they are knowingly used for such purpose, the borrower may be subject to additional liability, such as charges for fraud. There could be potential audits in the future.

74 Can I include independent contractors (reported for tax purposes on a 1099) in my payroll calculation and use the proceeds from a PPP loan to pay them? **[FAQ Added on April 15]**

No. 1099 independent contractors cannot be include in payroll calculations, nor can proceeds from a PPP be used to pay them. Independent contractors are eligible to apply for their own loans under the PPP. However, consult with counsel to ensure that your independent contractors have not been misclassified, as this could change the outcome.

75 Can employers require "essential workers" to return to work following potential exposure to COVID-19? **[FAQ Added on April 18]**

The CDC has recently advised that "essential workers" may be permitted to continue to work following potential exposure to COVID-19, provided that they "remain asymptomatic and additional precautions are implemented to protect them and the community." Essential workers who have had an exposure, but remain asymptomatic should follow certain practices prior to and during their work shift:

- **Pre-screen**: Employers should measure the employee's temperature and assess symptoms prior to them starting work.
- **Regular monitoring**: As long as the employee doesn't have a high temperature or symptoms, they should self-monitor under the supervision of their employer's occupational health program.
- **Wear a mask**: The employee should wear a facemask at all times while in the workplace for 14 days after last exposure. Employers can issue facemasks or can approve employees' supplied face coverings in the event of shortages.
- **Social distancing**: Employees should maintain a distance of six feet and practice social distancing as work duties permit.
- **Disinfect and clean work spaces**: Employers should routinely clean and disinfect all areas such as offices, bathrooms, common spaces, and shared electronic equipment.

If an employee becomes sick during the day, they should be sent home immediately. Surfaces in their workspace should be cleaned and disinfected. Information on persons who had contact with the ill employee during the time the employee had symptoms and two days prior to symptoms should be compiled. Others at the facility who were in close contact with (within six feet of) the employee during this time would be considered exposed.

It must be noted, however, that states and local health departments are still implementing their own rules that may place requirements and restrictions that extend beyond the CDC's guidance. Employers should check their state and local health department orders before following the above CDC guidance.

76 How have localities amended sick leave policies in response to COVID-19? **[FAQ Added on April 18]**

In response to COVID-19, many localities have enacted local laws that provide for paid leave benefits beyond those provided for under the Families First Coronavirus Response Act. These local ordinances commonly require employers to provide paid sick time to the extent that the employee is unable to work or telework because:

- the employee is subject to quarantine or isolation by federal, state, or local order due to COVID-19, or is caring for someone who is quarantined or isolated due to COVID-19;
- the employee is advised by a health care provider to self-quarantine due to COVID-19 or is caring for someone who is so advised by a health care provider;
- the employee is experiencing symptoms of COVID-19 and is seeking medical diagnosis; or
- the employee is caring for a minor child because a school or daycare is closed due to COVID-19.

By way of specific example, in New York, Governor Andrew Cuomo signed into law a bill providing job protection and benefits to certain employees quarantined due to the pandemic. Notably, the legislation provides certain job protections to employees subject to a mandatory or precautionary order of quarantine or isolation, protections that vary based on employer size.

Similarly, on April 7, 2020, two California cities, San Francisco and San Jose, passed emergency ordinances entitling full-time employees to 80 hours of paid leave and part-time employees to sick leave hours equal to the number of hours that the employee works on average over a two-week period. The ordinances further provide that employees can use the paid sick

leave immediately for the purposes described above, regardless of length of employment with the employer. That same day, Los Angeles Mayor Eric Garcetti passed a public order requiring employers with 500 or more employees within the City of Los Angeles or 2,000 or more employees within the United States to expand leave benefits to supplement already existing sick leave obligations.

Philadelphia similarly amended its preexisting Promoting Health and Families Workplaces Act to permit employees to use accrued paid sick leave to stay home due to COVID-19.

*Employers should be mindful that the above is **not** a comprehensive list of recently expanded state and local leave benefits, nor is it a comprehensive analysis of the cited laws. In all cases, employers should refer to the specific terms of each applicable ordinance, as they may vary, and confer with legal counsel to ensure compliance.*

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