COVID-19 Frequently Asked Questions

To assist employers in navigating the uncharted COVID-19 landscape, we have compiled a list of frequently asked questions relating to employee benefits and other workplace and employee concerns. These COVID-19 FAQs were updated on JANUARY 19, 2021 and will continue to be updated as things change at the federal level.

Frequently Asked Questions

CORONAVIRUS RESPONSE AND RELIEF SUPPLEMENTAL APPROPRIATIONS ACT, 2021

Q **What relief did the Coronavirus Response and Relief Supplemental Appropriations Act, 2021 ("the CAA") provide? (Added January 4, 2021)**

A On December 21, 2020, Congress passed the $1.4 trillion, 5,593 page Consolidated Appropriations Act, 2021 ("CAA") that included over $900 billion in relief in its Coronavirus Response and Relief Supplemental Appropriations Act, 2021. President Trump signed the CAA into law on December 27, 2020. While this is in no way an exhaustive list of the numerous provisions, the CAA provides for the following:

- **FFCRA Tax Credits:** Congress declined to extend the requirements for certain employers to provide paid leave under FFCRA; however, the CAA allows a covered employer an extension of time to submit tax credits should they *voluntarily* choose to extend qualifying paid leave to their eligible employees through March 31, 2021. See below FAQs for more information.
- **Health and Dependent Care Flexible Spending Accounts (FSAs):** The CAA includes temporary rules for health and dependent care FSAs to allow more flexibility for participants should employers choose to elect these permissive changes. See below FAQs for more information.
- **Surprise Medical Bill Ban:** The CAA includes the "No Surprises Act" which prohibits surprise bills by doctors, hospitals and air ambulances. Instead of billing patients who have health coverage for unpaid balances, providers must work with the group health plan or health insurance issuer to determine the appropriate amount to be paid by the plan or issuer, under the methodology provided in the Act. These provisions apply to plan years beginning on or after January 1, 2022, with implementing regulations to be issued by July 1, 2021.
- **Transparency for Group Health Plans:** The CAA includes several provisions intended to increase transparency for group health plans, such as added language on insurance cards, advance explanations of benefits, removal of gag clauses, price comparison tools, reporting on pharmacy benefits and drug costs, and up-to-date provider directories.
- **Mental Health Parity and Substance Use Disorder Benefits (MHPAEA):** MHPAEA is a federal law that prevents group health plans providing mental health or substance use disorder benefits from imposing less favorable benefit limitations on those benefits than on medical and surgical benefits. One element of MHPAEA is the protection of "nonquantitative treatment limitations," which are limitations on benefits not tied to specific monetary or visit limits. Nonquantitative treatment limitations include plan methods for determining usual, customary and reasonable charges, exclusions based on a failure to complete a course of treatment and restrictions based on facility type or provider specialty. The CAA includes provisions requiring group health plans to formally review compliance with MHPAEA related to these limitations. Plans will need to be prepared to document this review and provide documentation upon request to regulatory agencies such as DOL and HHS.
- **Unemployment Benefits:** The CAA allows eligible employees an additional $300 per week in unemployment benefits and extends this aid for another 11 weeks, through March 14, 2021. The CAA also extends the Pandemic Unemployment Assistance program that expanded unemployment eligibility to cover individuals who were not traditionally eligible to receive unemployment benefits, such as self-employed and 'gig' workers.

- **Small Business Administration (SBA) assistance and the Paycheck Protection Program (PPP):** This bill authorizes approximately $325 billion in funding to the SBA to assist small businesses and specifically allocates $284 billion to the PPP which provides forgivable loans to small businesses to pay their employees during the COVID-19 crisis. The CAA clarifies that employer-provided group insurance benefits other than healthcare benefits (group life, dental, vision or disability) fall within the definition of payroll costs. The CAA limits the eligibility criteria to businesses with less than 300 employees that have sustained at least a 25% loss in revenue during any quarter of 2020, as well as small 501(c)(6) organizations with 150 or fewer employees that are not lobbying organizations. Employers interested in applying for a second PPP loan under the CAA should reach out to their own financial institution for questions and for more information on the application process.
- **Direct Payments to Individuals**: Taxpayers may receive up to $600 for individuals, up to $1,200 for couples filing joint tax returns and an additional $600 per child for families. The bill follows the same eligibility guidelines as the previous CARES Act. Note: This amount is accurate as of December 27, but may be subject to change at some point in the future.
- **Student Loan Repayments**: Certain student loan repayments made between the CARES Act enactment date and the end of 2020 (up to $5,250) by employers for their employees will be tax free. The CAA extends these CARES Act provisions through December 31, 2025.

Q **Did the CAA make any changes to the paid leave requirements of the Families First Coronavirus Response Act (FFCRA)? (Added January 4, 2021)**

A FFCRA created two paid leave mandates for covered employers: the Emergency Paid Sick Leave (EPSL) and the Emergency Family and Medical Leave Expansion (EFML). FFCRA also created tax credits for employers to cover certain costs of the employee leave required by the law, specifically employee wages, health plan expenses allocable to those wages, and the employer's portion of the Medicare tax related to the wages. Both the EPSL and the EFML mandates sunset on December 31, 2020. See below FAQs for more detailed information on the benefits and requirements of FFCRA.

Congress declined to extend FFCRA's mandates beyond December 31, 2020; however, the CAA allows covered employers an extension of time to submit tax credits should they *voluntarily* choose to allow employees to take paid sick leave for COVID-19 related reasons or paid family medical leave for child care due to COVID-19 school or daycare closures. Employer tax credits will now apply for FFCRA leave taken through March 31, 2021. Note: the CAA did not provide for additional allowed leave time. The time allowed under the EPSLA is still only 80 hours of paid emergency sick leave, with 12 weeks of leave under the EFMLEA (with the first 2 weeks unpaid and the remaining 10 weeks eligible for paid family and medical emergency leave).

Q **What changes did the CAA make to health FSAs and dependent care FSAs (DCAPs)? (Added January 4, 2021)**

A Flexible spending accounts (FSAs) are generally subject to 'use it or lose it' rules with permissible exceptions that allow for a limited carryover of funds to the next plan year or a grace period within the next plan year to use funds. Because of the unavailability of elective medical

procedures, or the hesitation to visit medical providers unless absolutely necessary, many employees had funds remaining in their health FSA at the end of 2020. Additionally, due to closure of daycares and changing child care needs based on virtual schools, many employees had funds remaining in dependent care FSAs accounts (DCAPs).

For plan years ending in 2020 and 2021, the CAA allows employers to make the following optional changes to allow employees additional time to 'use' and therefore not 'lose' their funds and to provide greater flexibility to employees based on their individual needs:

- **Extended grace periods**: Generally, a plan may only extend its grace period to 2.5 months after the end of the plan year. The CAA allows a health FSA or DCAP with a plan year ending in 2020 or 2021 to extend its grace period to 12 months after the end of the plan year during which time employees may incur claims for reimbursement;
- **Enhanced Carryovers**: The CAA allows unlimited carryover of unused amounts remaining in health FSAs and DCAPs to the next plan year.
- **Terminated employees:** Generally, while a terminated employee may be able to continue to receive reimbursement for a DCAP during the plan year, a terminated employee could not use funds from a health FSA to reimburse expenses incurred after employment was terminated. The CAA allows employees who cease plan participation during the 2020 or 2021 calendar years to continue to receive reimbursements from unused amounts in any existing health FSA, as well as DCAPs, for expenses incurred through the end of the plan year (plus any applicable grace period) in which their participation ended.

An employer can also choose to amend their cafeteria plan to allow employees to prospectively modify the amount of their FSA contributions for plan years ending in 2021, even if they have not experienced a change in status. However, the applicable dollar limitations continue to apply.

All of the above allowed changes are permissive, not mandatory. If an employer chooses to adopt any of the above, the employer must amend its plan documents by the last day of the first calendar year beginning after the end of the plan year in which the amendment is effective, as well as communicate any and all changes to participants. See below FAQs on health FSAs, DCAPs and HDHP/HSAs for more information and details on the CAA changes.

VACCINES

Q **Can an employer require its employees to be vaccinated with the COVID-19 vaccine? (Updated December 21, 2020)**

A On December 15, 2020, the EEOC issued an update to its What You Should Know About COVID-19 and ADA Rehabilitation Act and Other EEO Laws, providing some much needed guidance on this subject. The general answer is yes, an employer can require employees to be vaccinated - so long as any vaccination policies have certain exceptions (for disability or religious accommodations), are job-related, and are consistent with business necessity. The EEOC has always encouraged employers to recommend rather than require vaccines for employees.

Q **What are the exemptions to any vaccine mandate that an employer must recognize? (Updated December 21, 2020)**

A The EEOC sets out two separate exemptions that may apply: (1) medical exemptions under the American with Disabilities Act (ADA) and (2) religious belief exemptions under Title VII of the Civil Rights Act (Title VII). In reviewing whether an ADA exemption may apply, employers should engage in the ADA's required interactive process to determine whether the employee has a medical condition preventing the employee from receiving the vaccine for medical reasons, while a religious belief exemption may apply if an employee has a "sincerely held" religious objection to the vaccine.

If one of these exemptions applies, then the employer must provide a reasonable accommodation to the required vaccine, unless that accommodation would cause undue hardship **or** the employee poses a "direct threat" even after reasonable accommodation. If there is no reasonable accommodation that can be made, the employee may be terminated. However, all employers should be aware that showing undue hardship in this scenarios will be a very high burden and should exercise extreme caution, as well as consult with their legal counsel.

See What You Should Know About COVID-19 and ADA Rehabilitation Act and Other EEO Laws

Q **What if an employee doesn't believe in vaccinations or is fearful about the new vaccines possibly having unknown side effects? Do these objections fall under EEOC protection? (Updated December 21, 2020)**

A The COVID-19 vaccine is a politically charged subject. Fear of the vaccine and/or general objections to vaccination do not fall under any medical or religious exemption. Employers will need to be prepared to deal with the employee relations backlash if they choose to mandate a vaccination. In addition, employers will need to determine in advance whether they will allow for objections such as these or if they will make the decision to terminate those employees whose objections are not protected by the EEOC.

Q **The vaccine is currently being administrated under an FDA Emergency Use Authorization (EUA). Can the employer require employees to be vaccinated while the vaccine is under an EUA? (Updated December 21, 2020)**

A The FDA Emergency Use Authorization (EUA) is different than approval under FDA vaccine licensure. The EEOC notes that the COVID-19 vaccines may only be available to the public for the foreseeable future under an EUA. When a vaccine is being issued under an EUA, the FDA has an obligation to:

> [E]nsure that recipients of the vaccine under an EUA are informed, to the extent practicable under the applicable circumstances, that FDA has authorized the emergency use of the vaccine, of the known and potential benefits and risks, the extent to which such benefits and risks are unknown, **that they have the option to accept or refuse the vaccine**, and of any available alternatives to the product.

While some industry groups requested that the FDA include guidance clarifying whether an employer may mandate a vaccine under an EUA, the FDA has not chosen to do so at this time. Because the EUA guidance specifically states that recipients have the option to accept or refuse the vaccine, employers should consult with legal counsel if they are considering whether to mandate the vaccine while an EUA is in place.

See What You Should Know About COVID-19 and ADA Rehabilitation Act and Other EEO Laws

Q **Are there compliance concerns if an employer wants to provide incentives through a wellness program to employees for receiving COVID-19 vaccinations? (Updated January 19, 2021)**

A Depending upon how a wellness program is structured, compliance concerns under ADA, ERISA, HIPAA, or GINA are often triggered. Many wellness programs ask employees to answer questions on a health risk assessment or undergo biometric screenings for risk factors (such as high blood pressure or cholesterol). Wellness programs that include such questions about employees' health or require medical examinations are subject to the ADA's rules on wellness programs.

The ADA generally prohibits employers with 15 or more employees from discriminating against individuals with disabilities. An employer may make disability-related inquiries and require medical examinations post-employment only if they are job-related and consistent with business necessity. There is an exception however for those inquiries and exams if they come as a result of a *voluntary* wellness program. As part of this voluntariness standard, there are limits to the incentive amount that can be offered in exchange for an employee's participation in a wellness program that is subject to the ADA.

The EEOC guidance regarding incentive limitations has had a tumultuous history. In 2016, the EEOC issued regulations that capped the reward for participating in ADA-implicated wellness programs and rewards generally could not exceed 30 percent of the cost of self-only coverage. A court later vacated that section of the regulations, but the underlying ADA concept of reasonable incentives remains (in order to avoid coercion and be considered involuntary). To avoid risk, most employers continue to keep their total wellness incentives within the 30% limit while awaiting more guidance from the EEOC (see below FAQ re proposed regulations for additional information). Further, employers should also consider the impact on the wellness program on those employees who are unable to receive the vaccine due to a valid disability or religious-based exemption.

With any wellness program, there are also concerns about allowing employees who are not on health plan to participate. When a wellness program is limited to those enrolled in the group health plan, it's relatively easy to integrate the wellness program with the group health plan to comply with laws like ERISA, COBRA and ACA group health mandates. Where access is granted to those not enrolled in the primary group health plan, however, compliance issues abound. An employer should consider this when determining which employees would be eligible for any incentive for COVID-19 vaccination.

Finally, an unintended consequence of a seemingly neutral policy providing an incentive for vaccinations is the potential for discrimination by disparate impact. Even if this is meant as a neutral policy, the policy could in fact discriminate against employees with medical conditions (ADA discrimination) or sincerely held religious beliefs (Title VII discrimination) that would prohibit them from participating in such a benefit program.

Q **Can I provide incentives outside of any wellness program? (Added January 19, 2021)**

A Unfortunately, just saying that something isn't part of a wellness program does not make it so. We're just not sure at this point whether a vaccination incentive program will be automatically deemed a wellness plans covered by the ADA regulations. There are also many unanswered questions should an employer wish to make the vaccine incentive program available to all employees, not just those enrolled in the group health plan. This would require an analysis of whether the vaccine program is a group health plan in and of itself and if so, what requirements under ERISA, COBRA, etc. must be met. Employers wishing to explore this option should consult with legal counsel.

Q **Will the proposed EEOC wellness regulations affect an employer's ability to provide incentives for COVID-19 vaccinations? (Added January 19, 2021)**

A In early January, the EEOC issued proposed rules regarding wellness programs that trigger ADA and GINA considerations. These rules are still in *proposed* form which means there is a period of time for the public to submit comments. In addition, a new Presidential administration usually halts any pending rules. It is likely that these rules will look quite different in their final form.

As written, the proposed rules limit any incentives offered in a connection with a participation-only wellness program (programs where participants are only required to submit to a medical exam or inquiry but do not have to achieve any particular outcome) to a "*de minimis*" threshold. This de minimis term is not defined, rather we are given examples of what could be considered de minimis, including included a water bottle or a gift card of modest value. Therefore, under the proposed rules, an employer could not offer a major incentive for a vaccine program *if* the ADA applies to the program under the proposed rules.

Medical exams or disability-related inquiries always trigger an ADA analysis; however, in its recent guidance relating to COVID-19 vaccines, the EEOC states that the administration of a vaccine, in and of itself, does not constitute a medical examination. Even though administration itself is not a medical exam, the vaccine administration is usually accompanied by medical questions to ascertain whether the person is susceptible to an allergic reaction or is otherwise not a good candidate for vaccination. This inquiry could be considered a disability-related inquiry and thus subject the program to ADA considerations, particularly if this information is requested by the employer or by a third party who has been hired by the employer to administer the vaccine as part of a wellness program. There is an argument that ADA restrictions or limitations could be avoided if an employee goes to a third party provider (pharmacy) who is NOT contracted by the employer to administer the vaccine, even if there is a screening process.

The argument here is that the employer is not touching that screening data nor has it contracted with a third party to do so. It essentially is a hands-off approach; and if the wellness program is structured in this way, it *may* possibly avoid the ADA limitations in the proposed regulations.

Q **Are there other ways to encourage employees to get a COVID-19 vaccination outside of wellness plan incentives or employer mandates? (Added January 19, 2021)**

A Yes. Employers are considering ways to encourage employees outside of wellness program incentives, such as developing communication programs to encourage employees to follow CDC recommendations regarding vaccinations and providing CDC information to assist employees in making their vaccination decisions. Some employer are assisting employees with logistical information to help navigate the difficult information gathering process of rapidly changing state and local guidelines. In some industries, employers are able to make the vaccine available on site for employees, much like the flu vaccine (although supply is making this option much more difficult for most employers, and any onsite option should involve discussions with legal counsel). Finally, employers are considering allowing employees paid time off to get the vaccine, essentially providing a floating holiday for time spent on vaccination efforts.

Q **What are some OSHA concerns relating to employer mandates of COVID-19 vaccinations? (Updated December 21, 2020)**

A OSHA concerns can be set out from both sides of this discussion. OSHA requires employers to provide a safe and healthy work environment. OSHA issued guidance in 2009 guidance relating to the H1N1 virus and stated that while employers could require employees to take vaccines, employers were also required to properly inform employees of the benefits of vaccinations and allowed for whistleblower protection for any employee who "refuses vaccination because of a reasonable belief that he or she has a medical condition that creates a real danger of serious illness or death (such as a serious reaction to the vaccine)." We await guidance from OSHA about whether vaccines are required in certain workplaces to provide this "safe and healthy" environment. However, it is unlikely that OSHA will issue a blanket mandate because of the possibility of employees having adverse reactions to mandated vaccines.

RETURN TO WORK

Return to Work: Employee Certifications, Temperature Checks and Testing

Q **When employees return to work, can they be asked if they have been diagnosed with or tested for COVID-19 or if they are experiencing any symptoms associated with COVID-19?**

A Yes. An employer can ask all employees who will be physically entering the workplace to self-certify, via attestation, questionnaire or form, if they have COVID-19 or been tested for COVID-19. Employers may also ask employees if they are experiencing any COVID-19-like symptoms such as fever, chills, cough, shortness of breath, loss of smell or taste or any other symptoms

identified by the CDC. All information obtained as a result of the self-certification must be maintained as a confidential medical record.

Note that such questions should generally be asked of *all* employees physically entering the workplace; if an employer wants to question only a single employee – or to take the temperature of or require testing of only one employee – the ADA requires that the employer have a "reasonable belief based on objective evidence" that this person may have the virus. Also, while employers are permitted to ask these questions of all employees physically entering the workplace or physically interacting with coworkers or others, such as customers, they are not generally allowed to ask such questions of employees who are teleworking.

An employer can refuse to allow an employee to return to work if they have COVID-19 or symptoms associated with COVID-19, as the EEOC has stated that their presence could pose a direct threat to the health and safety of others.

See What You Should Know About COVID-19 and the ADA, Rehabilitation Act, and Other EEO Laws

Q **Can an employer require employees who have been away from the workplace due to COVID-19 symptoms to provide a doctor's note certifying fitness to return to work?**

A Requiring a doctor's note is permitted under the ADA; however, as noted by the EEOC, as a practical matter, doctors and other health care professionals may be too busy during and immediately after a pandemic outbreak to provide fitness-for-duty documentation. Accordingly, employers may need to consider alternative approaches, such as reliance on local clinics to provide a form, a stamp or an email to certify that an individual does not have the virus.

The CDC expressly states that employers should not require sick employees to provide a negative COVID-19 test result or healthcare provider's note to return to work. The CDC instead sets out specific recommended criteria about when employees with COVID-19 who have stayed home can stop home isolation and return to work.

See Pandemic Preparedness in the Workplace and the ADA, Q20 and CDC Guidance for Suspected or Confirmed Cases of COVID-19 in the Workplace

Q **Can an employer ask questions about an employee's travel, even if the employee is not exhibiting any COVID-19-related symptoms?**

A Yes. The EEOC has confirmed that questions related to travel are not considered disability-related question. If the CDC or other state or local public health officials recommend that people who visit specified locations self-quarantine or remain at home for a certain period of time following the travel, an employer is permitted to ask whether employees are returning from these locations, even if the travel was personal.

Q **Can employers require a daily temperature check as a condition to work?**

A Yes. The ADA generally prohibits employers from requiring medical examinations or making disability-related inquiries unless 1) the exam or inquiry is job-related and consistent with business necessity, or 2) the employee's condition could pose a direct threat to the health or safety of the individual or others. However, the EEOC clearly states that because the CDC and state/local health authorities have acknowledged community spread of COVID-19 and issued precautions, employers may measure employees' body temperature without violating the ADA. Temperature checks should be conducted on a non-discriminatory basis (i.e., do not make decisions on who to check based on age or health condition). Also, keep in mind that an employee infected with COVID-19 may not display physical symptoms such as a fever, so temperature checks may not be that useful.

While an employer is allowed to maintain a log of temperature check results, the employer needs to maintain the confidentiality of this information. Any and all medical information should be stored separately from an employee's personnel file and access should be limited.

See What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws

Q **If an employer requires and performs a daily temperature check, should employees be required to sign a HIPAA Privacy Authorization Form?**

A A HIPAA Privacy Authorization Form will not generally be required. An employer, acting in its capacity *as an employer*, is not a covered entity subject to HIPAA. Accordingly, temperature readings or other results from medical tests performed *directly by the employer* are not considered Protected Health Information (PHI) and a HIPAA Privacy Authorization would not be required. However, employers must still take steps to treat any information obtained from the testing as confidential and to retain the results it in a separate medical file, as required by the ADA. In contrast, if the temperature reading or other health screening is conducted by a *health care provider* (i.e., external nurses coming onsite to conduct testing) – or if the results are otherwise run through the employer's *health plan* – the information will most likely be considered PHI, and all appropriate privacy and security measures should be followed, including securing the employee's authorization to share the results directly with the employer.

Q **Can employers perform temperature checks on customers or other visitors to the office?**

A Yes. Like any other testing, any inquiry should be narrowly tailored to reduce the threat of COVID-19 infection, and employers should ensure that medical information received from customers or any other visitors is stored in accordance with any applicable state or federal laws.

Q **Can employers require molecular testing for the active COVID-19 virus before permitting employees to return to work or enter the workplace?**

A Yes. The EEOC has clarified that because individuals with the virus pose a direct threat to the health of others, an employer may choose to administer a COVID-19 molecular or viral test to employees before initially permitting them to enter the workplace and/or periodically to determine if they have the active virus.

Note that there are currently two types of testing for COVID-19: molecular testing for an active infection (also known as viral testing) and serological testing for a previous infection (also known as antibody testing). The EEOC has confirmed that molecular or viral testing *is* permitted; however, serological or antibody testing is *not* currently permitted (see below FAQ).

The ADA generally prohibits employers from requiring medical examinations or making disability-related inquiries unless 1) the exam or inquiry is job-related and consistent with business necessity, or 2) the employee's condition could pose a direct threat to the health or safety of the individual or others. Applying this standard to the COVID-19 pandemic, an employer may choose to administer molecular or viral testing before employees enter the workplace because an individual with the virus may pose a direct threat to others at the workplace. Tests should be conducted on a non-discriminatory basis (i.e., do not make decisions on who to test based on age or health condition).

In its guidance issued on September 8, the EEOC further clarified that any testing administered by an employer that is consistent with current CDC guidance will meet the ADA's "business necessity" standard. Because the CDC periodically revises its guidance based on new information, employers are advised to check the agency website regularly for guidance. Employers should also continue to ensure that the tests are accurate and reliable (based on guidance by the U.S. Food and Drug Administration, the CDC or other public health authorities).

While testing is allowed, employers should understand that there may be issues with false-positives or false-negatives associated with a particular test. Without a clear understanding of the virus and limitations of testing, employees could have a false sense of security that they or their co-workers do not pose a risk for infection. As noted by the EEOC, an employee may test negative for an active infection on one day but have a positive result on the next, still posing a risk in the workplace. Thus, testing could theoretically be required on all employees every day, making testing not only labor intensive but also costly.

See What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws

Q **Can employers require serological antibody testing for COVID-19 before permitting employees to return to work or enter the workplace?**

A No, not at this time. As of June 17, the EEOC has taken the position that serological or antibody testing should not be required before employees are permitted to enter the workplace.

Note that there are currently two types of testing for COVID-19: molecular testing for an active infection (also known as viral testing), and serological testing, also known as antibody testing, to test for a previous infection. While the EEOC has confirmed that molecular or viral testing *is* permitted (see above FAQ), serological or antibody testing is *not* currently permitted.

The CDC has issued Interim Guidelines for COVID-19 Antibody Testing. This guidance states that antibody test results should not be used to make decisions about returning persons to the workplace. In light of this CDC guidance, the EEOC confirmed that an employer should not require antibody testing before permitting employees to re-enter the workplace.

An antibody test constitutes a medical examination under the ADA, and the ADA generally prohibits employers from requiring medical examinations or making disability-related inquiries unless 1) the exam or inquiry is job-related and consistent with business necessity, or 2) the employee's condition could pose a direct threat to the health or safety of the individual or others. Applying this standard to the COVID-19 pandemic, the EEOC's position is that an antibody test does not meet the ADA's "job related and consistent with business necessity" standard for medical examinations or inquiries for current employees at this time.

The EEOC will continue to closely monitor CDC's recommendations and could update this position in response to changes in CDC's recommendations. See What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws

Q **FFCRA and the CARES Act require carriers to pay for the costs of COVID-19 testing. Will an employer's health plan cover the cost of employer-mandated testing of employees before permitting them to return to work?**

A While COVID-19 tests prescribed by a health care provider are covered by health insurance plans, unfortunately, the tests are not covered at the discretion of an employer deciding to implement testing as part of a return to work plan.

On June 23, several regulatory agencies clarified that FFCRA requires coverage of items and services only for diagnostic purposes. Clinical decisions made by the individual's attending health care provider may include testing of individuals with symptoms typical of COVID-19, as well as asymptomatic individuals with known or suspected recent exposure. An "attending health care provider" for these purposes of making these clinical decision is an individual who is licensed (or otherwise authorized) under applicable law, who is acting within the scope of that license, and who is responsible for providing care to the patient. Testing conducted to screen for general workplace health and safety (such as employee "return to work" programs) is beyond this scope of FFCRA and the CARES Act.

Employers cannot use plan surplus funds to cover the cost of the purchased tests or the cost of administering those tests. Plan sponsors have a fiduciary duty to use plan assets for the *exclusive benefit* of its *participants*. While some employees tested would be participants in the employer's health plan, it is highly likely that others would not.

See FAQs About Families First Coronavirus Response Act and Coronavirus Aid, Relief, and Economic Security Act Implementation Part 43

Q **Does an employer have to compensate non-exempt employees for time spent in temperature checks or other testing, or while waiting to test?**

A The EEOC does not address the question of compensation for time spent waiting for, or taking tests like temperature checks. Employers must instead look to guidance from the Fair Labor Standards Act (FLSA) and state wage and hour regulations, as these activities are analogous to time spent by employees undergoing security checks or putting on protective gear. The conservative approach is to consider temperature checks to be a "principal activity" of the employee's workday and thus subject to compensable pay. We would certainly welcome more federal regulatory guidance on this subject.

Q **What can an employer do if an employee refuses to self-certify, undergo testing or have a temperature screening?**

A The ADA allows an employer to bar an employee from physically entering in the workplace if he or she refuses to answer self-certifying questions about whether he or she has COVID-19, is experiencing symptoms or has been tested for COVID-19, as well as to bar this employee's presence if he or she refuses to undergo a temperature screening.

The EEOC advises an employer to try to gain the cooperation of employees and ask for the reasons for the employee's refusal. The employer may be able to provide information or reassurance that they are taking these steps solely to ensure the safety of everyone in the workplace. The employer can also educate the employees on the measures the company is taking to keep any personal medical information confidential.

The EEOC clarified that an employee may request an alternative method of screening due to a medical condition as a reasonable accommodation under the ADA. The employer should proceed with evaluating the request as it would any other request for an accommodation under the ADA. If the requested change is easy to provide and inexpensive, the EEOC suggests making the change available to anyone who asks, without requiring the interactive process. If the employee requests as alternative method of screening as a religious accommodation, the employer should determine if an accommodation is available under Title VII.

Return to Work: Confidentiality of Medical Information

Q **Can COVID-19 information related to employee certifications, temperature checks or testing be stored in existing medical files or must employers create a new medical file system solely for COVID-related information?**

A While the ADA requires that all medical information about an employee be stored separately from an employee's personnel file in order to limit access to this confidential information, an employer is permitted to store all COVID-related information in existing medical files. Such information includes employee certifications relating to having the virus, being testing for the virus or having symptoms related to the virus as well as employer's notes or other documentation relating to temperature checks, questionnaires or testing.

Q **If an employee becomes aware that a coworker has symptoms related to COVID-19, does ADA confidentiality prevent the employee from disclosing this information to a supervisor?**

A No. It is not an ADA confidentiality violation for the employee to inform a supervisor about the coworker's symptoms.

Q **If a manager becomes aware that an employee has COVID-19 or symptoms related to the virus, does ADA confidentiality prevent the supervisor from reporting this information?**

A No. While information regarding an employee's symptoms of or diagnosis of COVID-19 is clearly medical information and the ADA requires an employer to keep all medical information confidential, a manager can report such information to appropriate employer officials so they can take actions consistent with guidance from the CDC and other public health authorities. The key question is how much information to report – whether an unnamed employee has symptoms of or has been diagnosed with COVID-19 or the specific identity of that employee.

The EEOC has cautioned that employers should make every effort to limit the number of people to whom the name of the specific employee is disclosed and that this decision will vary in each workplace depending on why the official needs this information. In some situations, an official will need the specific name in order to interview the employee for contact tracing and to secure a list of people with whom the employee possibly had contact throughout the workplace, so the employer can then take action to notify those individuals (without revealing the individual's identity). In other situations, it is enough to share that "someone at this location" or "someone on the fourth floor" has the virus, which does not implicate the ADA's prohibition of disclosure of confidential information. Employers should plan in advance what managers should do in this situation and determine which officials should be notified and the role they will play. All employer officials designated as needed to know the identity of an employee should be trained on maintaining the confidentiality of the information.

See What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws

Return to Work: Face Mask/Glove Considerations

Q **Can an employer require that employees wear face masks and/or wear gloves while at work? If we require this, does the company have to pay for the masks/gloves?**

A The EEOC clarified that an employer may require employees to wear facemasks or gloves and observe infection control practices (such as social distancing protocols). The employer may have an obligation under state or local laws to provide and/or pay for equipment like face coverings. At the time of this FAQ publication, several states are requiring employers to provide employees in public-facing positions with face coverings at the employer's expense. These states' orders are changing daily, and local ordinances also vary tremendously across the country.

See What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws

Q **What if an employee refuses to wear required face masks or gloves as mandated by the company?**

A If an employee refuses to wear a required face mask/gloves, the employer can begin disciplinary procedures as they would with any other infraction for failure to follow safety directives.

However, an employer must recognize that a reasonable accommodation must be made if the reason for the refusal is based on a protected disability under the ADA (ex. the employee has a latex allergy) or other protected reason (ex. a religious accommodation may need to be made if wearing the face mask or gloves would interfere with religious garb). If the accommodation does not create an undue hardship, then the modification or alternative should be allowed. Telework may also be a reasonable accommodation (if a viable option).

Return to Work: General

Q **Does the EEOC have any practical tools available to employers to reduce and address workplace harassment that may arise as a result of the COVID-19 pandemic?**

The EEOC recognizes that employers are having to deal with harassment issues that may be more prevalent when employees return to work post-COVID-19 pandemic. Employers can help reduce the chance of harassment by explicitly communicating to the workforce that fear of the COVID-19 pandemic should not be misdirected against individuals because of a protected characteristic, including their national origin, race, or other prohibited bases.

The EEOC has created several practical anti-harassment tools for small businesses:

- Anti-harassment policy tips for small businesses
- Select Task Force on the Study of Harassment in the Workplace (includes detailed recommendations and tools to aid in designing effective anti-harassment policies; developing training curricula; implementing complaint, reporting, and investigation procedures; and creating an organizational culture in which harassment is not tolerated):
    - report;
    - checklists for employers who want to reduce and address harassment in the workplace; and
    - chart of risk factors that lead to harassment and appropriate responses.

See What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws

Return to Work: Selecting Employees for Return

Q **How should an employer choose which employees to return to work first? Can risk factors, such as age or underlying medical conditions, be taken into account to help protect these employees from contracting the virus?**

A Unless an employment relationship is subject to a collective bargaining agreement or other employment agreement, an employer is generally free to schedule its employees as it chooses to meet the company's business needs, provided employment decisions are made on a non-discriminatory basis. Of course, any time an employer has to make decisions involving who will be rehired and when, it can potentially create legal challenges. To minimize risk and to the extent possible, employers will want to use objective, measurable criteria, such as seniority or documented performance metrics, when making these rehiring decisions. Conducting a disparate impact analysis through legal counsel may also be advisable.

The EEOC has reminded employers that they cannot discriminate against any protected class, including age, disability, national origin or pregnancy, when making employment decisions. Anti-discrimination statutes including Title VII, the Age Discrimination in Employment Act, the Americans with Disabilities Act and the Pregnancy Discrimination Act still apply. Even though employers may have the best interest of the employee in mind, taking into account known protected characteristics, such as age or an underlying medical condition, when making recall decisions may pose a significant risk under these statutes.

Q **If an employee has a medical condition identified by the CDC as placing the individual at a "higher risk for severe illness" and the employer is concerned that the employee's health may be jeopardized upon a return to the workplace, what can the employer do?**

A As noted in the prior question, the ADA generally prohibits an employer from taking into account an employee's disability or medical condition when making employment-related decisions. However, if an employee has been offered an opportunity to return to the workplace but indicates that an accommodation may be needed due to certain risk factors, employer now have an opportunity – and obligation under the ADA - to follow-up with the employee and engage in the interactive process to determine if a reasonable accommodation is available.

Given the current circumstances, the EEOC encourages both employers and employees to be as flexible and creative as possible. Accommodations may include options such as additional or enhanced masks, gloves or other protective equipment beyond what the employer may generally provide to employees or additional or enhanced protective measures, such as physical barriers to provide separation between an employee with a disability and coworkers or the public. Other possible accommodations include allowing the employee to reduce exposure by modifying the employee's hours of work, moving the location of where the employee performs work (i.e., moving the employee to the end of a production line rather than in the middle if it provides more social distancing), beginning/continuing to work remotely or deferring the offer to return to work. It is important that employers and employees engage in an interactive process to identify effective accommodations based on the employee's specific limitations, job duties and design of the workspace.

On the other hand, if the employee does not request an accommodation, the ADA does not require that the employer take any action. In fact, the ADA does not allow the employer to exclude the employee – or take any other adverse action – *solely* because the employee has an underlying medical condition that the CDC identifies as potentially placing the individual at "higher risk for severe illness." As noted by the EEOC, such action is not allowed unless the employee's disability poses a "direct threat" to the employee's health that cannot be eliminated or reduced by reasonable accommodation. The direct threat requirement under the ADA is a high standard and requires an employer to show that the employee has a disability that poses "a significant risk of substantial harm" to his own health under 29 C.F.R. section 1630.2(r). This assessment cannot be based solely on the condition being on the CDC's list; rather, it must be an individualized assessment based on a reasonable medical judgment about this employee's particular disability, using the most current medical knowledge and/or the best available objective evidence. Because the ADA regulations require an employer to consider the duration of the risk, the nature and severity of the potential harm, the likelihood that potential harm will occur and the imminence of potential harm, this analysis may vary based on the severity of the pandemic in a particular area, the employee's own health and specific job duties. If an employer has concerns that an employee may pose a direct threat if returned to the workplace, it is strongly recommended that an employer conduct this analysis as well as the interactive process to identify potential reasonable accommodations with the assistance of employment counsel.

See What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws

Q **Should employers provide special considerations to pregnant employees when determining who should return to work following the COVID-19 pandemic?**

A Sex discrimination under Title VII of the Civil Rights Act includes discrimination based on pregnancy. Women affected by pregnancy, childbirth, and related medical conditions should be treated the same as others who are similar in their ability or inability to work. This means that a pregnant employee may be entitled to job modifications, including telework, changes to work schedules or assignments, and leave to the extent provided for other employees who are similar in their ability or inability to work. If an employee makes a request for reasonable accommodation due to a pregnancy-related medical condition, the employer must consider it under the usual ADA rules.

Even if the employer is motivated by benevolent concern, an employer is not permitted to single out workers on the basis of pregnancy for adverse employment actions, including involuntary leave, layoff, or furlough.

See What You Should Know About COVID-19 and the ADA, Rehabilitation Act and Other EEO Laws, Section J

Q **Are employers required to restore employees returning to work after a furlough to their original positions?**

A Unless an employee was on job-protected leave, an employer is not required to return the employee to his or her original position or to an equivalent one, or even bring the employee back at all. As an employee relations matter, employees who were furloughed or laid off and are brought back in a different position than prior to the break in service may consider the move to be a demotion and, as such, may be less inclined to accept the offer or may be less engaged in the new role than they were in their previous job. Be sure to communicate to employees the reasons for any changes or restructuring of job positions. If employees understand the reasons for the changes, they may be less likely to claim discrimination or have other adverse reactions.

Q **When returning employees to work, can we ask for volunteers?**

A Yes. Employers ready to recall employees or to bring employees back into a physical location may solicit volunteers. Some employees may have personal reasons that they prefer not to return to work or to cease telework, such as underlying risk factors or lack of child care. In the event an employer has too many – or not enough – volunteers, it will still be important to have a plan for returning employees to work. As noted in the prior FAQ, it is critical that all employment decisions be made on a nondiscriminatory basis.

Q **What if an employee is scared of being exposed to COVID-19 and does not want – or refuses – to return to work?**

A Generally, employees do not have a right to refuse to work based only on a generalized fear of becoming ill if their fear is not based on objective evidence of possible exposure. However, with the continued threat of COVID-19 along with the extension of public health measures to control the spread of the virus by many states and localities (such as 'stay-at-home' or 'shelter-in-place' orders), it may be difficult to show that employees have no reason to fear coming in to work. Caution should be used in disciplining or terminating an employee who refuses to work in a location that has shelter-in-place rules in effect; however, this does not mean that an employer must continue to pay an employee who refuses to come in to work (assuming telework is not an option). An employer may require an employee who refuses to return to work to use any available PTO or, alternatively, could choose to deny a request to use PTO in this circumstance (keeping in mind the employee may qualify for state- or local-mandated sick leave or leave under the FFCRA if they otherwise meet one of the qualifying criteria).

If an employee is in a high risk category (immunocompromised or has an underlying condition) and indicates that he or she is unable to report to a worksite because of this condition, the employer should go through the interactive process to evaluate the request under the Americans with Disabilities Act (ADA), considering whether leave could be granted as a reasonable accommodation without an undue hardship or whether other options may permit the employee to perform the essential functions of his/her job (i.e., telework).

Under OSHA, an employee's refusal to perform a task may be protected if there are safety concerns. Employees who won't work because of safety concerns may be considered to be engaging in protected concerted activity under the National Labor Relations Act (NLRA) if they have a "good faith" belief that their health and safety are at risk.

It is also important to note that if a GROUP of employees refuse to return to work due to fears of COVID-19 then this could be considered protected concerted activity under the NLRA. In this case, the employer should not discipline workers but may, alternatively, have a right to find replacement workers.

Rather than disciplining employees who express fear at this time, it may be a better practice to consider methods to encourage employees to come to work. Consider emphasizing safety precautions in place (i.e., personal protective equipment (PPE), social distancing rules, reduced customer capacity, staggered shifts, or more extreme measures if warranted) and emphasizing that the company is operating in accordance with state and local safety and health guidelines.

Q **An employee is scared to return to work because of a family or household member who is at higher risk of severe illness from COVID-19 due to an underlying medical condition. Is an employer required under the ADA to permit this employee to continue to telework?**

A The ADA does not require that an employer accommodate an employee without a disability based on the disability-related needs of a family member or other person with whom s/he is associated. The EEOC clarified that an employee without a disability is not entitled under the ADA to telework as an accommodation in order to protect a family member with a disability from potential COVID-19 exposure.

The EEOC reminds employers that they are free to provide such flexibilities if they choose to do so. An employer choosing to offer additional flexibilities beyond what the law requires should be careful not to engage in disparate treatment on a protected EEO basis.

Q **Some employees do not want to return to work because they are receiving more pay through unemployment benefits. Is there anything an employer can do?**

A Unfortunately, with the increase in CARES Act funding to unemployment compensation, some employees are receiving more in unemployment benefits than they earned working. To combat this unintended consequence, it is a best practice to have clear documentation of any offers of or recalls to employment, including a written offer/recall letter specifying a firm return date. If an employee indicates that he or she will be unable to return on that date, it will be important to document this conversation along with the reason the employee is unable to return. In many cases, an employee's refusal to return to work will disqualify the employee from further unemployment benefits, and the state unemployment division may require such documentation to determine the employee's continued eligibility. If an employee conceals or misrepresents any information that can affect eligibility for benefits, it could be considered fraud. Under the CARES Act, an employee found to have committed fraud may be required to pay back what benefits were received, could lose further benefits, or could even face potential prosecution. So, it will be important that any offers to return to work are communicated appropriately.

Return to Work: Employee Benefits

Q **If coverage was terminated during the layoff or furlough, will an employee be immediately eligible for health insurance benefits when he or she returns to work, or must the employee complete a new waiting period?**

A It depends. When it comes to health insurance benefits, the Affordable Care Act (ACA) mandates that an individual hired after a break in service (period in which there are no hours of service credited) **of less than 13 weeks must be treated as a continuing employee** and must be returned in the same position as he or she left with no new waiting period, as determined by the employer's chosen measurement method:

- *Monthly Measurement Method* - Because eligibility for coverage is actually based on a month-to-month analysis, employees returning on a full-time basis are essentially re-gaining eligibility for any month in which they will have 130 or more hours of service and will have new election rights.
- *Look-back Measurement Method* – Following a return to work, employees step back into the same measurement and/or stability period(s) they were in when initially separated from employment. If an employee initially declined coverage for this stability period, an employer could rely on that declination and not offer coverage upon rehire. If the employee had initially elected coverage, the employer must reinstate coverage as soon as possible, but no later than first of the month following rehire.

In contrast, an individual rehired after a break in service of **at least 13 weeks may be treated as a new hire**, and the employer may apply a new waiting period and/or initial measurement period, as applicable.

An employer *can* allow the returning employees to make new elections, but that is not required. With the look-back measurement method, upon returning to the company, the employee would step back into the measurement or stability period that he or she was in when the employee initially separated from employment. If he or she initially declined coverage for this stability period, the employer could rely on that declination and not offer coverage upon rehire. If the employee had initially elected coverage, the employer should offer the same coverage – but can allow the employee to make a change at that time.

When it comes to benefits other than health insurance, it will be important to review the rehire and eligibility provisions in the related plan documents to confirm if benefits can be offered immediately or whether the employee must satisfy a new waiting period.

Q **If an employer decreased (or increased) employees' share of premium contributions during a shutdown or furlough, can the rates be adjusted again when employees return to work?**

A Possibly. Generally, employers have the discretion to make changes to their benefits plans, including to employer and employee contributions, provided they have not otherwise given up that right in other communications to employees. So, an employer can most likely revert back to

the original rates and contribution design – or even make new changes to contributions; however, several considerations should be taken into account prior to any modification.

If changes are made to health plan contributions, it is important to ensure that an employee's share of the cost for individual coverage on the lowest-cost minimum value plan is still considered "affordable" under the Affordable Care Act (ACA).

From a Section 125 perspective, if the cost increase or decrease is "significant" and both the Section 125 plan and underlying plan documents are written in a way to so provide, employees may have the right to make a new mid-year election or other corresponding change in their election. Unfortunately, the regulations do not provide a clear definition of "significant," so an employer would need to evaluate based on all of the facts and circumstances and on their employee population and past plan experience.

Additionally, if a contribution change is made, a Summary of Material Modifications (SMM) should be issued to participants explaining the change. Also, if premiums are included in the Summary of Benefits and Coverage (SBC), a 60-day advance notification may be required under the ACA.

Return to Work: FFCRA

Q **Once I reopen my business' doors or return furloughed employees to work, do I still have to comply with the emergency paid sick leave and expanded family and medical leave requirements under FFCRA? (Updated January 4, 2021)**

A FFCRA was effective on April 1, 2020 and sunset on December 31, 2020. Congress declined to extend the paid leave elements of FFCRA in the recently passed Consolidated Appropriations Act (CAA); however, the CAA allows a covered employer an extension of time to submit tax credits should they *voluntarily* choose to allow eligible employees to take paid sick leave for COVID-19 related reasons or paid family medical leave for child care due to COVID-19 school or daycare closures. Employer tax credits are now available for FFCRA leave taken through March 31, 2021. Note: the CAA did not provide for additional allowed leave time. The time allowed under the EPSLA is still only 80 hours of paid emergency sick leave, with 12 weeks allowed under the EFMLEA (of which 2 weeks is unpaid and up to 10 weeks is eligible for paid family and medical emergency leave). See below Q&A on FFCRA.

Q **Will employees be eligible for paid sick leave or expanded family medical leave when I reopen my business or when they are returned from furlough/layoff?**

Possibly. Although employees are not eligible for paid sick leave under the EPSLA or the EFMLEA while a worksite is closed or while the employee is on furlough, employees may be eligible for paid sick leave upon their return to work, provided time off is requested for a qualifying reason and provided available leave has not otherwise been exhausted.

Under the EPLSA, there is no minimum service requirement; so returned employees who request leave for a qualifying reason may be immediately entitled to up to 80 hours of paid sick

leave (prorated for part-time employees), again provided that available leave has not previously been exhausted (see below Q&A on the EPSLA for details on available benefits). There also continues to be an available exception for employees who are health care providers or emergency responders as noted in a below FAQ.

To be eligible for benefits under the EFMLEA, employees must have been employed for at least 30 calendar days. An employee is considered to have met this requirement as long as the employee was on the employer's payroll for the 30 days immediately preceding the date on which the employee's leave is scheduled to begin. The regulations also include a special consideration for employees who were laid off or otherwise terminated by the employer on or after March 1, 2020 and who are subsequently rehired on or before December 31, 2020 … these employees are considered eligible provided they had been on the employer's payroll for 30 or more of the 60 calendar days prior to the date the employee was laid off or terminated. For example, an employee was originally hired on January 15, 2020, but laid off on March 14, 2020, would be eligible for leave under the EFMLEA if the same employer rehired the employee on October 1, 2020. Eligible employees may be entitled to expanded family and medical leave under the Act (see below Q&A on the EFMLEA for details on available benefits).

WORKPLACE SAFETY

Q **Can we ask our health insurance carrier to give us the names of all employees who have tested positive for COVID-19?**

A No. Individually identifiable medical information, such as COVID-19 viral test results, are considered Protected Health Information (PHI) under HIPAA when maintained by a health insurance carrier. Accordingly, this information – or any other medical diagnosis – should not be shared directly with an employer without the employee's specific authorization.

Similarly, self-funded health plan sponsors must also be cognizant of HIPAA's privacy protections. While a company employee may have access to medical plan information and diagnoses, such as a positive COVID-19 test, based on his or her role as a *plan sponsor* and related responsibilities, the employee must be careful not to share that information with other employees who do not have a permitted need to know without the employee's specific authorization. The employee must also be careful not to use that information when performing in his or her *employer* role (such as when performing HR-related responsibilities).

Q **Can an employer take an employee's temperature as a condition to work?**

A The ADA generally prohibits employers from requiring medical examinations or making disability-related inquiries unless 1) the exam or inquiring is job-related and consistent with business necessity, or 2) the employee's condition could pose a direct threat to the health or safety of the individual or others. The EEOC now clearly states that because the CDC and state/local health authorities have acknowledged community spread of COVID-19 and issued precautions, employers may measure employees' body temperatures without violating the ADA.

Whether or not a medical exam or temperature check is job-related is very fact-specific and will depend on the employer and the particular set of employment circumstances. The EEOC is clear on its position that during a pandemic employers should rely on the latest information from the CDC and other public health authorities to determine whether the pandemic rises to the level of a "direct threat." It recently updated its guidance "Pandemic Preparedness in the Workplace and the American with Disabilities Act" on March 19, 2020 to state that "[b]ased on guidance of the CDC and public health authorities as of March 2020, the COVID-19 pandemic meets the direct threat standard. At such time as the CDC and state/local public health authorities revise their assessment of the spread and severity of COVID-19, that could affect whether a direct threat still exists."

Keep in mind that an employee infected with COVID-19 may not display physical symptoms such as a fever, so temperature checks may not be that useful.

See What You Should Know about COVID-19 and the ADA, the Rehabilitation Act and other EEO Laws

Q **Can an employer ask its employees about recent travel or possible exposure to COVID-19? Can we ask an employee to stay home if we think they've been exposed?**

A Yes. Employers are permitted to ask about any recent travel and exposure to COVID-19 or contact with others who have recently traveled to at-risk countries or been exposed to the virus. See CDC: Public Health Recommendations after Travel-Associated COVID-19 Exposure for more detailed information.

If an employer has a reasonable belief that the employee is a health threat to others, it can ask the employee to stay home and self-quarantine for the 14-day incubation period. See CDC: Public Health Recommendations for Community-Related Exposure for more detailed information.

Employees may be eligible for some paid and/or job-protected leave depending on federal and state legislation and company policies.

Source: EEOC – Pandemic Preparedness in the Workplace and the ADA

Q **During a pandemic, how much information may we request from employees who call in sick? Can we send employees home if they display COVID-19 symptoms during a pandemic?**

A ADA-covered employers may ask employees if they are experiencing COVID-19-like symptoms such as, fever, chills, cough, shortness of breath or sore throat. All information must be maintained as a confidential medical record.

If an employee becomes ill with symptoms of COVID-19, the CDC states that the employee should leave the workplace. The ADA does not interfere with employers following this advice. An employer can send home an employee with COVID-19 or symptoms associated with it.

Source: EEOC – Pandemic Preparedness in the Workplace and the ADA

Q **May an ADA-covered employer require employees who have been away from the workplace during a pandemic to provide a doctor's note certifying fitness to return to work?**

A Yes. Such inquiries are permitted under the ADA. As a practical matter, however, doctors and other health care professionals may be too busy during and immediately after a pandemic outbreak to provide fitness for duty documentation. Therefore, new approaches may be necessary, such as reliance on local clinics to provide a form, a stamp or an email to certify that the individual does not have the pandemic virus.

See What You Should Know about COVID-19 and the ADA, the Rehabilitation Act and other EEO Laws

Q **May I share with other employees if an employee has been exposed to or tested positive for COVID-19?**

A Maintain privacy of all disability-related inquiries or medical examinations. Information must be collected on separate forms, stored in separate medical files and treated as a confidential medical record.

In the event of potential exposure and without releasing individual information, simply let employees know that an employee with whom they might have had recent contact was exposed to or tested positive for the virus.

Q **What should we do if an employee tests positive for COVID-19?**

A An employer should ask the employee for the names of all other employees that he or she came in close proximity to in the workplace within the past 14 days. While the employer should inform these employees that they may have been exposed to COVID-19, employers should not provide identifying information about the infected employee and should maintain confidentiality. The other employees should be sent home to self-monitor for symptoms (i.e., fever, cough or shortness of breath). See CDC - What to do if you are sick for duration of time of self-quarantine.

The CDC has provided a list of recommendations on cleaning and disinfecting business (non-healthcare) that have suspected or confirmed COVID-19 exposures. A redacted list of steps is provided below. See CDC - Cleaning and Disinfecting for Community Facilities for more detailed instructions.

- The employer should close off the areas visited by the infected person, open up doors and windows for ventilation and allow for 24 hours (or as much time as practical) before cleaning. Cleaning staff should wear appropriate personal protective equipment (PPE) and clean and disinfect all areas used by the employee, focusing especially on frequently touched surfaces such as offices, bathrooms, common areas and shared electronic equipment.
- To clean and disinfect:

- If surfaces are dirty, they should be cleaned using a detergent or soap and water prior to disinfection. Note: "cleaning" will remove some germs, but "disinfection" is also necessary.
- The CDC states that most common EPA-registered household disinfectants should be effective, but also provides a list of approved products, as well as instructions for mixing household bleach solutions.
- Carpeted floors, rugs, drapes should be laundered if possible; electronics should be cleaned per manufacturer's instructions (CDC recommends wiping these devices down with alcohol based spray if no manufacturer guidance is available); and linens and clothing should be laundered using the warmest appropriate water setting.
- Cleaning staff should wear disposable gloves and gowns for all tasks in the cleaning process, including handling trash. Staff should clean their hands immediately after removing gloves and often throughout the cleaning process.

Employers should develop policies for worker protection and provide training to all cleaning staff on site prior to providing cleaning tasks, including the proper use and disposal of PPE. In addition, employers should educate staff performing cleaning, laundry and trash pick to monitor themselves for symptoms of COVID-19 and provide instructions on what to do if they develop symptoms. Employers must be cautious to comply with all appropriate OSHA standards.

Q **Can an employer reach out to employees with chronic conditions that would make them more susceptible to COVID-19 complications?**

A A better approach would be to send informative and appropriate communications to all employees. A recently released HHS bulletin reinforces the Health Insurance Portability and Accountability Act's (HIPAA's) privacy and security rules still continue to apply in an emergency situation such as a pandemic.

Covered entities may only use Protected Health Information (PHI) consistent with HIPAA's privacy rules. Written authorizations are required if PHI is disclosed for reasons other than treatment, payment or health care operations. It is important to determine how the employer learned of the information – from the group health plan or from the employee – to know whether HIPAA applies.

Best practices include:

- Sending general information to *all employees*, identifying conditions more susceptible to the virus and providing additional tips and resources;
- Treating all medical information as confidential and disclosing the minimum amount of PHI necessary;
- Avoiding use of medical information to make adverse employment decisions

Source: HIPAA Privacy and the Novel Coronavirus

Q **Is an employer liable for injury of a worker when an employee is working remotely?**

A Each evaluation will be state-specific based on the governing statutes and case law to determine whether an injury is compensable when an employee is working remotely. Generally, an injury will be compensable if it arises "out of and in the course and scope of the employment"; however, the employee typically has the burden of proving that the injury is "work related." The timing, location and circumstances of how and when an injury occurs may dictate whether that injury is deemed to be compensable. For example, an employee who is injured in a home office while performing his or her work duties may be compensated to the same extent as an employee in the workplace office. We strongly urge all policyholders to review applicable state laws and consult with their workers' compensation carrier to find out more information regarding potential compensability of injuries sustained by an employee working remotely and ways to mitigate that risk.

HEALTH BENEFITS AND COVID-19

Extensions of Deadlines

Q **We have a calendar year plan. Our plan is subject to ERISA and has more than 100 participants. Has the deadline to file our Form 5500 been extended?**

A At this time, the DOL has not extended the due date for 2019 Form 5500 filings for calendar year plans. The 2019 Form 5500 filing deadline for a calendar year plan falls on July 31, 2020. It's likely that the DOL declined to extend this deadline because plans have the option to request an extension until October 15th by filing IRS Form 5558 with the IRS prior to the July 31st deadline. The DOL did extend the due date for Form 5500 filings for plan years that ended in September, October or November 2019, as well as Form 5500 deadlines falling between April 1 and July 15, 2020 (as a result of a previously filed extension request). These filings are now due on July 15, 2020 and the extension is automatic.

Q **If we have an HRA or a Health FSA, are there any extensions of the deadlines for participants to file their claims for reimbursement? (Updated January 4, 2021)**

A Yes. Disaster Relief Notice 2020-01 provides a mandatory extension of time for participants to file claims for reimbursement. The Notice provides that plans must ignore the "Outbreak Period" when applying any time limits for filing claims. The "Outbreak Period" started on March 1, 2020. The end of the "Outbreak Period" will end 60 days after the announced end of the COVID-19 National Emergency. Since the end of the COVID-19 National Emergency is presently unknown, the end of the "Outbreak Period" is likewise unknown. By law, the extension of this deadline cannot extend beyond February 28, 2021. This is a mandatory claims submission extension only. The relief provided by Notice 2020-01 does not extend the time a participant can incur services.

Example: A Health FSA has a calendar year plan year. The plan provides participants 90 days following the close of the plan year to file claims. For 2019, participants normally would have until March 30, 2020 to submit claims. Because this deadline falls during the Outbreak Period, the Outbreak Period acts like a pause button (plans must ignore the Outbreak Period); so, participants will have an extended time in which to file claims. To calculate the date by which claims must be filed, first consider that participants had 60 days from January 1 – February 29 to submit claims. The plan then ignores the period from March 1 until the end of the Outbreak Period. Assuming the Outbreak Period ends February 28, 2021 (the maximum end date of the Outbreak Period by law), participants will have 30 days from February 28, 2021 (or until March 30, 2021) to submit claims from the 2019 Health FSA [60 days from January 1 – February 29, 2020 plus 30 days from February 28 – March 30, 2021 = 90 days].

Q **Has the DOL extended the deadlines for a qualifying beneficiary to elect COBRA?**

A Yes. Generally, COBRA rules provide a qualified beneficiary a period of at least 60 days to elect COBRA continuation coverage under a group health plan. On April 29, 2020, the DOL released its final rule extending certain deadlines, including the deadlines to elect COBRA. The DOL stated that all group health plans must disregard the period from March 1, 2020 until sixty (60) days after the announced end of the National Emergency or other date announced by the agencies (the "Outbreak Period") for all plan participants, beneficiaries, qualified beneficiaries, or claimants in determining the deadline for a qualifying beneficiary to elect COBRA.

DOL Example (reprinted from Final Rule): *The Example assumes that the National Emergency ends on April 30, 2020, with the Outbreak Period ending on June 29, 2020 (the 60th day after the end of the National Emergency).* Individual A works for Employer X and participates in X's group health plan. Due to the National Emergency, Individual A experiences a qualifying event for COBRA purposes as a result of a reduction of hours below the hours necessary to meet the group health plan's eligibility requirements and has no other coverage. Individual A is provided a COBRA election notice on April 1, 2020. What is the deadline for A to elect COBRA?

Conclusion. Individual A is eligible to elect COBRA coverage under Employer X's plan. The Outbreak Period is disregarded for purposes of determining Individual A's COBRA election period. The last day of Individual A's COBRA election period is 60 days after June 29, 2020, which is August 28, 2020.

See DOL Final Rule Extension of Certain Timeframes for Employee Benefit Plans, Participants and Beneficiaries Affected by COVID-19

Q **Did the DOL extend the time an employer must allow a qualified beneficiary to make COBRA premium payments?**

A Yes. Group health plans cannot require payment of premiums before 45 days after the day of the initial COBRA election. Generally, a premium payment is considered paid timely if it is made no later than 30 days after the first day of the period for which payment is being made (and COBRA can be terminated for failure to pay premiums). On April 29, 2020, the DOL released its final rule extending certain deadlines, including the deadlines for certain COBRA premium

payments. The DOL stated that all group health plans must disregard the period from March 1, 2020 until sixty (60) days after the announced end of the National Emergency or other date announced by the agencies (the "Outbreak Period") for all plan participants, beneficiaries, qualified beneficiaries, or claimants in determining the deadlines for COBRA premium payments.

DOL Examples (reprinted from Final Rule): The Example assumes that the National Emergency ends on April 30, 2020, with the Outbreak Period ending on June 29, 2020 (the 60th day after the end of the National Emergency).

Example 1: On March 1, 2020, Individual C was receiving COBRA continuation coverage under a group health plan. More than 45 days had passed since Individual C had elected COBRA. Monthly premium payments are due by the first of the month. The plan does not permit qualified beneficiaries longer than the statutory 30-day grace period for making premium payments. Individual C made a timely February payment, but did not make the March payment or any subsequent payments during the Outbreak Period. As of July 1, Individual C has made no premium payments for March, April, May, or June. Does Individual C lose COBRA coverage, and if so for which month(s)?

Conclusion. In this example, the Outbreak Period is disregarded for purposes of determining whether monthly COBRA premium installment payments are timely. Premium payments made by 30 days after June 29, 2020, which is July 29, 2020, for March, April, May, and June 2020, are timely, and Individual C is entitled to COBRA continuation coverage for these months if she timely makes payment. Under the terms of the COBRA statute, premium payments are timely if made within 30 days from the date they are first due. In calculating the 30-day period, however, the Outbreak Period is disregarded, and payments for March, April, May, and June are all deemed to be timely if they are made within 30 days after the end of the Outbreak Period.

Accordingly, premium payments for four months (i.e., March, April, May, and June) are all due by July 29, 2020. Individual C is eligible to receive coverage under the terms of the plan during this interim period even though some or all of Individual C's premium payments may not be received until July 29, 2020. Since the due dates for Individual C's premiums would be postponed and Individual C's payment for premiums would be retroactive during the initial COBRA election period, Individual C's insurer or plan may not deny coverage, and may make retroactive payments for benefits and services received by the participant during this time.

Example 2: Same facts as above. By July 29, 2020, Individual C made a payment equal to two months' premiums. For how long does Individual C have COBRA continuation coverage?

Conclusion. Individual C is entitled to COBRA continuation coverage for March and April of 2020, the two months for which timely premium payments were made, and Individual C is not entitled to COBRA continuation coverage for any month after April 2020. Benefits and services provided by the group health plan (e.g., doctors' visits or filled prescriptions) that occurred on or before April 30, 2020 would be covered under the terms of the plan. The plan would not be obligated to cover benefits or services that occurred after April 2020.

See DOL Final Rule Extension of Certain Timeframes for Employee Benefit Plans, Participants and Beneficiaries Affected by COVID-19

Premium Refunds

Q **We just received news that our voluntary dental carrier will be giving us a refund or a discount. This benefit is fully-insured and is 100% voluntary (employee paid). Can we keep this money for ourselves or do we have to pass it along to employees?**

A We would recommend that an employer treat this refund in the same manner as MLR rebates. If the employees paid 100% of the premiums for these benefits, then we believe the refund would constitute plan assets and it would not be appropriate for an employer to keep the money. Instead, the employer would need to determine a fair way to provide those refunds back to the employees whose payment of premiums contributed to the refund.

The employer should first look to the plan document and see if it addresses how plan rebates should be handled. Often times, the plan document is silent on this issue. If that is the case, an employer should look to DOL Technical Release 2011-04 for guidance. DOL Technical Release 2011-04 states that:

> "for group health plans, a distribution such as the rebate will be a plan asset if a plan has a beneficial interest in the distribution under ordinary notions of property rights. Under ERISA section 401(b)(2), if the plan or its trust is the policyholder, the policy would be an asset of the plan, and in the absence of specific plan or policy language to the contrary, the employer would have no interest in the distribution. On the other hand, if the employer is the policyholder and the insurance policy or contract, together with other instruments governing the plan, can fairly be read to provide that some part or all of a distribution belongs to the employer, then that language will generally govern, and the employer may retain distributions."

While TR 2011-04 seems to say that an employer can craft language in the plan document to declare that all refunds belong to employer, we advise an employer to exercise caution and consult with counsel. Employee contributions are considered plan assets and it seems counterintuitive that by a declaration the plan document can change that. The DOL has focused on this issue in the past and we recommend that an employer have legal counsel weigh in if the employer wishes to keep the full refund (and the employees contribute to the premiums).

When deciding on an allocation method, the plan fiduciary may properly weigh the costs to the plan and the ultimate plan benefit as well as the competing interests of participants or classes of participants provided such method is reasonable, fair and objective. For example, if a fiduciary finds that the cost of distributing shares of a rebate to former participants approximates the amount of the proceeds, the fiduciary may properly decide to allocate the proceeds to current participants based upon a reasonable, fair and objective allocation method. Similarly, if distributing payments to any participants is not cost-effective (e.g., payments to participants are of de minimis amounts, or would give rise to tax consequences to participants or the plan), the fiduciary may utilize the rebate for other permissible plan purposes including applying the rebate toward future participant premium payments or toward benefit enhancements.

Consumer-Driver Health Plans (HDHPs/HSAs/HRAs)

Q **We decided to extend the grace period for our employees to use their Health FSA dollars in 2020 and/or 2021. Will this impact HSA eligibility? (Updated January 4, 2021)**

A Yes. The IRS acknowledged in IRS Notice 2020-29 that extending a grace period could potentially constitute disqualifying coverage for HDHP enrollees. It indicated that employees with unused amounts remaining at the end of a plan year or grace period ending in 2020, who are allowed an extended period to incur expenses under a health FSA pursuant to a plan amended in accordance with this notice, will not be eligible to contribute to an HSA during the extended period (except in the case of an HSA-compatible health FSA, including a health FSA that is amended to be HSA-compatible). For example, let's assume an employer amends its plan with a March 31, 2020 plan year end to allow participants to spend down unused general purpose health FSA amounts through December 31, 2020. In that case, an employee with an unused balance will generally not be eligible to contribute to an HSA during the 2020 calendar year (absent a plan design that makes the spend-down amount HSA compatible for all participants, such as in a limited purpose health FSA).

While we have not been provided specific guidance, we expect any grace period allowed under the CAA will also disqualify employees from HSA eligibility. It is important to remember, unlike carryover, employees cannot voluntarily waive grace period coverage on an individual basis. It is critical for employers and employees to be aware of this. An additional 12-month grace period will disqualify an employee from HSA participation during that time if the employee has not spent all health FSA funds by the end of the plan year.

Q **If an employer offers a high-deductible health plan (HDHP) with a health savings account (HSA), can the plan cover COVID-19 testing and treatment without a deductible - or with a deductible below the required minimum deductible for HDHPs - without threatening the tax-favored treatment of participants' HSAs?**

A Yes. On March 11, the IRS issued Notice 2020-15 clarifying that COVID-19 testing and treatment are considered preventive care that may be provided by a health plan without a deductible, or at reduced or no cost to participants, without disqualifying the HDHP or contributions to an HSA. Subsequently the Families First Coronavirus Recovery Act (FFCRA) mandated that services related to *testing* of COVID-19 ***must*** be covered with no cost sharing. Employers, at least those sponsoring self-insured plans, retain the discretion of whether to eliminate cost sharing for COVID-19 *treatment*; this decision will typically be made by the carrier for fully-insured plans.

Plan amendments will be required to reflect this mandated coverage of testing; in addition, a summary of material modification (SMM) should be prepared and issued to plan participants. As noted above, some plans may also be amended to cover treatment with no cost sharing. Because this change is permissive and not required, it may require 60 days advance notice under the ACA if the change affects the Summary of Benefits and Coverage (SBC); however, the DOL has indicated in FAQs jointly issued with the Treasury and HHS on April 11, 2020 that it will not

seek to enforce this advance notice requirement for plan design changes that provide greater coverage relating to the diagnosis and/or treatment of COVID-19. Instead it requires notice be provided as soon as practicable. A single notice can serve as both the SBC-related notice and the SMM and should be issued as soon as possible. Based on the information currently available, it appears that many plans/insurers are implementing immediately and issuing the SBC/SMM as soon as possible.

Source: IRS Notice 2020-15; DOL Joint FAQs on FFCRA and CARES Act

Q **Our insurance carrier has unilaterally waived all copays, deductibles and any other out-of-pocket costs for telemedicine, regardless if the claim is COVID-19-related. Does this jeopardize the qualified nature of the HDHP?**

A No. The CARES Act now permits any telemedicine consultation, whether related to COVID-19 or not, to be provided with no cost sharing without jeopardizing the qualified status of an HDHP. This provision applies to HDHP plan years beginning on or before December 31, 2021.

Many employers and carriers are considering temporarily waiving cost sharing for ***all*** telemedicine consultations in order to incent employees to seek care using telemedicine services whenever possible during the COVID-19 pandemic. Prior to the passage of the CARES Act, these programs could technically disqualify employees from HSA eligibility because no official guidance allowed telemedicine consults free of charge prior to satisfying the deductible outside of COVID-19 related services. The prior need to charge fair market value (FMV) for a telemedicine consult hindered adoption of telemedicine under the HDHP/HSA plan design. However, the CARES Act now makes telemedicine fully compatible with the HDHP and HSA design such that any telemedicine consultation may be provided with no cost sharing without endangering an individual's HSA eligibility.

This change is permissive, not required. Since this change is not mandated, technically the change could require 60 days advance notice under the ACA if the change affects the content of the Summary of Benefits and Coverage (SBC). However, the DOL has indicated in FAQs jointly issued with the Treasury and HHS on April 11, 2020 that it will not seek to enforce this advance notice requirement for plan design changes that add benefits, or reduce or eliminate cost sharing, for telehealth and other remote care services. Instead it requires notice be provided as soon as practicable. Note that the relief is NOT limited to telehealth and remote care services related to COVID-19 treatment or testing. A single notice can serve as both the SBC-related notice and the SMM and should be issued as soon as possible. Many plans/insurers are likely to go ahead and implement now and issue the SBC-related notice/SMM as soon as possible.

Q **We have a wrap document. Will it need to be amended for COVID-19 testing, a COVID-19 vaccine, COVID-19 treatment, or telemedicine with no cost sharing?**

A No, in most instances. Wrap documents incorporate the underlying benefits documents but do not generally address the specifics of what expenses are covered by the underlying plans.

Q **Can an employee make changes to his/her HSA if placed on furlough?**

A An employee may suspend HSA contributions while on furlough, or make after-tax contributions directly and deduct on his or her own tax filing for the calendar year. When the employee returns to work, he or she could increase the election (as long as it does not go over the maximum allowed amount for that year). The IRS allowed eligible individuals until July 15, 2020 to make contributions to an HSA for 2019.

Q **Can employees use Health FSA, HRA and HSA dollars on over-the-counter (OTC) expenses?**

A Yes. The ACA previously barred the reimbursement of over-the-counter (OTC) expenses from Health FSAs, HRAs and HSAs. The CARES Act now allows employees to request reimbursement of these expenses, along with menstrual care products, without a prescription effective January 1, 2020. This change is permanent (no sunset date) but is a permissive, not required, change.

Employers wanting to permit OTC expenses for Health FSAs and HRAs will likely need to amend their plan document. Similarly, for HSAs, it is possible that the custodial agreement may need to be amended. Although there is no specific guidance to date, it may be possible to adopt an amendment now and make the change retroactive to January 1, 2020; however, as there is no definitive guidance, employers should consult with counsel if they are considering a retroactive amendment. Alternatively, plans can be amended on a prospective basis. Employers should check with their plan administrators for additional guidance, such as whether an amendment is needed, when amendment language will be available and whether retroactive manual claims are possible. Point of sale systems will likely require programming in order for debit cards to be used. Employers should consult counsel for advice on the effective date of this change.

Dependent Care Assistance Programs (DCAPs)

Q **Some of our employees have children who aged out during 2020 before they could use DCAP dollars. Is there any COVID-19 relief that could help? (Updated January 19, 2021)**

A Yes. The CAA temporarily increases the age limit for purposes of eligible dependent care assistance expenses, from 13 to 14 for certain DCAP participants, extending the period in which those participants can incur such expenses. The relief applies for DCAP participants with one or more dependents who turned 13 during the last plan year with an enrollment period ending on or before January 31, 2020 (the "2020 Plan Year").

Generally, DCAP participants can only submit expenses that are incurred before the day the dependent reaches age 13. This relief extends that period through the end of the 2020 Plan Year (as defined above). For example, for DCAPs with a calendar year plan year, the relief extends the time DCAP participants can use funds on expenses of dependents who reach age 13 during 2020 through the end of the year.

The ability for eligible DCAP participants to use DCAP funds on these dependents can also carry forward into the subsequent plan year if the participant has funds remaining at the end of the 2020 Plan Year (as defined above). In that case, DCAP participants can only submit expenses for

these dependents to the extent of the funds carried forward (and not for additional amount contributed for that subsequent plan year). This would allow DCAP participants to use the funds in the subsequent plan year until the dependent turns 14. Presumably the ability to carry forward these funds would only apply for DCAPs that adopted a carryover provision as permitted under the CAA for plan years ending in 2020 and/or 2021 although further clarification from the IRS would be helpful.

The CAA provisions described above will apply automatically unless a plan specifically includes an age 13 limitation (as opposed to referencing the relevant tax code section). Employers should check their DCAP plan document to determine whether these provisions apply automatically. If not, to add the provisions to their plan an employer must adopt a plan amendment by the last day of the first calendar year beginning after the end of the plan year in which the amendment is effective and operate the plan consistent with the amendment. All plans that will apply the temporarily increased age limit and extension (whether the limit increases automatically or by plan amendment) should notify all employees eligible to participate in the plan, ideally as soon as practicable.

Q **Our employee has elected DCAP contributions. Her day care has closed due to COVID-19, and she is now staying home with her child. Can she stop her DCAP contributions? (Updated January 19, 2021)**

A Yes, the closing of the day care and the employee now staying home would permit the employee to stop making DCAP contributions. Also, the IRS previously issued Notice 2020-29 that allowed employers to amend their cafeteria plans to permit participants to make prospective mid-year changes to their DCAP elections for any reason during 2020. The recently passed Coronavirus Response and Relief Supplemental Appropriations Act, 2021 ("the CAA") now extends the ability for employers to allow participants to make prospective mid-year changes to their DCAP elections for any reason for plan years ending in 2021.

Employers wishing to allow this election event must notify all employees eligible to participate in the plan, ideally as soon as practicable. They must also amend their plan to reflect the change no later than December 31, 2021 for the 2020 relief under Notice 2020-29 and no later than the last day of the first calendar year beginning after the end of the plan year in which the amendment is effective. It is important to note that changes must be prospective, which means employees cannot reduce elections below the amount already contributed for the plan year. There is still no mechanism to refund unused DCAP contributions as taxable compensation. Employers should coordinate with the DCAP administrator to ensure it can administer the plan consistent with the intended changes.

Q **Our employee did not elect DCAP contributions. His son's school has closed for the foreseeable future. Can he elect a DCAP mid-year so that he can pay for day care (son is under age 13)? (Updated January 19, 2021)**

A Prior to IRS Notice 2020-29 and the CAA the answer was not entirely clear, but most commentators felt the fact pattern could fall within the change in cost of coverage exception

that would permit a mid-year change in election to join the DCAP. IRS Notice 2020-29 and the recently passed CAA now make it clear that employers can amend their cafeteria plans to permit participants to make prospective mid-year changes to their DCAP elections for any reason during 2020 and for plan years ending in 2021.

As mentioned above, employers wishing to allow this election event must notify all employees eligible to participate in the plan, ideally as soon as practicable, and must also amend their plan to reflect the change no later than December 31, 2021 for the 2020 relief under Notice 2020-29 and no later than the last day of the first calendar year beginning after the end of the plan year in which the amendment is effective. It is important to note that changes must be prospective, which means employees cannot reduce the elections below the amount already contributed for the plan year. There is still no mechanism to refund unused DCAP contributions as taxable compensation. Employers should coordinate with the DCAP administrator to ensure it can administer the plan consistent with the employer's intended changes.

Q **Our employee's child used to go to day care after school, but now that his school has closed due to COVID-19, he needs to go to day care all day. Can the employee increase her DCAP election to pay for the additional cost of extended day care?**

A Yes, the need for additional day care hours would allow the employee to increase her DCAP election to pay the higher cost of day care.

Q **Our employee has elected DCAP to pay for a nanny. The nanny is quarantined now due to COVID-19 exposure, and the employee has found other day care that costs less. Can the employee drop his DCAP election to the new cost of day care coverage?**

A Yes, the change in provider and cost of coverage will permit the employee to change his DCAP election to be consistent with the new cost of day care.

Q **If an employee is not working during a temporary layoff or suspension, can the employee still pay for day care expenses from the DCAP?**

A IRS rules require an employee to be either gainfully employed or actively seeking employment for dependent care expenses to be eligible for reimbursement under a DCAP. If an employee is not working, then day care expenses cannot be reimbursed. There is an exception if the absence is for 2 weeks or less.

Q **If an employee works remotely from home (telework) and is still using day care services, are those expenses eligible for reimbursement under a DCAP?**

A Yes because the employee is still considered employed. This is true so long as both parents are working. If one parent is home and not working, then expenses would not be eligible for reimbursement from a DCAP.

Q **We would like to give our employees more time in 2020 and/or 2021 to spend their DCAP dollars? Can we extend our grace period? (Updated January 19, 2021)**

A Yes. IRS Notice 2020-29 originally provided relief in this area allowing employers to amend their plans to permit participants to spend down any DCAP amounts remaining at the end of a grace period or plan year ending in 2020. Under the original relief employers could extend a grace period ending in 2020 (such as one ending March 15, 2020 for a plan with a calendar year plan year) through the end of the 2020 calendar year.

The recently passed CAA has extended and expanded this relief allowing employers to amend their plans to extend the grace period for 12 months following any plan year ending in 2020 or 2021. This relief allows additional time for participants to incur services. This is temporary relief and will not apply to plan years ending in 2022 and beyond.

Employers wishing to take advantage of this relief must notify all employees eligible to participate in the plan, ideally as soon as practicable, as well as amend their plan to reflect the change no later than December 31, 2021 for the relief under Notice 2020-29 and no later than the last day of the first calendar year beginning after the end of the plan year in which the amendment is effective. Employers should also ensure the DCAP administrator can administer the plan consistent with the intended changes.

Q **We would like to allow our employees to carryover unused DCAP contributions to the next plan year. Is this permitted? (Updated January 19, 2021)**

A Employees are generally not permitted to carryover unused DCAP contributions from one plan year to the next. Employees must use DCAP contributions prior to the end of the plan year (or applicable grace period) or lose them. However, the CAA has provided temporary relief permitting employers to add a carryover feature to DCAP plans ending in 2020 and 2021. If the employer adopts, employees will be permitted to carryover all unused DCAP funds remaining at the conclusion of plan years ending in 2020 and 2021. This is temporary relief and will not apply to plan years ending in 2022 and beyond.

Employers wishing to take advantage of this relief must notify all employees eligible to participate in the plan, ideally as soon as practicable. They must also amend their plan to reflect the changes no later than the last day of the first calendar year beginning after the end of the plan year in which the amendment is effective. Employers should coordinate with the DCAP administrator to ensure it can administer the plan consistent with the employer's intended changes.

Flexible Spending Accounts (FSAs)

Q **Can employees use Health FSA, HRA and HSA dollars on over-the-counter (OTC) expenses?**

A Yes. The ACA previously barred the reimbursement of over-the-counter (OTC) expenses from Health FSAs, HRAs and HSAs. The CARES Act now allows employees to request reimbursement of these expenses, along with menstrual care products, without a prescription effective January 1, 2020. This change is permanent (no sunset date) but is a permissive, not required, change.

Employers wanting to permit OTC expenses for Health FSAs and HRAs will likely need to amend their plan document. Similarly, for HSAs, it is possible that the custodial agreement may need to be amended. Although there is no specific guidance to date, it may be possible to adopt an amendment now and make the change retroactive to January 1, 2020; however, as there is no definitive guidance, employers should consult with counsel if they are considering a retroactive amendment. Alternatively, plans can be amended on a prospective basis. Employers should check with their plan administrators for additional guidance, such as whether an amendment is needed, when amendment language will be available and whether retroactive manual claims are possible. Point of sale systems will likely require programming in order for debit cards to be used. Employers should consult counsel for advice on the effective date of this change.

Q **The pandemic has impacted our employees' ability to use Health FSA dollars. Can we allow our employees to cease or reduce Health FSA contributions during 2020 and 2021? (Updated January 19, 2021)**

A Yes. If adopted by the plan sponsor, relief is available in both 2020 and 2021 that would allow employees to make prospective election changes without a qualifying life event. In May, the IRS issued COVID-19 related relief in Notice 2020-29 to allow employers to amend their cafeteria plans to permit employees to make certain mid-year plan changes to their health FSA elections during calendar year 2020. Subsequently, the Coronavirus Response and Relief Supplemental Appropriations Act, 2021 ("the CAA") extended this relief through plan years ending in 2021.

Permissible change options include the ability to revoke an existing election, make a new election, or decrease *or increase* an existing election. Because all changes must be prospective, employees generally cannot reduce elections below the amount already contributed or reimbursed. There is still no mechanism to allow a refund of unused contributions as taxable compensation.

Employers wishing to allow some or all of these new election events must notify all employees eligible to participate in the plan, ideally as soon as practicable. They must also amend their cafeteria plans to reflect the change no later than December 31, 2021 for the 2020 relief under Notice 2020-29 and no later than the last day of the first calendar year beginning after the end of the plan year in which the amendment is effective. Employers should coordinate with the health FSA administrator to ensure it can administer the plan consistent with the employer's intended changes.

Q **We would prefer to just give our employees more time to spend their Health FSA dollars. Can we extend our grace period? (Updated January 19, 2021)**

A Yes. In May, IRS Notice 2020-29 provided relief in this area allowing employers to amend their plans to extend the grace period to December 31, 2020 for any plan year or grace period ending in 2020. The CAA has extended and expanded this relief allowing employers to amend their plans to extend the grace period for 12 months following any plan year ending in 2020 or 2021. This relief allows additional time for participants to incur services.

Employers wishing to take advantage of this relief must notify all employees eligible to participate in the plan, ideally as soon as practicable. They must also amend their cafeteria plans to reflect the change no later than December 31, 2021 for the relief under Notice 2020-29 and no later than the last day of the first calendar year beginning after the end of the plan year in which the amendment is effective. Employers should coordinate with the health FSA administrator to ensure it can administer the plan consistent with the employer's intended changes. See below FAQ for a summary of how this relief may impact HSA eligibility.

The original extension to incur claims through December 31, 2020, provided in Notice 2020-29 is available both to cafeteria plans with a grace period and those with a carryover (in spite of the typical requirement that a plan can only have a grace period or a carryover, but not both). However, it appears the extensions provided by the CAA can only apply to plans without the carryover.

Q **Our Health FSA includes the carryover feature. Have any changes been made to the $500 maximum carryover amount? (Updated January 19, 2021)**

A Yes, both temporary and permanent increases have been made to the $500 maximum carryover. First, the CAA provides temporary carryover relief to address employees' unused health FSA funds. Specifically, employers may permit employees to carry over any unused amount from a plan year ending in 2020 or 2021. The amount that can carryover as a result of this relief is unlimited. This is temporary relief that will expire at the conclusion of the plan year ending in 2021.

In addition, the IRS issued Notice 2020-33 on March 12, 2020, which allows employers to amend their plans to index the maximum amount of unused health FSA funds that participants can carry over to the next plan year. The change can apply to carryovers from 2020 and subsequent plan years. Going forward, the carryover limit would be indexed to 20% of the maximum health FSA contribution for a given plan year. Notwithstanding the temporary relief described above, this will increase the limit for unused health FSA carryover amounts from $500 to a maximum of $550 for the 2020 plan year, and then that amount will be adjusted annually for inflation.

Although participant friendly, neither the temporary nor permanent carryover increases are mandatory. Employers wishing to add the temporary unlimited increase must amend their plans no later than the last day of the first calendar year beginning after the end of the plan year in

which the amendment is effective. Employers must also notify all employees eligible to participate in the plan, ideally as soon as practicable, and coordinate with the health FSA administrator to ensure it can administer the plan consistent with the employer's intended changes.

Employers wishing to add the indexing of maximum carryover amounts must amend their plans by the end of the applicable plan year. For example, if the employer adds this provision for the 2021 plan year and it has a calendar year plan, then it must adopt the amendment by December 31, 2021. However, Notice 2020-33 allows employers adding the indexed increases for the 2020 plan year to adopt the required amendment by December 31, 2021, so long as they notify all employees eligible to participate in the plan of the change and operate the plan in accordance with the amendment.

Q **We decided to extend the grace period for our employees to use their Health FSA dollars in 2020 and/or 2021. Will this impact HSA eligibility? (Updated January 4, 2021)**

A Yes. The IRS acknowledged in IRS Notice 2020-29 that extending a grace period could potentially constitute disqualifying coverage for HDHP enrollees. It indicated that employees with unused amounts remaining at the end of a plan year or grace period ending in 2020 and who are allowed an extended period to incur expenses under a health FSA pursuant to a plan amended in accordance with this notice will not be eligible to contribute to an HSA during the extended period (except in the case of an HSA-compatible health FSA, including a health FSA that is amended to be HSA-compatible). For example, let's assume an employer amends its plan with a March 31, 2020 plan year end to allow participants to spend down unused general purpose health FSA amounts through December 31, 2020. In that case, an employee with an unused balance will generally not be eligible to contribute to an HSA during the 2020 calendar year (absent a plan design that makes the spend-down amount HSA compatible, such as in a limited purpose health FSA for all participants).

While we have not been provided specific guidance, we expect any grace period allowed under the CAA will also disqualify employees from HSA eligibility. It is important to remember, unlike carryover, employees cannot voluntarily waive grace period coverage on an individual basis. It is critical for employers and employees to be aware of this. An additional 12 month grace period will disqualify an employee from HSA participation during that time if the employee has not spent all health FSA funds by the end of the plan year.

Q **What happens to an employee's FSA when on furlough?**

A Coverage remains in effect during any protected leave period (FMLA, etc.) unless the employee revokes the election. The 125 plan document must be consulted to see what happens during a furlough. If leaves of absence cause a loss of eligibility, the plan sponsor needs to follow those terms unless they amend their 125 plan.

Q **What happens if an employee revokes FSA coverage during leave?**

A If an employee revokes FSA coverage during a furlough or leave of absence, health expenses incurred during the leave period are not eligible for reimbursement.

Q **Is there any relief for terminated employees to spend down unused Health FSA funds? (Updated January 19, 2021)**

A Generally, there is no spend down feature for terminated employees to use health FSA funds to reimburse expenses incurred after termination. However, the CAA permits employers to amend their plan to allow employees terminated in 2020 or 2021 to spend down unused health FSA funds through the end of the plan year in which they are terminated. As a result, terminated employees can continue to submit claims for expenses incurred after termination and prior to the end of the plan year (and applicable grace period).

This is permissive, temporary relief for 2020 and 2021 only. Employers wishing to take advantage of this relief must notify all employees eligible to participate in the plan, ideally as soon as practicable. They must also amend their cafeteria plans to reflect the change no later than the last day of the first calendar year beginning after the end of the plan year in which the amendment is effective. Employers should coordinate with the health FSA and COBRA administrators to ensure they can administer the plan consistent with the employer's intended changes.

Q **If an employee is terminated, do we have to offer COBRA for the Health Flexible Spending Account (Health FSA)? (Updated January 19, 2021)**

A It depends. If the terminated employee's Health FSA account is underspent, the employee must be offered COBRA at the time of termination. If the employee's Health FSA account is overspent, COBRA need not be offered. A Health FSA account is underspent at the time of termination if the employee has contributed more to the account during the current plan year than the employee has received in reimbursements. For example, assume an employee elected $2,400 in Health FSA elections in a calendar year plan. On June 30, the employee is terminated. At that time, the employee has contributed $1,200 to his Health FSA but has only submitted claims for $900 in reimbursements. The Health FSA is underspent, so COBRA must be offered.

This answer may also be impacted by the terminated employee relief in the CAA. We would welcome more guidance from the regulatory agencies and encourage employers to work with legal counsel and COBRA administrators in these situations.

Telemedicine & Employee Assistance Programs (EAPs)

Q **How can we better leverage group health benefits already available to our employees?**

A **Telemedicine** may be a valuable option for those seeking medical help for non-emergency care. These services often provide access to care and specialist referrals while minimizing external exposure, while also saving emergency resources for those who need it most.

A prior FAQ addresses HSA compatibility when employees are provided access to telemedicine consultations prior to meeting the minimum deductible under what would otherwise be a qualified HDHP. As noted, the CARES Act now makes telemedicine fully compatible with the HDHP and HSA design such that any telemedicine consultation may be provided with no cost sharing without endangering an individual's HSA eligibility for HDHP plan years beginning on or before December 31, 2021.

Employee Assistance Programs also provide helpful benefits for not only physical but also mental health, including personal finance, stress management, substance abuse, relationships and life changes and challenges – all potentially critical services during these uncertain times.

Health Plans must cover the cost of COVID-19 testing. The Families First Coronavirus Response Act requires plans to cover COVID-19 testing. The Act requires all insured and self-funded medical plans, including grandfathered plans, to cover diagnostic testing-related services for COVID-19 at 100 percent without any cost-sharing, including deductibles or co-pays. Examples include services provided by doctors, emergency rooms, telemedicine and urgent care centers leading up to the decision that testing is needed, along with the actual lab-based testing. The CARES Act expands the approved forms of diagnostic testing that must be covered. It also requires testing providers to publicize the testing price and establishes reimbursement rates for testing by reference to either previously negotiated or published rates.

Some states, however, have also mandated that fully-insured plans cover COVID-19 treatment at no cost to members. While self-funded plans are not generally subject to these state mandates, some claims administrators are automatically waiving cost-sharing for COVID-19 treatment unless the plan sponsor opts out. Employers should review the specific requirements in the states in which they operate.

Q **May a large employer offer coverage only for telehealth and other remote care services to employees who are not eligible for any other group health plan offered by the employer?**

A Yes. Generally, this type of arrangement would constitute a group health plan (a fund or program that is established by an employer to provide medical care to employees or their dependents) and would be subject to various federal requirements applicable to group health plans. However several regulatory agencies (DOL/HHS/DOT) announced that they are providing relief from certain ERISA, the ACA, and Internal Revenue Code requirements for a group health plan that solely provides benefits for telehealth (or other remote health care services). This relief is only for the duration of any plan year beginning before the end of the public health emergency related to COVID-19 and is limited to telehealth and other remote care service

arrangements that are sponsored by a large employer that are offered only to employees (or their dependents) who are not eligible for coverage under any other group health plan offered by that employer.

Under this temporary relief, the Departments will continue to apply otherwise applicable federal non-discrimination standards. These arrangements must continue to satisfy are: the provisions relating to prohibition of pre-existing condition exclusions or other discrimination based on health status; prohibition of discrimination against individual participants and beneficiaries based on health status; prohibition of rescissions; and parity in mental health or substance use disorder benefits. HHS encourages states to take a similar approach.
See FAQs About FFCRA and CARES Implementation Part 43

Section 125 Cafeteria Plans / HIPAA Special Enrollment Period

Q **Employees have asked to change their health coverage elections for all sorts of reasons. Some want to drop coverage while others want to add it or to change coverage options. Has the IRS expanded the types of qualifying events that will allow employees to change their health coverage elections under a cafeteria plan? (Updated January 4, 2021)**

A Yes. On May 12th, the IRS issued COVID-19 related relief in Notice 2020-29 to allow employers to amend their cafeteria plans to permit employees to make certain mid-year plan changes to their health coverage elections *during calendar year 2020*. Permissible change options include to change health coverage options (e.g., from HDHP to PPO), to add family members to coverage or to drop health coverage, although the latter requires a written certification that they are or will immediately enroll in other health coverage. The IRS provided a model certification employers can use for this purpose.

Keep in mind that all mid-year election event changes, including those available under the newly issued IRS guidance, are optional. An employer's cafeteria plan can permit all of those allowed under IRS rules, some or none of them. Employers wishing to allow some or all of these new election events must notify all employees eligible to participate in the plan, ideally as soon as practicable. They must also amend their cafeteria plans to reflect the changes no later than December 31, 2021.

The CAA sets out that an employer can also choose to amend their cafeteria plan to allow (or continue to allow) employees to prospectively modify the amount of their **FSA contributions** for plan years ending in 2021, even if they have not experienced a change in status. However, the applicable dollar limitations will continue to apply.

Employers should confirm, in advance, any action it intends to take in this area will be consistent with the extent to which their carrier or stop-loss provider has/will allow these enrollments. Likewise, employers should coordinate with the cafeteria plan administrator to ensure it can administer the plan consistent with the employer's intended changes. They

might also wish to consider the impact of allowing these changes, such as whether it will result in adverse selection.

Q **Does IRS Notice 2020-29 apply to dental and vision plans?**

A Notice 2020-29 does not specifically mention vision and dental coverage; however, these benefits are generally considered group health plans for most intents and purposes. In looking at the qualified benefits that can be offered under a cafeteria plan, dental and vision benefits are permissible offerings since they are considered "accident or health plans" under IRS rules. By analogy, this could pull dental and vision health plan benefits offered through a cafeteria plan into the purview of the Notice. Further clarification from the IRS would be helpful.

Q **What if employees have already been allowed to drop, add or change health coverage elections for any reason under a cafeteria plan during 2020, even before the recent guidance in IRS Notice 2020-29? Will the IRS seek to disqualify our plan?**

A No, provided the employer takes certain actions. Notice 2020-29 specifically allows employers to apply this guidance retroactively provided it adopts an amendment for the 2020 plan year, informs all employees eligible to participate in the plan of the plan changes and operates the plan in accordance with the guidance under the Notice. An employer wishing to take advantage of this relief should coordinate with their cafeteria plan administrator to ensure it can administer the plan consistent with the employer's intended changes and with its plan document providers, counsel and other parties as needed to ensure it can rely on the relief and that all documents and communications are handled properly.

Q **We would like to offer a special enrollment window to allow employees who previously declined group health coverage to elect coverage. Can we allow those who elect coverage to pay for it on a pre-tax basis under our cafeteria plan?**

A A special enrollment window, in and of itself, generally would not be a permissible mid-year change event under IRS cafeteria plan regulations meaning that employees should pay for the newly elected coverage on an after-tax basis. However, the IRS issued Notice 2020-29 on May 12th to provide relief that would allow for certain prospective elections during calendar year 2020. The Notice specifically allows employers to amend their cafeteria plans to allow those who previously declined group health coverage to elect coverage AND pay for it on a pre-tax basis. Keep in mind that this is an optional event, just as with other mid-year election change events, so an employer can choose to amend its cafeteria plan to add it or not. Employers should confirm, in advance, any action it intends to take in this area will be consistent with the extent to which their carrier or stop-loss provider has/will allow these enrollments. Employers wishing to allow some or all of these new election events must notify all employees eligible to participate in the plan, ideally as soon as practicable. They must also amend their cafeteria plans to reflect the changes no later than December 31, 2021 and coordinate with the cafeteria plan administrator to ensure it can administer the plan consistent with the employer's intended changes.

Remember that there are a number of permissible mid-year election change events under IRS regulations before the addition of those added by Notice 2020-29. If an employer makes other changes to its benefit offerings at the same time as adding a special enrollment window then it is possible one of these changes might create a permissible mid-year election change event. For example, IRS cafeteria plan regulations would generally allow a mid-year change to pre-tax elections if there is an addition of a new a benefit plan option or coverage or the significant improvement of an existing benefit plan option. For example, if an employer only had a PPO group health plan and added and high deductible health plan (HDHP) that would be a new benefit plan option allowing those who waived coverage to elect the new HDHP on a pre-tax basis. Perhaps, even if an employer had an HDHP but then decided to offer a second HDHP with an increased or decreased deductible that would also be considered a new benefit plan option or coverage allowing those who previously waived coverage to elect that new HDHP.

Other employer or employee action may also provide an election change opportunity under IRS cafeteria plan regulations. Another example is if an employer significantly reduces the employee/participant contribution cost that could also be a permissible mid-year election change event that would allow those who previously waived coverage to elect coverage on a pre-tax basis.

Remember, however, that all mid-year election events in cafeteria plans are permissive and not mandatory so be sure to check the cafeteria a plan document to see which permissible mid-year election event exist under that document currently.

Q **Has the DOL extended HIPAA special enrollment periods?**

A Yes. HIPAA requires a special enrollment period (outside of open enrollment) for certain qualifying circumstances, such as losing eligibility for an employer-sponsored health plan, or gaining a dependent. Generally, group health plans must allow such individuals to enroll in the available health plan if they are otherwise eligible and if enrollment is requested within 30 days of the qualifying event (or within 60 days, in the case of the special enrollment rights related to the CHIP program). On April 29, 2020, the DOL released its final rule extending certain deadlines, including the HIPAA special enrollment period. The DOL stated that all group health plans, disability and other employee welfare benefit plans, and employee pension benefit plans subject to ERISA or the Internal Revenue Code must disregard the period from March 1, 2020 until sixty (60) days after the announced end of the National Emergency or other date announced by the agencies (the "Outbreak Period") for all plan participants, beneficiaries, qualified beneficiaries, or claimants in determining the HIPAA special enrollment period.

DOL Example (reprinted from Final Rule): *The Example assumes the National Emergency ends on April 30, 2020, with the Outbreak Period ending on June 29, 2020 (the 60th day after the end of the National Emergency).* Individual B is eligible for, but previously declined participation in, her employer-sponsored group health plan. On March 31, 2020, Individual B gave birth and would like to enroll herself and the child into her employer's plan; however, open enrollment does not begin until November 15. When may Individual B exercise her special enrollment rights?

Conclusion. The Outbreak Period is disregarded for purposes of determining Individual B's special enrollment period. Individual B and her child qualify for special enrollment into her employer's plan as early as the date of the child's birth. Individual B may exercise her special enrollment rights for herself and her child into her employer's plan until 30 days after June 29, 2020, which is July 29, 2020, provided that she pays the premiums for any period of coverage.

COVID-19 RELATED EMPLOYEE LEAVE AND BENEFITS

Families First Coronavirus Response Act (FFCRA)

Q **What is the Families First Coronavirus Response Act?**

A On March 18, 2020, President Trump signed into law Coronavirus relief legislation, the Families First Coronavirus Response Act (FFCRA), in response to the Coronavirus pandemic. The Act contains two separate components requiring employee paid leave for specified purposes related to the novel Coronavirus or COVID-19. Those components are the Emergency Family and Medical Leave Expansion Act (EFMLEA), which amends and expands the federal Family Medical Leave Act (FMLA), and the Emergency Paid Sick Leave Act (EPSLA), which requires certain employers to provide paid leave to employees who have been affected by the Coronavirus.

The DOL has issued numerous FAQs to provide compliance assistance to employers (see https://www.dol.gov/agencies/whd/pandemic/ffcra-questions), and the IRS has released additional guidance on the available tax credits, COVID-19-Related Tax Credits for Required Paid Leave. Additional guidance was provided in the temporary rule effective April 2, 2020 as well as in a subsequent temporary rule effective September 16, 2020, which was issued in response to an August 3, 2020 District Court decision invalidating certain portions of the original rule (see *New York v. U.S. Dep't of Labor*, No. 20-CV-3020 (JPO), 2020 WL 4462260 (S.D.N.Y. Aug 3, 2020 and the DOL's FFCRA: Questions and Answers, Question 101).

See also DOL - WHD FFCRA - Employer Paid Leave Requirements

Q **When are the EFMLEA and the EPSLA effective? (Updated January 4, 2021)**

A Both the EFML and EPSL mandates were operational as of April 1, 2020 and expired on December 31, 2020. Congress declined to extend the paid leave elements of FFCRA in the recently passed Coronavirus Response and Relief Supplemental Appropriations Act, 2021 ("the CAA"); however, the CAA allows the employer an extension of time to submit tax credits should they *voluntarily* choose to allow employees to take paid sick leave for COVID-19 related reasons, or paid family medical leave for child care due to COVID-19 school or daycare closures. Employer tax credits will now apply for FFCRA leave taken through March 31, 2021. Note: the CAA did not provide for additional allowed leave time. The time allowed under the EPSLA is still only 80 hours of emergency paid sick leave, with 12 weeks under the EFMLEA (of which 2 weeks is unpaid and up to 10 weeks is eligible for paid family and medical emergency leave).

Q **What employers are covered by the FFCRA?**

A The EFMLEA and EPSLA provisions of the FFCRA apply to private employers with fewer than 500 employees as well as certain public employers.

Most public sector employees are covered by the Act, including state, county and municipal employees, regardless of the size of the public entity. While most federal employees are eligible for paid sick leave under the EPSLA, the eligibility of federal employees under the EFMLEA will depend on whether the employee is covered under Title I or Title II of the FMLA. Federal employees are encouraged to seek guidance from their respective employers.

Q **If a private employer has 500 or more employees, is it subject to the FFCRA?**

A No. Private employers with 500 or more employees are not subject to the FFCRA. However, similar state or local laws may apply, so it is important for employers to be aware of any applicable state or local guidance.

Q **How does a private employer know if its business is under the 500-employee threshold and therefore must provide paid sick leave and/or expanded family and medical leave?**

A The number of employees is calculated as of the date an employee's leave is to be taken. In determining if the entity employs fewer than 500 employees, the employer should count both full-time and part-time employees as well as employees on leave, temporary employees for whom the entity is a joint employer, and day laborers supplied by a temporary agency.

Typically, a corporation (including its separate establishments or divisions) is considered to be a single employer, and its employees must each be counted toward the 500-employee threshold. Where a corporation has an ownership interest in another corporation, the two corporations are separate employers unless they are joint employers under the FLSA with respect to certain employees. If two entities are found to be joint employers, all of their common employees must be counted.

For purposes of the EFMLEA, two or more entities are considered separate employers unless they meet the integrated employer test under the FMLA. If two entities are an integrated employer, then employees of all entities making up the integrated employer must be counted when determining eligibility for expanded family and medical leave.

Source: DOL – FFCRA: Questions and Answers, Q2

Q **Are covered employers required to post a FFCRA Notice in the workplace? What do we do about employees who are teleworking?**

A Yes. Each covered employer must post a notice of the FFCRA's requirements in a conspicuous place on its premises. For employees who are teleworking, an employer may satisfy this requirement by emailing or direct mailing this notice, or by posting this notice on an employee

information internal or external website. English and Spanish versions of the poster can be found on the DOL's website: COVID-19 and the American Workplace.

Source: FFCRA Notice – Frequently Asked Questions

Q **What if I am a small employer with less than 50 employees and providing paid sick leave and expanded family and medical leave would jeopardize the viability of my business?**

A An employer with fewer than 50 employees (small business) may be exempt from providing emergency paid sick leave (EPSL) and expanded family and medical leave (EFML) due to school or place of care closures when doing so would jeopardize the viability of the small business as a going concern. A small business may claim this exemption if an authorized officer of the business has determined that:

1) The provision of EPSL or EFML would result in the small business' expenses and financial obligations exceeding available business revenues and cause the small business to cease operating at minimum capacity;
2) The absence of the employee or employees requesting EPSL or EFML would entail a substantial risk to the financial health or operational capabilities of the small business because of their specialized skills, knowledge of the business or responsibilities; or
3) There are not sufficient workers who are able, willing and qualified, and who will be available at the time and place needed, to perform the labor or services provided by the employee or employees requesting EPSL or EFML, and these labor or services are needed for the small business to operate at a minimal capacity.

Note that these provisions do *not* exempt a small business from providing EPSL for reasons other than to care for a child whose school or place of care is closed, or whose child care provider is unavailable, due to COVID-19 related reasons, and the DOL encourages employers and employees to collaborate to reach the best solution for maintaining the business and ensuring employee safety.

Source: DOL – FFCRA: Questions and Answers, Q58-Q59

Q **If leave is being requested after the employee's worksite has been closed or after the employee has been placed on furlough, can the employee still request leave under the EPSLA or EFMLEA?**

A No. If an employer closes a worksite for a legitimate business reason – whether due to a lack of business or because it was required to close pursuant to a Federal, State or local directive - an employee is not eligible for paid sick leave or expanded family and medical leave as of the date of the closure; however, the employee may be eligible for unemployment benefits. Similarly, if an employee is furloughed because of a lack of work, the employee is not eligible for paid leave under the FFCRA but may be eligible for unemployment benefits.

While this work-availability requirement was challenged by the District Court in *New York v. Dep't of Labor*, in the temporary rules effective September 16, 2020, the DOL affirmed its position that work must be available before an employee can qualify for leave under the EPSLA or EFMLEA and provided a detailed explanation of its reasoning. The temporary rule provides that "if there is no work for an individual to perform due to circumstances other than a qualifying reason for leave – perhaps the employer closed the worksite (temporarily or permanently) – that qualifying reason could not be a but-for cause of the employee's inability to work. Instead, the individual would have no work from which to take leave. The Department thus reaffirms that an employee may take paid sick leave or expanded family and medical leave only to the extent that any qualifying reason is a but-for cause of his or her inability to work."

Q **If an employee's work hours have been reduced, can the employee use leave under the EPLSA or EFMLEA for the hours that he or she is no longer scheduled to work?**

A No. Under the same reasoning as above, if an employer reduces an employee's work hour because of a lack of work, the employee is not permitted to use paid sick leave or expanded family and medical leave for the hours the employee is no longer scheduled to work. The employee, however, may be eligible for partial unemployment for the reduced hours, depending on the particular state's guidelines.

Q **Who qualifies for the exception as a "health care provider" or "emergency responder" under the FFCRA?**

A The FFCRA provides that employers *may* exclude "health care providers" or "emergency responders" from paid sick leave or expanded family and medical leave to prevent disruptions to the health care system's ability to respond to the COVID-19 public health emergency.

The term "health care provider" was initially defined very broadly in the DOL's early guidance to include anyone employed at a doctor's office, hospital, health care center, clinic, post-secondary educational institution offering health care instruction, medical school, local health department or agency, nursing facility, retirement facility, home health care provider, any facility that performs laboratory or medical testing, pharmacy or any similar institution, employer or entity. This definition primarily took into consideration the type of facility at which the individual was employed (i.e., the identity of the *employer*). *However*, in response to the District Court's holding in *New York v. Dep't of Labor* that this definition was overly broad, the DOL significantly revised its definition of a "health care provider" in the temporary rule effective September 16, 2020, focusing more on the type of services provided by the individual employee (i.e., the skills, role, duties or capabilities of the *employee*).

According to the new regulations, a "health care provider" includes two categories of employees. First, the term includes employees who are licensed doctors of medicine, nurse practitioners, or other health care providers who are permitted to issue a certification for purposes of the FMLA. The second category includes employees who are "employed to provide diagnostic services, preventive services, treatment services or other services that are integrated with and necessary to the provision of patient care and, if not provided, would adversely impact

patient care" (see 29 C.F.R. 826.30 (c)(1)(B)). This group would generally include employees such as nurses, nurse assistants and medical technicians; employees who directly assist or are supervised by a direct provider of diagnostic, preventive, treatment or other patient care services; and employees who are integrated into and necessary to the provision of those service, such as laboratory technicians.

The DOL further clarified that a person is *not* a health care provider merely because his or her employer provides health care services. Employees such as IT professionals, maintenance staff, HR personnel, cooks, food service workers, records managers, consultants and billers should not be considered health care providers, even if they work at a health care facility.

An "emergency responder" includes an employee necessary to provide transport, care, health care, comfort and nutrition of such patients. It also includes employees whose services are otherwise needed to limit the spread of COVID-19, such as military or national guard, law enforcement officers, correctional institution personnel, fire fighters, emergency medical services personnel, physicians, nurses, public health personnel, emergency medical technicians, paramedics, emergency management personnel, 911 operators and public works personnel.

This exclusion is optional, and to minimize the spread of the virus, the DOL encourages employers to be judicious when using these definitions to exempt employees from the provisions of the FFCRA. Also, in light of the recently revised definition of "health care provider," health care employers should work closely with their employment counsel to ensure employees are classified correctly before denying leave under this exclusion.

Source: DOL – FFCRA: Questions and Answers, Q56-Q57

Q **Since part-time employees are eligible for pro-rated benefits under the EPLSA and EFMLEA, how do I count the hours worked by a part-time employee for these purposes?**

A For part-time employees (those regularly scheduled to work less than 40 hours per week), the available leave is based on the number of hours the employee is normally scheduled to work. If the employee's schedule varies, such that regular hours are unknown, an employer may use a six-month average to calculate the average daily hours. If this calculation cannot be made because the employee has been employed less than six months, an employer can either use the number of hours agreed upon at the time of hire or the average hours per day the employee has worked over the entire term of employment.

Q **Are all of my employees considered "quarantined or isolated subject to federal, state or local quarantine or isolation order" and eligible for paid leave if my state's governor issues a 'stay at home' or 'shelter in place' order due to COVID-19?**

A The DOL addressed this specific question in its FAQs – "a Federal, State, or local quarantine or isolation order includes quarantine or isolation orders, as well as shelter-in-place or stay-at-home orders, issued by any Federal, State, or local government authority that causes you to be unable to work (or to telework) even though your employer has work that you could perform

but for the order." The key element is that in order for FFCRA to apply, there must be work available, but the employee is unable to perform it due to the shelter-in-place or a stay-at-home order. Example: if the retail store where an employee works as a cashier is still open, but the employee is over 65 and subject to an executive order from their governor that all people over 65 should stay home, the employee would be eligible for EPSL. Source: DOL – FFCRA: Questions and Answers, Q60, 23-27

Q **Must employer-sponsored health coverage be continued while an employee is on leave under the EPSLA or EFMLEA?**

A Yes. If an employer provides – and the employee has elected – group health coverage, the coverage must be continued during EPSLA and EFMLEA leave on the same terms as for an active employee. Employees must generally continue to contribute their share of the cost of coverage in a timely manner.

Q **Does the FFCRA include any other requirements impacting welfare benefit health plans?**

A Yes. The Act requires all insured and self-funded medical plans, including grandfathered plans, to cover diagnostic testing-related services for COVID-19 at 100 percent without any cost-sharing, including deductibles or co-pays. Examples include services provided by doctors, emergency rooms, telemedicine and urgent care centers leading up to the decision that testing is needed, along with the actual lab-based testing. This mandate does not apply to treatment.

Recent regulatory guidance confirms that these requirements apply to both fully-insured *and* self-funded groups. Also note that the CARES Act further expands testing and coverage of COVID-19 without cost sharing as noted in a below FAQ.

Q **If a grandfathered group health plan adds benefits, or reduces or eliminates cost-sharing requirements, for the diagnosis and treatment of COVID-19 or for telehealth and other remote care services during the COVID-19 pandemic, will the plan lose its grandfather status solely because it later reverses these change upon the expiration of the emergency period?**

A No. In general, for purposes of determining whether changes to the terms of a plan or coverage would cause a loss of grandfather status under regulations issued by the Departments, the revised terms are compared to the terms that were in effect as of March 23, 2010. To the extent that a plan or issuer added benefits or reduced or eliminated cost sharing (as required by FFCRA and the CARES Act), the plan or coverage would not lose its grandfather status solely because these changes are later reversed. See FAQs About FFCRA and CARES Implementation Part 43

Emergency Paid Sick Leave Act (EPSLA)

Q **Who is an eligible employee under the EPSLA?**

A All employees, regardless of hire date; although, there may be exceptions for employees who are health care providers or emergency responders as noted in the above FAQ.

Q **What is a covered employer required to do under the EPSLA? (Updated January 4, 2021)**

A The EPSLA requires covered employers to provide up to 80 hours of paid sick leave for full-time employees (those normally scheduled to work 40 or more hours per week) for specified reasons related to COVID-19, including when an employee is:

1) Quarantined or isolated subject to federal, state or local quarantine/isolation order;
2) Advised by a health care provider to self-quarantine due to concerns related to COVID-19;
3) Experiencing symptoms of COVID-19 and seeking a medical diagnosis;
4) Caring for an individual who is quarantined or self-quarantined as described in bullets 1 and 2 above;
5) Caring for a child whose school or place of care is closed due to COVID-19; or
6) Experiencing any other substantially similar condition specified by the Secretary of Health and Human Services.

Part-time employees are entitled to leave based on the average number of work hours in a two-week period. For more information on how to count hours worked by a part-time employee, see above FAQ.

Under the EPSLA, employees on paid sick leave are to be paid at their regular rate of pay for leave related to the employee's own illness, quarantine or care; this pay is capped at $511 per day or $5,110 aggregate. Sick leave must be paid at two-thirds of the employee's regular rate of pay for leave taken to care for another individual or to care for a child whose school or place of care is closed; this pay is capped at $200 per day or $2,000 aggregate.

Tax credits are available to covered employers to offset some of the costs associated with the sick leave wages paid as a result of this legislation. See IRS Notice 2020-57 and below FAQs for more details.

Congress declined to extend the paid leave elements of FFCRA; however, the CAA allows covered employers an extension of time to submit tax credits should they *voluntarily* choose to allow employees to take paid sick leave for COVID-19 related reasons, or paid family medical leave for child care due to COVID-19 school or daycare closures. Employer tax credits will now apply for FFCRA leave taken through March 31, 2021. The extension of tax credits did not increase the available 80 hours of available paid sick leave. For example, if an employee was entitled to 80 hours of EPSL between April 1 and December 31, 2020, and only used 40 hours in 2020, then that employee would have 40 hours left to use between January 1, 2021 and March 31, 2021, *if* the employer chose to extend the available leave and submit tax credits.

Q **Can leave under the EPLSA be taken intermittently?**

A Possibly. An employer may agree to allow intermittent leave for 1) employees who are *teleworking* and requesting leave for any qualifying reason as well as 2) employees who are working at the usual worksite and requesting leave to care for a child whose school or place of care has closed for reasons related to COVID-19. Such intermittent leave may be taken in any increment agreed upon.

For example, if a child's school or place of care is unavailable for an entire week due to COVID-19-related reasons and if the employer and employee agree, an employee could take EFML intermittently on Monday, Wednesday and Friday, but work on Tuesday and Thursday while another family member watches the child. In contrast, the DOL further clarified in its FAQs that if a child's school, place of care or child care provider were closed or only unavailable on Monday, Wednesday and Friday – as opposed to the entire week- then an employee would not need to take intermittent leave on these days because each day of closure or unavailability is considered a separate reason for leave.

In contrast, employees who are working at the usual worksite and requesting leave under the EPSLA for any other reason (other than to care for a child due to a school or place of care closure) must take leave in full-day increments. Unless teleworking, once an employee begins taking paid sick leave for one or more of the qualifying reasons (other than to care for a child due to a school or place of care closure), the employee must continue to take paid sick leave until the employee either 1) uses the full amount of paid sick leave or 2) no longer has a qualifying reason for taking paid sick leave. The DOL imposes this limit because if an employee is sick or possibly sick with COVID-19, or is caring for an individual who is sick or possibly sick with COVID-19, the intent of the FFCRA is to provide such paid sick leave as necessary to keep the employee from spreading the virus to others.

Note that the DOL refined this guidance in response to the District Court's holding in *New York v. Dep't of Labor*, which invalidated the DOL's original provision requiring an employee to obtain an employer's approval before taking FFCRA leave intermittently. The DOL, however, in the temporary regulations effective September 16, 2020, continued to affirm that employer approval is still required for intermittent leave.

Q **Can an employee take 80 hours of paid sick leave for a self-quarantine and then additional paid sick leave for a different reason under the EPSLA?**

A No. The total number of hours of paid leave is capped at 80 hours; however, a full-time employee may take that maximum amount of paid sick leave for any combination of the qualifying reasons.

Q **If my employer provided paid leave prior to April 1, 2020 for a reason identified in the EPSLA, can my employer deny me paid sick leave under the EPSLA?**

A No. The EPSLA imposes a new leave requirement on employers that is effective beginning on April 1, 2020.

Q **Can an employee be required to use other paid leave provided by the employer, such as vacation, sick or personal leave, before – or concurrent with – paid leave under the EPSLA?**

A No. EPSL is *in addition to* an employee's other leave entitlements. An employer may not require an employee to use accrued vacation, sick, personal or PTO leave before – or concurrent with - the paid sick leave. However, if both the employer and employee agree, accrued company-sponsored leave may be used to supplement the amount an employee receives under the EPLSA, up to the employee's normal earnings.

Q **What documentation should an employer request from an employee asking for leave under the EPLSA?**

A In order to not only evaluate an employee's request for leave under the EPSLA but also substantiate eligibility for family leave tax credits, an employer should require employees to provide sufficient information to determine whether a leave request is covered by the EPSLA.

The regulations specifically permit an employer to require the following documentation:

- The employee's name;
- The date or dates for which leave is requested;
- A statement of the COVID-19-related reason for the leave request;
- In the case of leave requested based on a quarantine or self-quarantine advice, the name of the governmental entity ordering the quarantine or the name of the health care professional advising self-quarantine, and, if the person subject to the quarantine or advised to self-quarantine is not the employee, that person's name and relation to the employee; and
- In the case of leave requested to care for a child whose school or place of care has closed, or child care provider is unavailable, due to COVID-19-related reasons, the DOL provides examples of what documentation an employer can require – such as a notice of closure or unavailability from the child's school, place of care, or child care provider, including a notice that may have been posted on a government, school, or day care website, published in a newspaper, or emailed from an employee or official of the school, place of care, or child care provider. An employer cannot request more information than this, such as an official notice from a closed school or day care.

While the DOL permits employers to require employee to provide *sufficient* information to determine whether the requested leave is covered by the EPSLA, employers may *not* require the notice to include information beyond what is outlined in the regulations as summarized above.

In response to the District Court's holding in *New York v. Dep't of Labor*, which invalidated the DOL's initial provision stating that documentation must be provided "prior to" taking paid sick leave, the DOL has clarified that documentation must be provided "as soon as practicable."

Q **Can employees take EPSLA leave for the closure of a summer camp or other summer program?**

A The DOL issued Field Assistance Bulletin 2020-4 to address when employees may take FFCRA leave for the closure of a summer camp or other summer program. The Bulletin directs Wage and Hour investigators in evaluating whether an employer improperly denied FFCRA leave, to consider whether there is evidence of a plan for the child to attend the camp or program, or whether it is more likely than not that the child would have attended the camp or program had it not closed. Some of that evidence could be that the child was enrolled in the camp or program before the summer camp or other program announced closure, or prior attendance and current eligibility of the camp or program. However, the Bulletin notes that a parent's mere interest in a camp or program is generally not enough.

See Wage & Hour Division Field Assistance Bulletin No. 2020-4

Emergency Family Medical Leave Expansion Act (EFMLEA)

Q **Who is an eligible employee under the EFMLEA?**

A Employees must have been employed with the employer for at least 30 days to qualify for the leave benefits under the EFMLEA. An employee is considered to be employed for at least 30 days if the employee was on the employer's payroll for the 30 calendar days immediately prior to the day leave would begin The DOL clarifies that an employee who was previously working for the company as a temporary employee may count that days worked as a temporary employee toward the 30-day eligibility period. Note: this expands the eligibility for EFMLEA leave and is broader than the regular FMLA requirement that an employee have been employed for at least 12 months and have worked at least 1250 hours in the preceding 12 months.

Q **What are covered employers required to do under the EFMLEA? (Updated January 4, 2021)**

A The EFMLEA amends the FMLA to:

1) Require 10 days of unpaid public health emergency leave (PHEL) (which will generally also be covered as paid leave under EPSLA – see above); and
2) Expand the qualifying reasons for Family and Medical Leave to include leave to care for a child under 18 years old because of a school closure or other lack of childcare caused by COVID-19.

Under the EFMLEA, the leave must be partially compensated after the first 10 days, at two-thirds of an employee's wage, up to $200 per day or $10,000 total.

Congress declined to extend the paid leave elements of FFCRA; however, the CAA allows the employer an extension of time to submit tax credits should they *voluntarily* choose to allow employees to take paid sick leave for COVID-19 related reasons, or paid family medical leave for child care due to COVID-19 school or daycare closures. Employer tax credits will now apply for FFCRA leave taken through March 31, 2021. The extension of tax credits did not extend the amount of leave time available under the EFMLEA, but if the employer's FMLA 12-month period resets on a calendar year basis (or another fixed FMLA tracking period that starts before March 31, 2021) *and* the DOL fails to readopt the regulations they wrote related to EFMLA, then it is possible that the employee would have an additional amount of time. Additional guidance from the IRS and DOL would be appreciated.

Q **Can leave under the EFMLEA be taken intermittently?**

A Yes, if intermittent leave is allowed by the employer. If an employee is unable to work or telework his or her normal schedule of hours because of the need to care for a child whose school or place of care is closed, the employee and the employer can agree on an intermittent leave schedule. Intermittent leave may be taken in any increment agreed upon.

For example, if a child's school or place of care is unavailable for an entire week due to COVID-19-related reasons and if the employer and employee agree, an employee could take EFML intermittently on Monday, Wednesday and Friday, but work on Tuesday and Thursday while another family member watches the child. In contrast, the DOL further clarified in its FAQs that if a child's school, place of care or child care provider were closed or only unavailable on Monday, Wednesday and Friday – as opposed to the entire week- then an employee would not need to take intermittent leave on these days because each day of closure or unavailability is considered a separate reason for leave.

Note that the DOL refined this guidance in response to the District Court's holding in *New York v. Dep't of Labor*, which invalidated the DOL's original provision requiring an employee to obtain an employer's approval before taking FFCRA leave intermittently. The DOL, however, in the temporary regulations effective September 16, 2020, continued to affirm that employer approval is still required for intermittent leave.

Q **Employees are generally eligible for up to 12 weeks of FMLA leave. If a employee has already used four (4) weeks of FMLA leave over the current 12-month period, does the employee qualify for a full 12 weeks of leave under this expansion?**

A No. The EFMLEA does not expand the amount of FMLA leave to which an employee is entitled in the designated 12-month period, and an employee's eligibility for EFML depends on how much leave has already been taken. If an employee has taken some, but not all, of the available 12 workweeks of leave under the FMLA during the current 12-month period, the employee may take the remaining portion of leave available. For example, if an employee has already taken four weeks of FMLA leave, the employee would have eight weeks remaining.

Q **Is all leave under the FMLA now paid leave?**

A No. Only leave taken to care for a child whose school or place of care is closed, or whose child care provider is unavailable, due to COVID-19-related reasons qualifies for paid leave under the EFMLEA, and only if such leave exceeds 10 days (the first 10 days will generally be paid under the EPSLA).

Q **What documentation should an employer request from an employee asking for leave under the EFMLEA?**

A In order to not only evaluate an employee's request for leave under the EFMLEA but also substantiate eligibility for family leave tax credits, an employer should require employees to provide sufficient information to determine whether a leave request is covered by the Act.

The regulations specifically permit an employer to require the following documentation:

- The employee's name;
- The date or dates for which leave is requested;
- A statement of the COVID-19-related reason for the leave request (i.e., that the employee is unable to work or telework in order to care for a child due to the closure of the child's school or place of care, or child care provider unavailability, for reasons related to COVID-19);
- The name and age of the child (or children) to be cared for;
- The name of the school that has closed or the place of care that is unavailable;
- Representation that no other person will be providing care for the child during the period for which the employee is requesting leave; and
- With respect to care for a child over the age of 14 during daylight hours, a statement that special circumstances exist requiring the employee to provide care.

The DOL gives examples of what an employer can require an employee to provide when the leave is to take care in a child whose school or place of care is closed, or whose child care provider is unavailable, due to COVID-19-related reasons - such as a notice of closure or unavailability from the child's school, place of care, or child care provider, including a notice that may have been posted on a government, school, or day care website, published in a newspaper, or emailed from an employee or official of the school, place of care, or child care provider.

While the DOL permits employers to require employee to provide *sufficient* information to determine whether the requested leave is covered by the EPSLA, employers may *not* require the notice to include information beyond what is outlined in the regulations as summarized above.

In response to the District Court's holding in *New York v. Dep't of Labor*, which invalidated the DOL's initial provision stating that documentation should be provided "prior to" taking paid sick leave, the DOL has clarified that documentation must be provided "as soon as practicable."

Q **Can employees take EFMLEA leave for the closure of a summer camp or other summer program?**

A The DOL issued Field Assistance Bulletin 2020-4 to address when employees may take FFCRA leave for the closure of a summer camp or other summer program. The Bulletin directs Wage and Hour investigators in evaluating whether an employer improperly denied FFCRA leave, to consider whether there is evidence of a plan for the child to attend the camp or program, or whether it is more likely than not that the child would have attended the camp or program had it not closed. Some of that evidence could be that the child was enrolled in the camp or program before the summer camp or other program announced closure, or prior attendance and current eligibility of the camp or program. However, the Bulletin notes that a parent's mere interest in a camp or program is generally not enough.

Q **How do the EPSLA and the EFMLEA interact?**

A The DOL tells us that an employee may be eligible for both types of leave if leave is needed to care for a child whose school or place of care is closed, or child care provider is unavailable, due to COVID-19-related reasons, but only for a maximum of 12 weeks of paid leave. In this situation, the EPSLA provides for an initial two weeks of paid leave. This period also covers the first ten workdays of expanded family and medical leave, which are otherwise unpaid under the EFMLEA an employee elects to use existing vacation, personal, or medical or sick leave under an employer's policy. After the first ten workdays have elapsed, the employee will be eligible for 2/3 of his/her regular rate of pay for the hours scheduled to work in the subsequent ten weeks under the EFMLEA. Note that an employee can only receive the additional ten weeks of expanded family and medical leave under the EFMLEA for leave to care for your child whose school or place of care is closed, or child care provider is unavailable, due to COVID-19 related reasons and if the employee's 12-week FMLA entitlement has not otherwise been exhausted.

EPSL and EFML Tax Credits

Q **Which employers are eligible for the EPSL or EFML credit?**

A Eligible employers are businesses and tax-exempt organizations that have fewer than 500 employees and are required under the FFCRA to pay EPSL or EFML. Public employers are not eligible for the EPSL or EFML tax credits.

Q **How much is the EPSL credit? (Updated January 4, 2021)**

A Credit is given for 100% of the amount of EPSL that the employer is required to pay for leave taken between April 1, 2020 and December 31, 2020. Credit is also available for leave taken during this time period but not paid until later date, for example early 2021. Further, credit is also given for the amount of allocable qualified health plan expenses associated with the EPSL as well as the employer's share of Medicare taxes on the EPSL.

While Congress declined to extend FFCRA's paid leave requirements, the CAA allows an eligible employer an extension of time to submit tax credits should they *voluntarily* choose to extend the paid leave elements through March 31, 2021.

Q **How much is the EFML credit? (Updated January 4, 2021)**

A Credit is given for 100% of the amount of EFML that the employer is required to pay for leave taken between April 1, 2020 and December 31, 2020. Credit is available for leave taken during this time period but not paid until later date, for example early 2021. Further, credit is also given for the amount of allocable qualified health plan expenses associated with the EFML and the employer's share of Medicare taxes on the EFML.

While Congress declined to extend FFCRA's paid leave requirements, the CAA allows an eligible employer an extension of time to submit tax credits should they *voluntarily* choose to extend the paid leave elements through March 31, 2021.

Q **Are EPSL and EFML taxable to the employee? If so, what are the withholding requirements for payment of EPSL and EFML?**

A Both EPSL and EFML are taxable as wages and subject to withholding of federal income tax and the ***employee portion*** of social security and Medicare taxes. EPSL and EFML are also considered wages for purposes of other benefits that the employer provides, such as contributions to 401(k) plans. Employers can continue to allow employee salary reductions to 401(k) plans from EPSL and EFML.

An employer is not subject to the ***employer portion*** of social security tax imposed on EPSL and EFML but is subject to the employer portion of the Medicare tax (subject to taking a credit as described below).

Q **How does an employer claim the EPSL and EFML credits? (Updated January 4, 2021)**

A The credits will be claimed on IRS Form 941, but most employers will recoup some or all on the credits in anticipation of claiming them on that Form. This is done by retaining federal employment taxes related to EPSL and EFML leave paid between April 1, 2020, and December 31, 2020. To fund the credits, the following may be retained for ***all employees*** up to the maximum amount of the credits**:**

- Federal income tax withheld from employees,
- The employees' share of social security and Medicare taxes,
- The employer's share of social security and Medicare taxes.

The Form 941 will provide instructions about how to reflect the reduced liabilities for the quarter and the retained amounts.

If an employer does not have enough federal employment taxes set aside for deposit to cover its obligation to provide EPSL and EFML (including allocable qualified health plan expenses and the employer's share of Medicare tax on the EPSL and EFML), the employer may request an advance of the credits by completing Form 7200, Advance Payment of Employer Credits Due to COVID-19. The employer will account for the amounts received as an advance when it files its Form 941, for the relevant quarter.

Example: An employer pays $10,000 in EPSL and EFML in Q2 2020. It does not owe the employer's share of social security tax on the $10,000, but it will owe $145 for the employer's share of Medicare tax. Its credits equal $10,145, which include the $10,000 in EPSL and EFML wages plus $145 for the employer's share of Medicare tax (note that this example does not include any qualified health plan expenses). This amount may be applied against federal employment taxes that employer is liable for on any wages paid to ***all*** employees in Q2 2020 (as mentioned above, this applies to both the employee and employer portion of these taxes but the employer must still withhold from the employees' wages the employee's share of taxes).

While Congress declined to extend FFCRA's paid leave requirements, the CAA allows an eligible employer an extension of time to submit tax credits should they voluntarily choose to extend the paid leave elements through March 31, 2021. We await additional guidance to determine if there are any changes to how employers should file for the tax credits in 2021, but we expect the process to be the same or similar.

Q **How do I determine the amount of "qualified health plan expenses" that are allocable to EPSL and EFML?**

A "Qualified health plan expenses" are the amounts paid or incurred to maintain a health plan, but only to the extent that the money is excluded from the gross income of the employee.

Generally, qualified health plan expenses are properly allocated to EPSL and EFML if the allocation is made on a pro rata basis among covered employees (for example, ***the average premium for all employees covered by a policy***) and pro rata on the basis of periods of coverage (***relative to the time periods of leave to which such wages relate***). These amounts would include **both** the portion the employer pays as well as the amount the employee on leave pays on a pre-tax basis.

- If an employer has multiple plans, then the expenses are determined separately for each plan and allocated to the employees who participate in that plan (and aggregated if an employee participates in multiple plans).
- For a **fully insured** group health plan the IRS permits the use of COBRA rates and we expect most employers will use that rate.
    - There is some flexibility to using a single average premium for all employees or an average premium that is determined separately for self-only coverage and other than self-only coverage. IRS guidance sets out specific steps to be used to determine the average premium rate if the employer does not use the COBRA rates.

- For **self-insured** group health plans the COBRA rate can be used and, again, we expect that most employers will use that rate. Employers can also use another reasonable actuarial method. The IRS guidance provides some general parameters for other acceptable actuarial methods.
- Contributions to health reimbursement arrangements (HRAs) and health flexible spending accounts (Health FSAs) are included in the amount of qualified health plan expenses based on the amount of contributions made to the particular employee.
- Qualified health plan expenses do not include employer contributions to HSAs or Archer MSAs. Contributions to qualified small employer health reimbursements arrangements (QSEHRAs) are not included either.

Source: IRS – COVID-19-Related Tax Credits for Required Paid Leave Provided by Small and Midsize Businesses FAQs, questions 31-36

Q **What information should an employer receive and maintain to substantiate eligibility for EPSL and EFML credits?**

A The documentation requirements are rigorous and include the following that should be maintained by the employer for a period of four years from when any applicable tax became due or is paid, whichever comes later:

1) A statement from the employee that contains:
   - The date or dates for which EPSL and/or EFML is requested;
   - The COVID-19 related reason for the leave and written support for the reason;
     - If the reason is based on a quarantine order or self-quarantine advice, the statement should include the name of the governmental entity ordering quarantine or the name of the health care professional advising self-quarantine, and, if the person subject to quarantine or advised to self-quarantine is not the employee, that person's name and relation to the employee;
     - In the case of a leave request based on a school closing or child care provider unavailability, the statement should include:
       - The name and age of the child (or children) to be cared for;
       - The name of the school that has closed or place of care that is unavailable;
   - A representation that the employee is unable to work, including by means of telework, for the COVID-19 reason.
     - If the inability to work or telework is because of a need to provide care for a child, a representation that no other person will be providing care for the child during the period for which the employee is receiving EFML.
     - If the inability to work or telework is because of a need to provide care for a child older than fourteen during daylight hours, a statement that special circumstances exist requiring the employee to provide care.

2) Documentation to show how the employer determined the amount of EPSL and EFML and associated credits including records of any work or telework.

3) Documentation to show how the employer determined the amount of qualified health plan expenses.

4) Copies of any completed Forms 7200, Advance of Employer Credits Due To COVID-19 that the employer submitted to the IRS.

5) Copies of the completed Forms 941, Employer's Quarterly Federal Tax Return that the employer submitted to the IRS or were submitted on the Eligible Employer's behalf.

Source: IRS – COVID-19-Related Tax Credits for Required Paid Leave Provided by Small and Midsize Businesses FAQs, questions 44-45

Family and Medical Leave Act (FMLA)

Q **Must an employer grant FMLA leave to an employee who is sick or who is caring for a family member who is sick with a COVID-related illness?**

A Possibly. In its guidance, the DOL had reminded covered employers that employees may be entitled to job-protected, unpaid leave for specified family and medical reasons, such as the employee's or immediate family member's serious health condition – which may include the flu or a virus such as COVID-19 where complications arise or it rises to the level of a serious health condition as defined by the FMLA. Employers should take steps to ensure the required notifications are provided and that qualifying leave is classified as Family and Medical Leave, ensuring its protections such as continuation of benefits and job protection.

Note that these types of absences may now also qualify under the Emergency Paid Sick Leave Act (EPSLA) and be eligible for paid leave as outlined in the Families First Coronavirus Response Act (FFCRA).

Q **If an employee demonstrates no symptoms of COVID-19 but either self-quarantines or is asked to quarantine due to potential exposure – or to care for family member who is quarantined – should this leave be classified as FMLA?**

A No. If the employee is experiencing no symptoms of COVID-19, an employer should not count any of this leave against the employee's FMLA allotment, as there is no evidence (yet) of a serious health condition. Ideally, these employees should be permitted to work from home-provided this telework is an option – as they are likely healthy enough to continue working. However, if remote work is not available and leave is required, employees should be instructed to self-monitor for symptoms of the virus. If symptoms develop, the employee should immediately inform the employer and the FMLA process, including notifications and designation, should be initiated.

Q **Can an employee request FMLA to stay home to minimize exposure to and the risk of contracting the pandemic influenza?**

A No. While the FMLA protects eligible employees who are – or who are needed to care for covered family members who are - incapacitated by a serious health condition, "[l]eave taken by an employee for the purpose of avoiding exposure to the flu would not be protected under the FMLA.

Source: DOL - COVID-19 or Other Public Health Emergencies and the FMLA Questions and Answers

Q **Does the FMLA cover parents who need time off to care for children who have been dismissed from school?**

A Possibly, if your organization has fewer than 500 employees. While the Family and Medical Leave Act of 1993 as originally enacted does not cover leave for the purpose of caring for a child due to a school closure or other lack of childcare, the Families First Coronavirus Response Act (FFCRA) and related Emergency Family and Medical Leave Expansion Act (EFMLEA) now adds this as a qualifying reason for employers with fewer than 500 employees. Employees must have been employed at least 30 days to qualify, and partial compensation is available after the first 10 days of leave. See Emergency Family and Medical Leave Expansion Act above for more details.

Company-Sponsored Paid Leave Programs (PTO/Vacation/Sick Leave)

Q **What are some best leave practices during COVID-19 pandemic?**

A According to the CDC, the most effective thing employers can do to prevent the spread of coronavirus is to make sure workers stay home when they are sick. Some best leave practices include:

- Maintaining flexible leave policies that are consistent with public health guidelines and that allow employees to stay home to care for a sick relative.
- Relaxing requirements for a healthcare provider's notice for employees with acute respiratory illness to validate their illness or return to work.
- Offering effected workers additional paid or unpaid time off through emergency leave policies and/or leave sharing plans.

Q **What about Leave Sharing Plans during COVID-19?**

A The IRS has issued specific guidance for the tax treatment of a leave-sharing arrangement that permits employees to donate PTO/leave/vacation time in an employer-sponsored leave bank for use by other employees adversely affected by an event declared a major disaster or emergency

by the President. To avoid negative tax consequences to the leave donor, employers must have a formal, written leave-sharing program that meets IRS requirements. Consult a tax professional to ensure compliance.

Source: IRS Notice 2006-59

Short-Term Disability Insurance

Q **Are employees on leave related to COVID-19 eligible for Short-Term Disability Insurance?**

A Possibly. Employees covered by a short-term disability plan may be eligible for benefits if they are diagnosed with the illness and are sick and unable to perform the major duties of their job due to the sickness.

Eligibility for benefits will depend on the plan's definition of "disability."

- Simply staying at home due to a potential illness or quarantine may not fit under most definitions of disability, absent a corresponding physical or mental impairment.
- Some policies may contain a Quarantine Benefit Rider, which can provide benefits in a quarantine situation as ordered by a doctor.

Several states, including California, Hawaii, New Jersey, New York and Rhode Island offer/require state-sponsored disability insurance. It is important for employers in these states to consult the state agencies for details on eligibility and benefits.

Q **Our STD policy has a 14-day elimination period. Can we waive this period for COVID-19-related illnesses?**

A Possibly. For employers simply offering a salary continuation programs, these benefits can generally be modified at the employer's discretion. Fully-insured disability programs will have additional requirements. In addition to the critical step of securing the approval of the carrier, insured disability programs are governed by ERISA and will require a formal plan amendment as well as certain disclosures to participants.

COVID-19 STAFFING CHALLENGES

Essential Businesses

Q **Our business is deemed "essential." We need to have employers come in to do their jobs. What do we do if employees do not want to come into the office because of fear of COVID-19 exposure? Can we discipline them?**

A Generally, employees do not have a right to refuse to work based only on a generalized fear of becoming ill if their fear is not based on objective evidence of possible exposure. However, COVID-19 cases are increasing, and many cities and states are implementing public health

measures to control spread of the virus (such as 'stay-at-home' or 'shelter-in-place' orders). It may be difficult to show that employees have no reason to fear coming in to work. Caution should be used in disciplining or terminating an employee who refuses to work in a location that has shelter-in-place rules in effect. However, that does not mean that an employee must continue to pay an employee who refuses to come in to work (assuming telework is not an option). An employer may require that an employee use any available PTO. Absence from work due to fear of COVID-19, without any accompanying circumstances, does not make an employee eligible for any paid leave under FFCRA.

If an employee is in a high risk category (immunocompromised or underlying condition) and indicates that he or she is unable to report to a worksite because of this condition, the employer should go through the interactive process to evaluate the request under the Americans with Disabilities Act (ADA), considering whether leave could be granted as a reasonable accommodation without an undue hardship on the business or whether other options may permit the employee to perform the essential functions of his/her job (i.e., telework).

Under OSHA, an employee's refusal to perform a task may be protected if there are safety concerns. Employees who won't work because of safety concerns may be considered to be engaging in protected concerted activity under the National Labor Relations Act (NLRA) if they have a "good faith" belief that their health and safety are at risk.

Instead of disciplining employees who express fear at this time, it may be a better practice to consider methods to encourage employees to come to work. Consider emphasizing safety precautions in place (i.e., social distancing rules, reduced customer capacity, staggered shifts, or more extreme measures if warranted). Some employers are offering premium pay or PTO for use in the future to employees who must come to work.

Telework

Q **May an employer require its employees to telework?**

A Yes. An employer can require its employees to work remotely as an infection-control or prevention strategy.

Telework also can be a reasonable accommodation under the ADA. However, employer cannot single out employees to telework based on a protected class. Also, if telework is a reasonable accommodation, employees must be compensated at the same hourly rate or salary.

Source: DOL - COVID-19 or Other Public Health Emergencies and the Fair Labor Standards Act Questions and Answers

Q **Does an employer have to pay employees the same hourly rate/salary for telework?**

A Yes, if granted as a reasonable accommodation or part of a collective bargaining agreement. Otherwise the following general rules will apply:

- For *non-exempt employees*: The Fair Labor Standards Act (FLSA) requires employers to pay non-exempt employees for hours actually worked. When implementing telework for non-exempt employees, employers should 1) determine how employees will track hours; 2) decide limits on non-exempt hours and establish whether overtime needs approval; and 3) consider meal and rest breaks (approximately 20 states have required breaks).
- For *exempt employees*: The FLSA requires that exempt employees receive their full salary for any week in which they perform any work (even if work is minimal, such as checking emails), with limited exceptions. It is a best practice to maintain accurate records of hours worked for all employees, including exempt employees participating in telework.

Source: DOL - COVID-19 or Other Public Health Emergencies and the Fair Labor Standards Act Questions and Answers

Q **Is an employer required to cover any costs that employees may incur to telework (i.e., internet access, computer, phone line, etc.)?**

A An employer *should* furnish or reimburse employees for the tools necessary to telework. An employer *must* reimburse an employee to the extent those expenses cause the employee's wages to dip below minimum wage.

Source: DOL - COVID-19 or Other Public Health Emergencies and the Fair Labor Standards Act Questions and Answers

EMPLOYEE FURLOUGHS AND LAYOFFS

Q **What's the difference between a furlough and a layoff?**

A The language used when sending employees home for a period of time is less important than communicating actual intent to employees.

A furlough is a mandatory, but temporary, unpaid leave of absence or reduced scheduled work hours. For example, an employer may reduce employees' hours to 20 per week for a period of time as a cost-saving measure, or the employer may place all employees on a one-month unpaid leave. This is typically not considered termination; although employees would likely still be eligible for unemployment. Depending upon the terms of the employer's health plan, and the definition of full-time employee, the furloughed employee *may* be able to continue benefits coverage.

A layoff is generally considered a termination of employment for a period of time when no work is available (at no fault of the employee). A layoff may be temporary or permanent. Temporary layoffs are appropriate for relatively short-term slowdowns or closures. A layoff is generally considered permanent if there are no plans to rehire the employee or employees because the

slowdown or closure is expected to be lengthy or permanent. Typically, benefits continuation is not appropriate during a layoff (although COBRA is likely warranted), and employees will be eligible for unemployment benefits.

Employee Furlough and Layoffs – Compensation

Q **Does an employer have to pay an employee who is sent home due to COVID-19-related office closure?**

A The following general rules apply:

- For *non-exempt employees*: A non-exempt employee may be sent home without pay as long as the employee does not perform any compensable work from home.
- For *exempt employees*: Exempt employees must receive their full salary for any week in which they perform any work; however, they are not required to be paid for any weeks in which they perform no work.

Q **Can an employer direct salaried, exempt employees to use accrued vacation (or leave bank) due to COVID-19 office closure?**

A Yes. An employer can require an exempt employee to use paid leave (vacation/leave bank) for any partial- or full-day absences, as long as payment equals and improper deductions are not taken from the employee's guaranteed salary. Requiring substitution of paid leave does not impact exempt status.

Source: DOL - Wage & Hour Division Opinion Letter FLSA 2005-41

Q **Are there advance notice requirements prior to a mass layoff?**

A Possibly. There may be WARN Act notification requirements, depending on the size of the layoff and length of time of break in service. However, a possible exception to the federal and state WARN Act statutes may apply to this pandemic, which may allow for shortened notice if terminations result from circumstances that were not reasonably anticipated 60 days before the mass layoff. Certain states are already waiving the prior notice requirement of their particular state mini-WARN acts. Due to the complexity and intricacies of the WARN Act, it is strongly recommended that employers consult counsel for guidance.

Q **Will workers qualify for unemployment benefits if COVID-19 causes an employer to shut down operations or to lay off employees? (Updated January 4, 2021)**

A While each state determines the eligibility and benefits of its unemployment program, the DOL has issued guidance outlining states' flexibility in administering their programs, allowing states to elect to pay benefits when:

- An employer temporarily ceases operations due to COVID-19;
- An individual is quarantined with the expectation of returning to work after the quarantine is over; and
- An individual leaves employment due to a risk of exposure or infection or to care for a family member.

If an employee is receiving payment from his or her employer pursuant to a paid leave policy or State or local requirements, the employee will not be eligible for unemployment insurance in most circumstances.

The FFCRA allocated increased funding to states to extend unemployment benefits. Specifically, $1 billion was provided in the form of grants to states. To receive these reserve amounts, states were required to amend their laws to ease unemployment eligibility requirements and access in light of COVID-19, such as waiving work search or waiting period requirements. This federal funding allowed laid-off employees to access unemployment insurance more easily and more quickly as well as eased the future burden on employers' unemployment insurance taxes.

The CARES Act increased the amount of unemployment benefits to allow eligible employees an additional $600 per week in unemployment benefits and an extension of available benefits to up to 39 weeks (rather than the 26-week cap under most programs). The additional $600 in weekly benefits was designed to keep as many workers as whole as possible. Some individuals temporarily received more benefit than their paycheck. The temporary $600 was payable by the State to the individual, to be reimbursed by the Federal Government. It was not to be charged to the employer's Unemployment Insurance account. This additional sum was only available through July 31.

The CARES Act also expanded unemployment eligibility to cover individuals who are unable to work due to a COVID-19 related reason and added several categories of employees who have never been covered, such as self-employed, 'gig' workers and part-time workers.

On December 21, 2020, Congress passed the $1.4 trillion, 5,593 page Consolidated Appropriations Act ("CAA") that included over $900 billion in relief in its Coronavirus Response and Relief Supplemental Appropriations Act, 2021. President Trump signed the bill into law on December 27, 2020. The CAA allows eligible employees an additional $300 per week in unemployment benefits. The additional unemployment benefits and extensions will provide aid for another 11 weeks, through March 14, 2021. The CAA also extends the Pandemic Unemployment Assistance that expanded unemployment eligibility to cover individuals who were not traditionally eligible to receive unemployment benefits, such as self-employed and 'gig' workers.

Employers will want to check with their state unemployment insurance program for applicable information.

Employee Furlough and Layoffs – Benefits

Q **Should I continue (or terminate) an employee's health insurance benefits when that employee has to be furloughed or laid-off?**

A It depends. First, it is important to confirm the status of the employee. Is the employee on a permanent layoff, such that employment has been terminated with no specific right to reinstatement? Or is the employee on a temporary layoff, leave or furlough, such that the employee is still considered employed by the employer, simply with no active hours but an intention to be returned to work at a future date?

If employment has been terminated, the employee is no longer eligible for group health plan coverage as an active employee, and COBRA must be offered (if applicable) for all qualifying benefits (i.e., medical, dental, vision, FSA, etc.) due to the termination of employment. While some employers have inquired about continuing active coverage for a separated employee during an extended severance period, it is a best practice to terminate coverage immediately, initiate the COBRA process and provide the departing employee with additional severance pay to find his or her own coverage in order to minimize risk of non-compliance. Other employers have inquired about subsidizing the COBRA premium for separated employees. Employers considering this approach should consult with their McGriff Employee Benefits team to ensure that any subsidy will not jeopardize any applicable non-discrimination testing.

If employee is not terminated and the employee is on a temporary layoff, leave or furlough, then it is critical for an employer to determine how long the employee's benefits can be continued while the employee is not actively working (on leave). Unfortunately, there is not a simple answer to this question. Several issues should be considered:

- How does the plan document define eligibility? And termination of benefits?
- Is the leave protected by FMLA, other state leave regulation or the new Families First Coronavirus Response Act (FFCRA) expanded protections?
- If the employer is an applicable large employer (ALE) under the Affordable Care Act (ACA), what measurement method has the group adopted for determining FT status?
- Is there a company policy addressing how long benefits may be continued during an approved LOA?
- Is there a company precedent? How long has the company continued benefits for other employees who have been out on a LOA for any reason?

One of the most important steps is to review the plan documents to determine if they address whether benefits may be continued during a leave/furlough – and, if so, for how long – to avoid inadvertently self-insuring claims for coverage extended to ineligible participants. Each benefit policy could have a different requirement, so it may be helpful to reach out directly to carriers to confirm. It is also essential to consider whether the employee is on a form of leave with protected benefits (i.e., FMLA or state-equivalent leave), if the employee is still in a stability

period for employers using the look-back method to determine eligibility (provided the look-back periods have also been incorporated in a plan's terms of eligibility) as well as internal policies/procedures. Once the employee is no longer eligible for a benefit plan based on these considerations, COBRA must be offered due to the reduction in hours worked. Employer desiring to make an exception or offer benefits outside the established parameters should discuss with the carrier/stop loss carrier to request approval and ensure any plan amendments are made and communicated in accordance with ERISA any other applicable regulations.

Q **We would like to temporarily modify the definition of eligibility to allow employees with reductions of hours, or even on furloughs, to remain eligible for our health plan. Do we need to update our wrap document or to issue an SMM to our participants?**

A Any time a plan sponsor makes a change to the terms of its plan it needs to update the applicable plan document(s). The particulars of which documents need updating depends on the language contained within those documents. Some changes to a group health plan could implicate the group health plan document, a cafeteria plan documents and/or a wrap plan document. These changes should be communicated to plan participants and can be done in a Summary of Material Modification (SMM). If the eligibility definition is set forth in the Summary of Benefits and Coverage (SBC), this document may need to be modified as well. Note that while eligibility is not generally included on the SBC, changes to an SBC require a 60-day advance notice to participants per the Affordable Care Act (ACA).

Q **If an employer is using the look-back measurement to determine full-time status of its employees for benefit eligibility purposes, how does this impact an employee's eligibility during a temporary layoff or furlough? What about future eligibility?**

A It is important to first understand a key premise of the look-back measurement method. Under the method, employers look at an employee's average hours of service over a pre-determined historical period of time, known as the measurement period, to determine an employee's eligibility for coverage over a future coverage period, or stability period, *regardless of the number of hours currently being worked*. So, if an employer is using the look-back measurement method and *provided the look-back method's measurement and stability periods have been incorporated into the plan's eligibility and approved by the carrier/stop loss carrier*, an employee will generally remain eligible for coverage through the end of the current stability period, even if the employee goes on a temporary furlough or leave.

As an example, assume an employer has a January 1 renewal and uses a standard measurement period of 11/1 – 10/31 for ongoing employees to determine eligibility for the standard stability period of 1/1 – 12/31 (coinciding with the group's plan year). An employee's eligibility for the 2020 plan year would be dependent on the employee's average hours of service during the standard measurement period of 11/1/18 – 10/31/19. If the employee averaged 130+ hours of service per month during this measurement period, the employee would be considered eligible for coverage during the 2020 plan/calendar year, regardless of the current hours being worked during 2020.

In this example, the employee's break in service due to the temporary layoff/furlough would be taken into consideration for the 2021 plan year, when the employer measures the next measurement period of 11/1/19 – 10/31/20. If there is an extended break in service, the employee could fail to average full-time hours during the current measurement period, potentially making the employee ineligible for coverage during the 2021 plan year.

Some employers have asked about making an exception due to breaks in service related to COVID-19. Employers considering this approach should work closely with their McGriff Employee Benefits team to discuss options with their carrier/stop loss carrier and determine whether an exception could be made, possibly adjusting the standard required 130 hours average during the measurement period (the minimum required by the IRS) to something lower to account for the lack of hours worked during the furlough (for example, an average of 100 hours over the course of the measurement period).

Q **An employee was hired as a full-time employee, but put on a furlough before completing his waiting period. Will the time out on furlough be counted toward waiting period?**

A Whether or not approved leave of absence counts toward the completion of a waiting period depends upon what the plan document says. Eligibility is likely defined as a *full-time employee* who has completed the waiting period. A furlough is generally an approved LOA with no hours of service (meaning that the leave does not fall into any "special unpaid leave" like FMLA, USERRA or jury duty). The ACA prevents an *otherwise eligible employee (or dependent) from being required to wait more than 90 days before coverage becomes effective***.** It may be that these employees aren't otherwise eligible due to this reduction in hours during an approved leave of absence prior to reaching eligibility. Note: the HIPAA nondiscrimination rules can complicate the use of actively at work provisions if the employee is absent due to a medical condition (this would not be the case if an employee is on furlough due to a reduction of work availability due to COVID-19).

Q **Can employees remain on a group life insurance policy while on furlough due to COVID-19?**

A Employers should review their plan documents and insurance policies to determine if benefits such as life insurance continue during any time when an employee will not be actively working or will be working reduced hours. If the employee is no longer eligible, he or she may have the right to convert that coverage to an individual policy. An employer should confirm that it is meeting any and all requirements to notify the employee of the right of conversion per the terms of the contract with the life carrier. Employers should check with their carriers to see if they are making any exceptions or special accommodations for COVID-19 situations.

Q **What happens to an employee's FSA when on furlough?**

A Coverage remains in effect during any protected leave period (FMLA, etc.) unless the employee revokes the election. The 125 plan document must be consulted to see what happens during a

furlough. If leaves of absence cause a loss of eligibility, the plan sponsor needs to follow those terms unless they amend their 125 plan.

Q **What happens if an employee revokes FSA coverage during leave?**

A If an employee revokes FSA coverage during a furlough, health expenses incurred during the leave period are not eligible for reimbursement.

Q **Is the reduction in hours due to employee furlough a qualifying event allowing the employee to drop coverage?**

A IRS rules would allow for a mid-year election change under an employer's cafeteria plan to drop coverage due to a change in employment status, such as a reduction in hours, if it causes a loss of coverage. The IRS added an additional permissible change event to cafeteria plan rules post-ACA to allow for an election change due to a reduction in hours, even if there is no loss of coverage provided the employee certifies that he or she has obtained other coverage.

Most recently, on May 12th, the IRS issued cafeteria plan COVID-19 related relief in Notice 2020-29 to allow employers to amend their cafeteria plans to permit employees to make certain mid-year plan changes during calendar year 2020. Permissible change options include to change health coverage options (e.g., from HDHP to PPO), to add family members to coverage or to drop health coverage, although the latter requires a written certification that they are or will immediately enroll in other health coverage. The IRS provided a model certification employers can use for this purpose. Employers wishing to allow some or all of these new election events must notify all employees eligible to participate in the plan, ideally as soon as practicable. They must also amend their cafeteria plans to reflect the changes no later than December 31, 2021 and coordinate with the cafeteria plan administrator to ensure it can administer the plan consistent with the employer's intended changes. Employers should also confirm, in advance, any action it intends to take in this area will be consistent with the extent to which their carrier or stop-loss provider has/will allow these enrollments.

Keep in mind that all mid-year election event changes, including those available under the newly issued IRS guidance, are optional. An employer's cafeteria plan can permit all of those allowed under IRS rules, some or none of them. Employers should carefully review plan documents to discern what election change options are currently available and decide whether to add additional options per Notice 2020-29.

Q **If coverage is terminated during a furlough or layoff, will an employee be immediately eligible for health insurance benefits when he or she returns to work or must the employee complete a new waiting period?**

A It depends. When it comes to health insurance benefits, the Affordable Care Act mandates that an individual hired after a break in service (period in which there are no hours of service credited) **of less than 13 weeks must be treated as a continuing employee** and must be

returned in the same position as he or she left with no new waiting period, as determined by the employer's chosen measurement method:

- Monthly Measurement Method - Because eligibility for coverage is actually based on a month-to-month analysis, employees returning on a full-time basis are essentially re-gaining eligibility and will have new election rights.
- Look-back Measurement Method – Following a return to work, an employee steps back into the same measurement and/or stability period(s) that he or she was in when initially separated from employment. If the employee initially declined coverage for this stability period, an employer could rely on that declination and not offer coverage upon rehire. If the employee had initially elected coverage, the employer must reinstate coverage as soon as possible, but no later than first of the month following rehire.

In contrast, an individual rehired after a break in service of **at least 13 weeks may be treated as a new hire**, and the employer may apply a new waiting period and/or initial measurement period, as applicable.

An employer *can* allow the returning employees to make new elections, but that is not required. With the look-back measurement method, upon returning to the company, the employee would step back into the measurement or stability period that he or she was in when the employee initially separated from employment. If he or she initially declined coverage for this stability period, the employer could rely on that declination and not offer coverage upon rehire. If the employee had initially elected coverage, the employer should offer the same coverage – but can allow the employee to make a change at that time.

When it comes to benefits other than health insurance, it will be important to review the rehire and eligibility provisions in the related plan documents to confirm if benefits can be offered immediately or whether the employee must satisfy a new waiting period.

Q **If an employee loses coverage, can the employee sign up for insurance on the Marketplace outside of open enrollment?**

A Yes. Losing employer sponsored coverage due to a reduction of hours or loss of employment is a special event that would allow an individual to enroll at the Marketplace.

In addition, multiple states have reopened their health insurance exchanges to allow for enrollment. No federal marketplace open enrollment opportunity as of yet but HHS has been urged to open healthcare.gov for special enrollment opportunity. The CMS website instructs individual to see if they qualify for special enrollment here: https://www.healthcare.gov/blog/coronavirus-marketplace-coverage/.

Employee Furlough and Layoffs – Premium Payments

Q **What happens if a furloughed employee is not working and does not have enough money in a paycheck to deduct the employee's share of premiums for insurance benefits?**

A Generally, employees are required to pay premiums within an established grace period or coverage may be terminated. Particularly when an employee is on layoff, leave or furlough and will not have sufficient earnings from which to deduct premiums, it is important for the employer to provide the employee with written documentation, outlining expectations as to how much premium must be remitted, when premiums are due and any applicable grace period (minimum 30 days), to whom payments should be made and the consequences for failure to pay timely (i.e., retroactive termination to the date of the last payment).

Premiums may be collected in one of the following ways:

- Catch up – The employer may pay the full premium while the employee is on layoff or furlough and recoups the employee's portion of the premium when the employee returns to work;
- Pre-pay – The employee may voluntarily remit his or her expected share of the premium before going on leave; or
- Pay-as-you-go – The employer may require the employee to remit premiums on a regular basis (often monthly or on a pay period basis) on an after-tax basis.

Note that the FMLA has additional notification requirements before coverage may be terminated if the employee is on FMLA leave.

Keep in mind that an employee's failure to remit premium timely and any resulting termination of coverage is *not* a COBRA event and coverage may not be continued under this regulation.

Q **Can an employer adjust (either increase or decrease) employees' premium contributions while they are on furlough or leave?**

A Possibly. Generally, employers can change welfare plans at any time in their discretion unless they have given up that right through communications to employees. If changes are made, a Summary of Material Modifications (SMM) should be issued to participants. Additionally, if premiums are included in the Summary of Benefits and Coverage (SBC), a 60-day advance notification may be required.

From a Section 125 perspective, if the cost decrease is "significant" and both the Section 125 plan and underlying plan documents are written in a way to so provide, employees may have the right to make a new mid-year election or other corresponding change in their election. Unfortunately, the regulations do not provide a clear definition of "significant," so an employer would need to evaluate based on all of the facts and circumstances and on their employee population and past plan experience. You may also want to consult your McGriff Employee

Benefits Team about possible non-discrimination issues if employees on furlough are charged less for premiums than employees who are actively working.

Q **If a non-exempt employee's hours have been reduced, or the employee is on a furlough, but the employee remains eligible for coverage, how is the affordability determination under the Affordable Care Act's "Pay or Play" rules affected?** **(Updated January 4, 2021)**

A Applicable large employers (ALEs) are required to offer health insurance coverage that is "affordable" and provides "minimum value" or risk a tax penalty. In 2021, coverage is considered affordable if the employee's portion of the self-only premium for the employer's lowest-cost plan that provides minimum value does not exceed 9.83% of the employee's household income for the tax year.

The IRS provides three optional affordability safe harbors that allow an ALE to calculate affordability of its health coverage without requiring information on an employee's household income: the federal poverty level (FPL), the W-2 or the rate of pay. The loss of income caused by reduced hours or a furlough due to COVID-19 pandemic raises issues for the affordability calculations. If the employer is using the rate of pay or FPL safe harbors, there are no issues. The employer should be able to rely on either of these safe harbors as a determination of affordability. However, because the W-2 safe harbor is based on an employee's Box 1 earnings for the *current* calendar year, it is certainly possibly that the reduction in hours and/or furlough could negatively impact the affordability calculation, causing the employee's share of the premium to exceed 9.83% of the Box 1 earnings. Keep in mind, however, an employer will only be penalized if an employee's coverage is considered unaffordable *and* the employee receives a premium tax credit after obtaining coverage through the Marketplace.

We would welcome additional guidance from the IRS in light of these unusual circumstances.

Employee Furlough and Layoffs – COBRA

Q **If we offer COBRA to furloughed or terminated employees, do we have to pay some or all of the premiums on behalf of those employees?**

A No. When COBRA is offered, employers can charge 102% of premium for continued coverage.

Q **If we offer COBRA and want to pay for some or all of the coverage, what issues should we consider?**

A Employers should condition its payment of COBRA premiums on the employee timely electing COBRA coverage. Even if the employer is paying for full coverage for 18 months, there needs to be a written formal election. Without this election an insurer or stop loss carrier may deny coverage. Also, the employer should be clear on the amount it will pay. For example is it a full subsidy, or a partial subsidy? Does the subsidy apply to employee-only coverage or for family coverage? How long will the subsidy last? If the subsidy is not for the full COBRA period, there

is some uncertainty whether the cessation of a COBRA subsidy will trigger a special enrollment event for the Marketplace/Exchange.

Q **If we pay for COBRA coverage, is that taxable to the terminated or furloughed employee?**

A It depends:

- If the coverage is fully insured, any employer subsidy is nontaxable to the employee;
- If the plan is self-funded and the employer provides a subsidy to all participants eligible for COBRA coverage, then that subsidy should also be nontaxable;
- If a self-funded plan provides a subsidy to only a certain class(es) of employees, this practice may raise discrimination issues if highly-compensated individuals are included in the class(es). Highly-compensated individuals are generally those in the top 25% by compensation.

Counsel should be consulted if an employer wants to subsidize the COBRA premiums for only certain classes of employees in a self-funded plan in order to ensure compliance with Section 105(h) nondiscrimination rules. Also, any employer subsidy should be made directly to the carrier or plan. It may be possible to reimburse an employee directly on a tax free basis but only if the employee provides the employer with evidence that it has paid the full COBRA premium. Providing the employee with reimbursement without such proof would result in the subsidy being taxable.

Q **What if furloughed/terminated employees who have elected COBRA cannot afford to pay the COBRA premiums?**

A Failure to pay COBRA premiums timely will result in the COBRA coverage being terminated prior to the end of the COBRA required coverage period (usually 18 months). This early termination of coverage triggers a plan's obligation to notify each affected Qualifying Beneficiary in writing of the early termination date, the reason for the termination, and the availability of any alternative group or individual coverage under the plan, such as conversion rights.

Q **What happens to COBRA if we have to close down our business?**

A If your company goes out of business and there is no other related company (in the same controlled group) that offers a group health plan, then there is no COBRA available since there is no group health plan to which COBRA can attach.

Q **What kind of notice must we provide to COBRA beneficiaries and participants if the group health plan is terminated?**

A A notice of COBRA termination must be furnished by the plan administrator (usually the employer) as soon as practicable following the decision to terminate the plan. If the plan administrator is able to provide advance notice prior to the plan being terminated, it must do so. There may be other advance notice requirements for termination of a group health plan. For

example, the ACA requires 60 days advance notification for a material change to the Summary of Benefits and Coverage (SBC) and we think that a plan termination may fall into that category. Further, in some states there can be criminal or civil penalties for a group health sponsor to terminate a group health plan without advanced notice (For example, in North Carolina termination of a plan without 45 days advance can be a felony). Counsel should be consulted.

Q **How does FMLA or EFMLEA leave impact COBRA?**

A The start of an FMLA leave of absence is not a COBRA qualifying event. The COBRA qualifying event does not occur until an employee does not return to work following the FMLA leave of absence or the employee provides notice that he or she will not be returning.

Q **Can we elect COBRA coverage on behalf of our terminated employees?**

A No. Employers subject to COBRA must offer COBRA coverage to terminated employees, but the actual election of COBRA must be completed by the Qualifying Beneficiary/ies.

Q **If an employee is terminated, do we have to offer COBRA for the employee's Health Flexible Spending Account (Health FSA)? (Updated January 4, 2021)**

A It depends. If the terminated employee's Health FSA account is underspent, the employee must be offered COBRA at the time of termination. If the employee's Health FSA account is overspent, COBRA need not be offered. A Health FSA account is underspent at the time of termination if the employee has contributed more to the account during the current plan year than the employee has received in reimbursements. For example, assume an employee elected $2,400 in Health FSA elections in a calendar year plan. On June 30, the employee is terminated. At that time, the employee has contributed $1,200 to his Health FSA, but has only submitted claims for $900 in reimbursements. The Health FSA is underspent, COBRA must be offered COBRA.

This answer may also be impacted by the terminated employee relief under the CAA outlined above. We would welcome more guidance from the regulatory agencies and encourage employers to work with legal counsel and COBRA administrators in these situations.

Q **Has the DOL extended the deadlines for a qualifying beneficiary to elect COBRA?**

A Yes. Generally, COBRA rules provide a qualified beneficiary a period of at least 60 days to elect COBRA continuation coverage under a group health plan. On April 29, 2020, the DOL released its final rule extending certain deadlines, including the deadlines to elect COBRA. The DOL stated that all group health plans must disregard the period from March 1, 2020 until sixty (60) days after the announced end of the National Emergency or other date announced by the agencies (the "Outbreak Period") for all plan participants, beneficiaries, qualified beneficiaries, or claimants in determining the deadline for a qualifying beneficiary to elect COBRA.

DOL Example (reprinted from Final Rule): *The Example assumes that the National Emergency ends on April 30, 2020, with the Outbreak Period ending on June 29, 2020 (the 60th day after the*

end of the National Emergency). Individual A works for Employer X and participates in X's group health plan. Due to the National Emergency, Individual A experiences a qualifying event for COBRA purposes as a result of a reduction of hours below the hours necessary to meet the group health plan's eligibility requirements and has no other coverage. Individual A is provided a COBRA election notice on April 1, 2020. What is the deadline for A to elect COBRA?

Conclusion. Individual A is eligible to elect COBRA coverage under Employer X's plan. The Outbreak Period is disregarded for purposes of determining Individual A's COBRA election period. The last day of Individual A's COBRA election period is 60 days after June 29, 2020, which is August 28, 2020.

See DOL Final Rule Extension of Certain Timeframes for Employee Benefit Plans, Participants and Beneficiaries Affected by COVID-19.

Q Did the DOL extend the time an employer must allow a qualified beneficiary to make COBRA premium payments?

A Yes. Group health plans cannot require payment of premiums before 45 days after the day of the initial COBRA election. Generally, a premium payment is considered paid timely if it is made no later than 30 days after the first day of the period for which payment is being made (and COBRA can be terminated for failure to pay premiums). On April 29, 2020, the DOL released its final rule extending certain deadlines, including the deadlines for certain COBRA premium payments. The DOL stated that all group health plans must disregard the period from March 1, 2020 until sixty (60) days after the announced end of the National Emergency or other date announced by the agencies (the "Outbreak Period") for all plan participants, beneficiaries, qualified beneficiaries, or claimants in determining the deadlines for COBRA premium payments.

DOL Examples (reprinted from Final Rule): The Example assumes that the National Emergency ends on April 30, 2020, with the Outbreak Period ending on June 29, 2020 (the 60th day after the end of the National Emergency).

Example 1: On March 1, 2020, Individual C was receiving COBRA continuation coverage under a group health plan. More than 45 days had passed since Individual C had elected COBRA. Monthly premium payments are due by the first of the month. The plan does not permit qualified beneficiaries longer than the statutory 30-day grace period for making premium payments. Individual C made a timely February payment, but did not make the March payment or any subsequent payments during the Outbreak Period. As of July 1, Individual C has made no premium payments for March, April, May, or June. Does Individual C lose COBRA coverage, and if so for which month(s)?

Conclusion. In this example, the Outbreak Period is disregarded for purposes of determining whether monthly COBRA premium installment payments are timely. Premium payments made by 30 days after June 29, 2020, which is July 29, 2020, for March, April, May, and June 2020, are timely, and Individual C is entitled to COBRA continuation coverage for these months if she timely makes payment. Under the terms of the COBRA statute, premium payments are timely if

made within 30 days from the date they are first due. In calculating the 30-day period, however, the Outbreak Period is disregarded, and payments for March, April, May, and June are all deemed to be timely if they are made within 30 days after the end of the Outbreak Period.

Accordingly, premium payments for four months (i.e., March, April, May, and June) are all due by July 29, 2020. Individual C is eligible to receive coverage under the terms of the plan during this interim period even though some or all of Individual C's premium payments may not be received until July 29, 2020. Since the due dates for Individual C's premiums would be postponed and Individual C's payment for premiums would be retroactive during the initial COBRA election period, Individual C's insurer or plan may not deny coverage, and may make retroactive payments for benefits and services received by the participant during this time.

Example 2: Same facts as above. By July 29, 2020, Individual C made a payment equal to two months' premiums. For how long does Individual C have COBRA continuation coverage?

Conclusion. Individual C is entitled to COBRA continuation coverage for March and April of 2020, the two months for which timely premium payments were made, and Individual C is not entitled to COBRA continuation coverage for any month after April 2020. Benefits and services provided by the group health plan (e.g., doctors' visits or filled prescriptions) that occurred on or before April 30, 2020 would be covered under the terms of the plan. The plan would not be obligated to cover benefits or services that occurred after April 2020.

Q **Can we provide more than 18 months of COBRA coverage to furloughed/terminated employees?**

A The COBRA rules do not prohibit an employer from offering a longer period than the normal 18 month required period. However, if an employer wants to offer a longer period, it should discuss this with the carrier or stop loss carrier for the plan and obtain permission in writing before making this offer. Otherwise, the carrier or stop loss carrier may deny any claims during the extended period and the employer may be 100% fully self-insured (bare) on those claims and have to pay them out of the employer's assets.

CORONAVIRUS AID, RELIEF AND ECONOMIC SECURITY ACT (CARES ACT)

Q **What is the CARES Act?**

A The President signed the Coronavirus Aid, Relief and Economic Security Act (CARES Act) on March 27, 2020. This legislation provides $2.2 trillion in federal funding intended to stimulate the economy due to layoffs and other economic consequences of the COVID-19 pandemic. It follows on the heels of the FFCRA which provided expanded paid leave provisions in light of COVID-19. The CARES Act is 880 pages long and covers many different areas. The below FAQs touch on a few key provisions of the CARES Act related to group health plans and other employee benefit plans as well as certain aspects of the broader economic stimulus.

CARES Act: Group Health Provisions

Q **Does the CARES Act expand testing and coverage of COVID-19 without cost sharing?**

A The CARES Act expands testing and coverage of COVID-19 without cost sharing. The FFCRA previously required waiving all cost sharing for certain *FDA approved tests* but the CARES Act expands the approved forms of diagnostic testing that must be covered. It also requires testing providers to publicize the testing price and to establish reimbursement rates for testing by reference to either previously negotiated or published rates. Additionally, it requires coverage for any "qualifying coronavirus preventive service" which should ultimately cover vaccines/ immunizations that meet certain standards. Once a vaccine meets those standards, it must be covered with no cost sharing within *15 days* **-** a substantially shorter period than required under the ACA for other newly approved preventive services.

While COVID-19 testing is covered without cost sharing, several regulatory agencies recently clarified that testing conducted to screen for general workplace health and safety (such as employee "return to work" programs) is beyond this scope of FFCRA and the CARES Act.

Q **What documents need to be amended to address the requirement that COVID-19 testing and COVID-19 vaccines (when developed) be provided without cost sharing?**

A This change is required, not permissive. The group health plan will need to be amended with a corresponding summary of material modifications (SMM) issued to plan participants. Usually these types of changes could require 60 days advance notice under the ACA if the change affects the content of the Summary of Benefits and Coverage (SBC), but that timing is overridden for these changes that are required, not permissive. A single notice can serve as both the SBC-related notice and the SMM and should be issued as soon as possible.

Q **Can employees use Health FSA, HRA and HSA dollars on over the counter (OTC) expenses?**

A Yes. The ACA previously barred the reimbursement of over the counter (OTC) expenses from Health FSAs, HRAs and HSAs. The CARES Act now allows employees to request reimbursement of these expenses, along with menstrual care products, without a prescription effective January 1, 2020. This change is permanent (no sunset date) but is a permissive, not required, change.

Employers wanting to permit OTC expenses for Health FSAs and HRAs will likely need to amend their plan document. Similarly, for HSAs, it is possible that the custodial agreement may need to be amended. Although there is no specific guidance to date, it may be possible to adopt an amendment now and make the change retroactive to January 1, 2020; however, as there is no definitive guidance, employers should consult with counsel if they are considering a retroactive amendment. Alternatively, plans can be amended on a prospective basis. Employers should check with their plan administrators for additional guidance, such as whether an amendment is needed, when amendment language will be available and whether retroactive manual claims are possible. Point of sale systems will likely require programming in order for debit cards to be used. Employers should consult counsel for advice on the effective date of this change.

Q **The IRS extended the deadlines for certain actions, such as the deadline for filing personal income tax returns and making HSA contributions. Did the DOL also extend the deadline for filing Form 5500s?**

A No. The 2019 Form 5500 filing deadline for a calendar year plan falls on July 31, 2020. It's likely that the DOL declined to extend this deadline because plans have the option to request an extension until October 15th by filing IRS Form 5558 with the IRS prior to the July 31st deadline.

The DOL did extend the due date for Form 5500 filings for plan years that ended in September, October or November 2019, as well as Form 5500 deadlines falling between April 1 and July 15, 2020 (as a result of a previously filed extension request). These filings are now due on July 15, 2020 and the extension is automatic.

CARES Act: Other Provisions

Q **We hear there are a lot of tax-related provisions in the CARES Act. Can you give me a brief summary of what other provisions there are that might help my employees and my business?**

A The CARES Act is a pretty massive piece of legislation. Besides the provisions for group health plans, it contains provisions for retirement plans and a number of tax provisions that businesses across a broad spectrum of industries may find helpful. Keep in mind that certain eligibility criteria apply and some tax provisions only apply to certain industries (e.g., hospitality). These tax provisions are substantial in nature and as such, employees and employers should consult their respective tax advisors for clarification and further assistance. That said, below is a listing of some other important retirement plan and stimulus provisions.

- **Certain Retirement Plans**:
  - Can add a special "coronavirus-related distribution" in 2020 for "qualified individuals" who are diagnosed with COVID-19, have certain family members diagnosed with COVID-19, or experience certain specified adverse financial consequences related to their work because of COVID-19;
  - Can increase available loan amounts and likely must suspend (and re-amortize) certain loan repayments for qualified individuals as described above for coronavirus-related distributions; and
  - Can suspend certain required minimum distributions for 2020.
- **Employee Retention Credit**: Eligible employers (including tax-exempt entities but not governmental entities) may receive a refundable payroll tax credit of up to 50% of the first $10,000 of certain qualified wages (up to a potential net credit of $5,000 per employee) paid for periods during which the business operations are closed or partially suspended due to the COVID-19 pandemic. Family or sick leave wages paid out under the FFCRA do *not* qualify here as wages for purposes of the employee retention credit.

- **Paycheck Protection Program (PPP)**: This program authorizes up to $349 billion in forgivable loans to small business to pay their employees during the COVID-19 crisis. All businesses (including nonprofits, Tribal business concerns, sole proprietorships, self-employed individuals and independent contractors) with 500 or fewer employees can apply. Businesses in certain industries can have more than 500 employees if they meet applicable SBA employee-based size standards for those industries. Payroll costs include employee benefits: costs for vacation, parental, family, medical, or sick leave; allowance for separation; payments required for the provisions of group health care benefits including insurance premiums; and payment of any retirement benefit.

  If an employer is interested in requesting a PPP loan under the CARES Act, they should reach out to their own financial institution for more information on the application process and how much can be borrowed. The Treasury Department Fact Sheet provides very helpful FAQs on the process and benefits available. See also SBA Small Business Guidance Loan.

- **Delay of Employer Payroll Taxes**: Employers and self-employed individuals may defer paying employer payroll taxes related to Social Security and Railroad Retirement for wages paid in 2020. The deferred amounts would be payable over the next two years – half due December 31, 2021, and half due December 31, 2022.

- **Direct Payments to Individuals**: Taxpayers may receive up to $1,200 for individuals, up to $2,400 for couples filing joint tax returns and an additional $500 per child for families in the form of an advance refundable tax credit. The payments reduce with the level of income and phase out completely at certain income levels. Amounts are not taxable, but individuals must have a Social Security number to be eligible.

- **Student Loan Repayments**: Certain student loan repayments made between the CARES Act enactment date and the end of 2020 (up to $5,250) by employers for their employees will be tax free. The repayment must apply to the employee's student loan (not the employee's spouse or children); although, the employer can direct payment to either the employee or lender.

- **Unemployment Benefits:** The CARES Act increased the amount of unemployment benefits to allow eligible employees an additional $600 per week in unemployment benefits and an extension of available benefits to up to 39 weeks (rather than the 26-week cap under most programs). The additional $600 in weekly benefits is designed to keep as many workers as whole as possible. Some individuals may temporarily receive more benefit than their paycheck. The temporary $600 is payable by the State to the individual, to be reimbursed by the Federal Government. It will be not charged to the employer's Unemployment Insurance account. This additional sum is only available through July 31. The CARES Act also expanded unemployment eligibility to cover individuals who are unable to work due to a COVID-19 related reason and added several categories of employees who have never been covered, such as self-employed, 'gig' workers, independent contractors, new hires and part-time workers.