# COVID-19 Compliance Guidebook

## Employer Guide to Compliance Concerns Associated with COVID-19

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Gallagher

Insurance | Risk Management | Consulting

Now more than ever, employers need comprehensive support as you try to navigate the multitude of issues arising from the COVID-19 pandemic. Employers are faced with issues related to employee benefits, applicable leave laws, what constitutes a qualifying leave, reductions in hours, furloughs and layoffs, as well as many more. Some of the issues you may have already considered, others you may not, given the fast changing landscape. To help you get through this challenging time, the Gallagher Compliance Consulting team has put together this guidebook. If you have questions, please reach out to your Gallagher Consultant for assistance.

## About Gallagher Compliance Consulting

Gallagher's Compliance Consulting practice, which consists of more than 30 attorneys and consultants, averaging over 20 years of experience, partners with employers to deliver the strategy, deep expertise and holistic approach that allows our clients to differentiate their organization and build a workplace culture centered on organizational wellbeing at sustainable cost structures. Gallagher understands that employers are faced with numerous challenges when they are crafting benefits programs that meet their operational goals while still complying with all relevant mandates. Those same employers are now faced with additional unique challenges as a result of the COVID-19 pandemic. However, during this tumultuous time, Gallagher's compliance experts have continued to help employers stay on top of the many challenges they are confronting. Our team is immersed in the details and legal issues surrounding all aspects of employer-provided benefits during the COVID-19 pandemic, and together with our clients we work on crafting proactive plans that protect workforce and organizational wellbeing, reduce risk, take into consideration employers' strategic goals and address employers' unique compliance challenges as they work toward a better response to COVID-19.

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The information in this article is current through May 20, 2020. However, given the fast changing nature of the nation's response to the COVID-19 pandemic, we acknowledge that facts will change and invite you to visit our pandemic **site** where we maintain up-to-date information.

# Employer Response to COVID-19

As employers respond to the impact of the global spread of the coronavirus (COVID-19), it is important that they consider not only how their employees are impacted, but also how they can be supported by their employee benefits during this time of uncertainty. Below, we outline some important considerations as your organization tackles this worldwide phenomenon.

## Global Impact

On March 11, 2020, the World Health Organization (WHO) declared COVID-19 to be a pandemic. Shortly thereafter, the CDC provided guidance to help employers respond to COVID-19. In part, the CDC reminds employers to respond with flexibility to varying levels of severity and to be prepared to refine their business response plans as needed. The CDC guidance is still relevant as many employers are now contemplating returning to the workplace.

## Employee Benefits

In addition, the WHO and the CDC encourage employers to proactively educate employees on precautionary steps while working to strategically plan for business continuity and protect employees. Employers may also wish to communicate steps to proactively counter the spread of COVID-19, such as:

- disinfecting workspaces and common areas frequently
- promoting hand washing and personal hygiene
- encouraging trusted education and avoiding misinformation
- encouraging the use of telework opportunities and flexible work hours
- quarantining employees who may be showing flu-like symptoms

The last suggestion may raise concerns under federal employment laws, such as the Americans with Disabilities Act (ADA); however, employers may nonetheless ask employees who display flu-like symptoms to go home. Specifically, ADA guidance provides that:

*Employers may nonetheless ask employees who display flu-like symptoms to go home.*

*The CDC states that employees who become ill with symptoms of influenza-like illness at work during a pandemic should leave the workplace. Advising such workers to go home is not a disability-related action if the illness is akin to seasonal influenza or the 2009 spring/summer H1N1 virus. Additionally, the action would be permitted under the ADA if the illness were serious enough to pose a direct threat.*

Employers sponsoring health plans should also be mindful of privacy concerns under the Health Insurance Portability and Accountability Act (HIPAA). The Department of Health and Human Services (HHS) released a bulletin to remind covered entities and business associates that the HIPAA privacy requirements continue to apply during crises. HHS' bulletin emphasizes that HIPAA does not preclude the use and disclosure of the minimum amount of protected health information (PHI) necessary to treat a patient (i.e., an employee or dependent), to protect the nation's public health, or to prevent a serious and imminent threat to the health and safety of a person or the public. As employers are likely aware, HIPAA privacy rules contain limitations on a covered entity's ability to release information from a health plan for employment purposes.

When determining whether HIPAA applies, employers should be mindful of the source of the information about an employee's or dependent's infection. If the source of the information is from a claim under, diagnosis from, or some other connection to an employer-sponsored health plan, then the HIPAA privacy rules will apply, and the plan cannot

release the information without authorization from the individual for employment-related purposes. If an employer learns that an employee or an employee's dependent has the virus from the employee or a supervisor in connection with sick leave, for example, then the employer should look to employment-related laws, such as the ADA or FMLA, on how to communicate with fellow employees. For example, you may wish to send employees home who worked closely with an infected employee for a period of at least 14 days (or longer if governmental authorities determine a longer period is merited), but you should not identify the employee by name due to privacy concerns.

While employers are contemplating steps, as noted above, on how to address a localized outbreak, employers should also consider how their employee benefit programs may support employees due to the uncertainty surrounding the potential spread and impact of COVID-19. It will not surprise anyone that employees may feel additional concerns about their wellbeing, their family member's wellbeing, their jobs, and more. Employees may worry about interacting with individuals who have recently been exposed, but remain asymptomatic, or may worry about how the scope and course of the virus may impact their ability to work. So, employers should consider how their existing benefits programs can support employees. For example, employers may wish to circulate contact information about their employee assistance program (EAP) benefits when providing general information on how to protect against contracting the virus. EAPs are generally resource programs that can help employees through stressful situations and events.

*Employers should also consider how their employee benefit programs may support employees in these uncertain times.*

Additionally, employers may wish to consider how their telehealth benefits, if any, can assist with employees concerned about possible exposure to the virus. For example, if employees are self-quarantining, then access to telehealth services to confer with healthcare providers may be an appreciated benefit and helpful to reduce potential exposure for others.

## Coverage for COVID-19 diagnosis and testing

The Families First Coronavirus Response Act (FFCRA) generally requires group health plans and health insurance issuers offering group or individual health insurance coverage to provide benefits for certain items and services related to diagnostic testing for the detection of COVID-19. Under the FFCRA, plans and issuers must provide this coverage without imposing any cost-sharing requirements (including deductibles, copayments, and coinsurance) or prior authorization or other medical management requirements.

The CARES Act amends the FFCRA to include a broader range of diagnostic items and services that plans and issuers must cover without any cost-sharing requirements, prior authorization, or other medical management requirements. Additionally, the CARES Act generally requires plans and issuers providing coverage for these items and services to reimburse any provider of COVID-19 diagnostic testing an amount that equals the negotiated rate or, if the plan or issuer does not have a negotiated rate with the provider, the cash price for such service that is listed by the provider on a public website. (The plan or issuer may negotiate a rate with the provider that is lower than the cash price.)

Moreover, certain state departments of insurance have required coverage not only for testing and diagnosis, but also for treatment of COVID-19, so employers should check with their insurers for their fully insured medical benefits to ensure that applicable requirements are met.

## Sick Leave

In addition to benefit considerations, many employers have provided additional paid sick leave. For example, Uber offers drivers and delivery people 14 days of paid sick leave if they fall ill with COVID-19 or are placed in quarantine.

Other employers may have employees eligible for state or local paid sick leave. The California Department of Industrial Relations issued FAQs on paid sick leave and COVID-19, which affirm the use of leave under California paid sick leave laws. Several states and cities around the country have passed laws mandating that employers provide workers with paid sick leave, certain employers must provide paid sick leave under the Families First Coronavirus Response Act (FFCRA), and employers should be mindful that unpaid leave under the Family and Medical Leave Act (FMLA) is likely to be available. Given the patchwork nature of laws, all employers, irrespective of location, should evaluate which, if any employees, are entitled to mandated state or local sick leave, paid leave under the FFCRA, or unpaid leave under FMLA.

# Families First Coronavirus Response Act

On March 18, 2020, the Families First Coronavirus Response Act (FFCRA) was signed into law. The FFCRA, which passed with bipartisan support, seeks to ensure the safety of Americans and ease the economic toll of the 2019 Novel Coronavirus (COVID-19) by strengthening the social safety net. A summary of the most important provision for employers follows.

## Emergency Paid Sick Leave

For many employers and their employees, the most significant provision is the introduction of Emergency Paid Sick Leave. The FFCRA requires employers with fewer than 500 employees and government employers to provide employees who are unable to work or telework with two weeks of paid sick leave, Emergency Paid Sick Leave or EPSL, calculated using the employee's regular rate of pay, due to one of the following reasons:

*Eligible employees are entitled to two weeks of paid sick leave.*

(1) The employee is subject to a Federal, State, or local quarantine or isolation order related to COVID-19.

(2) The employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19.

(3) The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis.

(4) The employee is caring for an individual who is subject to a quarantine or isolation order as described in (1), above, or has been advised as described in (2), above.

(5) The employee is caring for a son or daughter whose school or place of care has been closed, or the child care provider is unavailable, due to COVID-19 precautions.

(6) The employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services in consultation with the Secretary of the Treasury and the Secretary of Labor.

Under the FFCRA, an employer's obligations are limited to paid leave of $511 per day ($5,110 in the aggregate) where leave is taken for reasons (1), (2), and (3) above (i.e., an employee's own illness or quarantine) calculated using 100% of an employee's regular rate of pay, and $200 per day ($2,000 in the aggregate) where leave is taken for reasons (4), (5), or (6) (i.e., care for others or school closures) calculated using two-thirds an the employee's regular rate of pay.

*Paid sick leave for part-time employees is based on their typical two-week periods.*

Full-time employees are entitled to two weeks (80 hours) of leave and part-time employees are entitled to the typical number of hours that they work in a typical two-week period. The FFCRA allows employers to exclude employees who are health care providers or emergency responders from this coverage.

Under the FFCRA, Emergency Paid Sick Leave expires on December 31, 2020, and any unused paid leave granted by the FFCRA does not carry over into 2021.

## Emergency Family and Medical Leave Expansion Act

The FFCRA also temporarily amends the Family and Medical Leave Act (FMLA) to provide employees of employers with fewer than 500 employees and government employers who have been on the job for at least 30 days with the right take up to 12 weeks of job-protected leave for Public Health Emergency Leave (PHEL).

To qualify for PHEL, an employee must be unable to work or telework due to a need to care for the son or daughter under 18 years of age because the child's school or place of care has been closed, or the child care provider of such son or daughter is unavailable, due to a public health emergency. A "public health emergency" is defined to mean "an emergency with respect to COVID-19 declared by a Federal, State, or local authority." Note that an employee must provide advance notice as soon as practicable of a need for leave under this temporary provision when the need for leave is foreseeable.

The first two weeks of leave may be in the form of EPSL (described above) or an employee may choose to substitute accrued vacation leave, personal leave, or other medical leave during this period, but an employer may not require an employee to do so. An employee may also take unpaid leave for the first two weeks. After two weeks of leave, employers must continue paid PHEL at a rate of no less than two-thirds of the employee's usual rate of pay. The FFCRA limits the amount of required paid leave to no more than $200 per day and $10,000 in total.

As with EPSL, the FFCRA provides that an employer may exclude employees who are health care providers or emergency responders from PHEL coverage.

As with traditional FMLA leave, this leave is job-protected, which means that an employer must return the employee to the same or equivalent position upon his or her return to work. However, there is an exception to the job protection provisions for employers with fewer than 25 employees if the employee's position does not exist after FMLA leave due to an economic downturn or other operating conditions that affect employment caused by the COVID-19 pandemic.

Emergency Family and Medical Leave (or PHEL) is effective April 1, 2020 through December 31, 2020.

## Tax Credits for Paid Sick and Paid Family and Medical Leave

Payroll Credit for Required Paid Sick Leave. To assist employers who need to fund emergency paid sick leave, the FFCRA provides a refundable tax credit equal to 100 percent of qualified paid sick leave wages paid by an employer for each calendar quarter. The tax credit is allowed against the tax imposed by Internal Revenue Code section 3111(a) (the employer portion of Social Security taxes).

*The FFCRA provides refundable tax credits to fund the leave programs it mandates.*

For tax purposes, the FFCRA distinguishes among reasons an employee is paid qualified sick leave wages. For employees who are subject to a quarantine or are seeking diagnosis or treatment with respect to COVID-19, the amount of qualified sick leave wages taken into account for each employee is capped at $511 per day. For amounts paid to employees for the other qualifying reasons for paid sick leave (e.g., to take care of a child whose school had been closed), the amount of qualified sick leave wages taken into account for each employee is capped at $200 per day. The aggregate number of days taken into account per employee may not exceed the excess of ten over the aggregate number of days taken into account for all preceding calendar quarters.

If the credit exceeds the employer's total tax liability under section 3111(a) for all employees for any calendar quarter, the excess credit is refundable to the employer. To prevent a double benefit, no deduction is allowed for the amount

of the credit. In addition, no credit is allowed with respect to wages for which a credit is allowed under Code section 45S. Employers may also elect to not have the credit apply.

Payroll Credit for Required Paid Family Leave. To assist employers who need to fund paid Public Health Emergency Leave, the FFCRA also provides a refundable tax credit equal to 100 percent of qualified PHEL wages paid by an employer for each calendar quarter. The tax credit is allowed against the tax imposed by Code section 3111(a) (the employer portion of Social Security taxes). Qualified wages are wages required to be paid by the Emergency Family and Medical Leave Expansion Act.

The amount of qualified family leave wages taken into account for each employee is capped at $200 per day and $10,000 for all calendar quarters. If the credit exceeds the employer's total liability under Code section 3111(a) for all employees for any calendar quarter, the excess credit is refundable to the employer.

To prevent a double benefit, no deduction is allowed for the amount of the credit. In addition, no credit is allowed with respect to wages for which a credit is allowed under Code section 45S. Employers may again elect to not have the credit apply

Any wages paid for emergency paid sick or emergency family and medical leave under the FFCRA are not considered wages for purposes of Code section 3111(a).

The tax credits for emergency paid sick leave and emergency paid family leave will be available for eligible leaves taken between April 1, 2020 and December 31, 2020.

# DOL Temporary Rule on COVID-19 and FFCRA Leave

On April 1, the Department of Labor (DOL) issued a Temporary Rule implementing required paid leave under the Families First Coronavirus Response Act (FFCRA). Following is a brief discussion of some of the key points in the Temporary Rule.

*The DOL Temporary Rule on COVID-19 and FFCRA Leave provides important clarifications.*

## Additional Definitions

The Temporary Rule provides more detailed explanations of some of the key terms under the FFCRA, including the following:

- Son or daughter. A son or daughter is defined as the employee's biological, adopted, or foster child, stepchild, a legal ward, or a child of a person standing in loco parentis who is under 18 years of age. The definition also includes a child 18 years of age or older who is incapable of self-care because of a mental or physical disability.

- Being advised by a health care provider to self-quarantine. Being advised by a health care provider to self-quarantine includes situations where the health care provider has determined that the individual has, or may have, COVID-19, or the health care provider has determined that the individual is particularly vulnerable to COVID-19.

- Seeking medical diagnosis for COVID-19. Seeking medical diagnosis for COVID-19 applies if the individual is experiencing COVID-19 symptoms (as identified by the CDC) and is taking affirmative steps to obtain a medical diagnosis such as making, waiting for, or attending an appointment for a test for COVID-19.

- Health care provider. The term health care provider is expanded for purposes of determining who may be excluded from eligibility for EPSL and PHEL. Substantially broader than the definition of a health care provider under the Family and Medical Leave Act (FMLA), in this context, a health care provider includes health care professionals and individuals who are employed at health care facilities and institutions, laboratories and pharmacies, but it also includes a broader range of individuals, including individuals employed by an entity that contracts with a facility such as a hospital to provide services or maintain the operation of that facility. The definition also includes anyone employed by an entity that provides medical services, produces medical products, or is involved in the making of COVID-19 related medical equipment, tests, drugs, diagnostic vehicles, or treatments.

- First responder. The term first responder is similarly broadly defined to include those categories of employees who (1) interact with and aid individuals with physical or mental health issues, including those who are or may be suffering from COVID-19; (2) ensure the welfare and safety of our communities and of our Nation; (3) have specialized training relevant to emergency response; and (4) provide essential services relevant to the American people's health and wellbeing. Thus, an emergency responder is anyone necessary for the provision of transport, care, healthcare, comfort and nutrition of patients, or others needed for the response to COVID-19. It would include military or National Guard, law enforcement officers, correctional institution personnel, fire fighters, emergency medical services personnel, paramedics and emergency medical technicians, but would also include 911 operators, public health personnel, child welfare workers, and others who have been identified as "essential workers." While the DOL endeavored to identify these categories of workers, it was cognizant that no list could be fully inclusive or account for the differing needs of specific communities. Therefore, the definition allows for the highest official of a state or territory to identify other categories of emergency responders, as necessary.

## Emergency Paid Sick Leave (EPSL)

One of the reasons employees may qualify for EPSL is when they are unable to work or telework because of a Federal, State, or local quarantine or isolation order related to COVID-19. Importantly, the Temporary Rule clarifies the application of the term "subject to a quarantine or isolation order" to include quarantine, isolation, containment, shelter-in-place, or stay-at-home orders issued by any Federal, State, or local government authority. However, there must be work or telework that the employee could perform ***but for the order***. Thus, an employee may take EPSL only if being subject to one of these orders is the factor that prevents him or her from working or teleworking. The Temporary Rule includes an example of a coffee shop that closed due to a downturn in business related to COVID-19. An employee who was previously employed at the coffee shop and who is subject to a stay-at-home order may not take EPSL because his inability to work is not due to his need to comply with the stay-at-home order, but rather due to the closure of his place of employment. The DOL states that this analysis holds even if the coffee shop's closure was substantially caused by the stay-at-home order.

The same analysis would apply if the employee's reason for leave is the need to care for an individual, such as a spouse, who has been quarantined for COVID-19 reasons. The qualifying reason applies only if "but for' the need to care for the individual subject to the order, the employee would be able to work. If the employer does not have work for the employee, he would not be eligible for EPSL. Note also that the employee must have a genuine need to care for the individual. That is, the person being cared for must be an immediate family member, roommate, or a similar person with whom the employee has a relationship that creates an expectation that the employee would care for the person.

Similarly, the Temporary Rule also clarifies that EPSL applies when an employee is unable to work or telework because the employee needs to care for his or her son or daughter if the child's school or place of care has closed or the child care provider is unavailable, due to COVID-19 related reasons, but only if the employer has work for the employee to perform. In addition, the employee is not eligible for emergency paid sick leave if another suitable individual – such as the spouse – is available to care for the child.

The Temporary Rule also clarifies what it means to be able to telework in the context of EPSL. An employee subject to an order to quarantine or isolate may not take EPSL if (a) the employer has work for the employee to perform; (b) the employer permits the employee to perform that work from the location where the employee is being quarantined or isolated; and (c) there are no extenuating circumstances that prevent the employee from performing that work. This is intended to encourage employers and employees to implement highly flexible telework arrangements during such unconventional times. The DOL includes an example where an employee works 7-9 a.m., 12:30-3 p.m. and 7-9 p.m. on weekdays with the employer paying the employee for the 7.5 hours per day actually worked (rather than use the DOL's continuous workday rule).

All employees employed by a covered employer are eligible to take EPSL regardless of their duration of employment. If an employee is eligible for both EPSL and PHEL, the employee may first use the two weeks of EPSL, which would run concurrently with the first two weeks of PHEL. Note that the first two weeks of PHEL would otherwise be unpaid (unless the employee elects to use accrued PTO, vacation, or sick time, in any order).

### *Amount and Payment of EPSL*

The Temporary Rules provides additional details on the amount and payment of EPSL. A full-time employee is entitled to 80 hours of EPSL, and a part-time employee is entitled to the number of hours that he works, on average, over a two-week period. If the part-time employee's schedule varies from week to week, the number of hours should be calculated using the average number of hours per week that the employee was scheduled over the six-month period ending on the date on which the employee takes the paid sick leave – including hours for which the employee took leave (if any). As a general rule, if the employee has been employed for less than six months, the number of

hours of paid leave is based on the average hours worked for his entire period of employment. It is of important note that the 80 hour maximum of EPSL applies on a per person basis, not a per employer basis. Consequently, an employee who uses 60 of his 80 EPSL hours is only eligible for 20 hours, either from the current employer or a subsequent employer.

An employee taking paid sick leave because the employee is unable to work or telework because of (1) a Federal, State, or local quarantine or isolation order related to COVID-19; (2) advice by a health care provider to self-quarantine due to concerns related to COVID-19; or (3) symptoms of COVID-19 while seeking medical diagnosis, is eligible to receive, as paid leave, for each applicable hour, the greater of:

- the employee's regular rate of pay;
- the federal minimum wage in effect under the FLSA; or
- the applicable State or local minimum wage.

In these circumstances, the employee's paid leave is subject to a maximum of $511 per day, or $5,110 total over the entire paid sick leave period.

In contrast, an employee may take EPSL because the employee is: (1) caring for an individual who is subject to a Federal, State, or local quarantine or isolation order related to COVID-19 or an individual who has been advised by a health care provider to self-quarantine due to concerns related to COVID-19; (2) caring for a child whose school or place of care is closed, or child care provider is unavailable, due to COVID-19 related reasons; or (3) experiencing any other substantially-similar condition that may arise, as specified by the Secretary of Health and Human Services, is entitled to compensation at 2/3 of the greater of the amounts above. Finally, an employee's entitlement to, or use of, EPSL may not be used to reduce or eliminate any other right or benefit to which the employee is entitled under any other Federal, State or local law, bargaining agreement, or employer policy that existed prior to April 1, 2020. EPSL is in addition to other sources of sick leave to which the employee is entitled.

## Public Health Emergency Leave (PHEL)

As stated above, PHEL is only available for one reason – an employee is unable to work or telework because of a need to care for the employee's son or daughter whose school or place of care is closed or whose child care provider is unavailable due to COVID-19 related reasons. The FFCRA created this new leave by temporarily amending Title I of the FMLA. As a result, many of the rules that apply to the FMLA will also apply to PHEL. However, there are a number of significant differences:

- Private employers with fewer than 500 employees that do not qualify for the small business exemption (outlined below) are required to provide PHEL. FMLA generally applies to employers with 50 or more employees.

- Employees who have been on the payroll of a covered employer for at least 30 calendar days are eligible for PHEL. Employees will be treated as eligible if they were on their employers' payroll for 30 calendar days immediately before taking leave. In addition, an employee who is laid off on or after March 1, 2020, will be considered to have been employed for at least 30 calendar days if she is rehired on or before December 30, 2020 and had been on the employer's payroll for 30 or more of the 60 calendar days prior to the date of layoff. In contrast, under the FMLA an employee must have been employed for at least 12 months with at least 1,250 hours of service.

- PHEL is unpaid leave for the first two weeks. Thereafter, the employee must be paid two-thirds (66 2/3%) of her regular wages for a period of up to 10 weeks. The employee may take EPSL or use other available leave or paid time off, such as vacation days, for the first two weeks. FMLA leave is generally unpaid.

- For PHEL, the use of intermittent leave is more limited than under "traditional" FMLA, and both the employer and employee must agree on intermittent leave, including the increments of time to be used for the intermittent leave. Intermittent leave is permitted for telework, but for employees who report to the employer's worksite, intermittent leave is permitted **solely** when the leave is to care for the employee's son or daughter whose place of school is closed or whose child care provider is unavailable because of COVID-19.

- An employee may take up to 12 weeks of PHEL between April 1, 2020 and December 31, 2020. No PHEL is available after 2020, but payments may be made in early 2021 for leave taken in late 2020 where payment is delayed due to payroll periods. In addition, because the FFCRA amended Title I of the FMLA, PHEL counts toward the FMLA maximum leave time. For example, if an employer uses the calendar year for FMLA and an employee used eight weeks of FMLA before April 1, 2020 for a serious illness, that employee would only be eligible for up to four weeks of PHEL. Further, if the employee uses 10 weeks of PHEL through August 2020, she would have two weeks of FMLA remaining for 2020 to care for a newborn child. An employee who has already used her 12-week FMLA entitlement would not be eligible for PHEL, but may be eligible for EPSL.

- Employees and employee notice requirements are more flexible (described below) than those for traditional FMLA.

In addition, an employee is not eligible for PHEL to care for a child whose school or place of care has closed or whose child care provider is unavailable due to COVID-19 if another suitable individual (such as a spouse) is available to care for the child. In addition, similar to the requirements for EPSL, the Temporary Rule uses the same "but for" analysis to determine an employee's eligibility for PHEL. In other words, an employee may not take PHEL to care for his or her child unless, but for a need to care for the child, the employee would be able to perform work either at the employer's normal workplace or through telework.

### *Amount and Payment of PHEL*

The Temporary Rules provides additional guidance on the amount and payment of PHEL. The first two weeks of PHEL is unpaid leave; however, employees are entitled to use EPSL during the first two weeks of PHEL or to substitute other available paid leave, and PHEL is paid leave after the first two weeks. The amount payable is two-thirds (66 2/3%) of the greater of (1) the employee's regular pay; (2) federal minimum wage, or (3) applicable state or local minimum wage – up to a maximum of $200 per day ($10,000 in aggregate).

Under a related DOL FAQ, after the first two workweeks (usually 10 workdays) of PHEL, an employee may elect, or an employer may require, that an employee take concurrently (for the same hours of PHEL leave) any existing leave that, under the employer's policies, would be available to the employee under the same circumstances. This would likely include personal leave or paid time off, but not medical or sick leave if the employee (or a covered family member) is not ill.

If an employer does require concurrent leave, it must pay the employee the full amount to which he or she is entitled under an existing paid leave policy for the period of leave taken. If the employee exhausts all preexisting paid vacation, personal, medical, or sick leave, the employer must pay the employee at least 2/3 of his or her pay for subsequent periods of PHEL taken, up to $200 per day and $10,000 in the aggregate. The employer may amend its own policies to the extent consistent with applicable law.

## Health Plan Coverage

*Employees eligible for EPSL or PHEL are entitled to continue health coverage during leave.*

Similar to the FMLA, an employee who takes EPSL or PHEL, is entitled to continue health coverage during the leave. Group health plan coverage must be provided to the employee on the same terms as if the employee did not take leave - including medical, dental, vision, and other health benefits. Coverage under an account-based plan, such as a health reimbursement arrangement (HRA) or a health flexible spending account (health FSA), must also be continued. The employee may, however, choose to discontinue health coverage during the leave period. If the employee discontinues coverage during the leave, she is entitled to have the coverage reinstated when she returns from leave. If there is a change in the health benefits plan while the employee is on leave, the employee is entitled to the modified benefits to the same extent as if the employee was not on leave.

Employees in a group health plan who take EPSL or PHEL are required to pay their regular contributions. Employee contributions should be made using the normal method if the leave is paid. If the leave is unpaid, the employer may use the FMLA rules, which include three possible methods – pay-as-you-go, post-pay and pre-pay. Pre-pay may not be the only option.

Except as required by the Consolidated Omnibus Budget Reconciliation Act of 1986 (COBRA), an employer's obligation to maintain health benefits while an employee is taking EPSL or PHEL ceases if and when the employment relationship would have terminated if the employee had not taken EPSL or PHEL (e.g., if the employee fails to return from leave, or if the entitlement to leave ceases because an Employer closes its business).

Neither the FFCRA nor FMLA require employers to continue other types of coverage, such as life and disability insurance, during a leave. Employers should work with their insurers to determine what options may be available for continuing coverage.

## Return to Work

In most cases, an employee who takes EPSL or PHEL is entitled to be restored to the same or an equivalent position upon return from leave. Similar to the FMLA, the new leave does not change the rules concerning employment changes, such as layoffs, that would have affected the employee regardless of whether leave was taken. Under certain circumstances, an employer may deny job restoration to a key employee who took PHEL (but not EPSL) if it is necessary to prevent substantial and grievous economic injury to the operations of the employer.

There is also an exception to the return-to-work rule after PHEL for an employer who has fewer than 25 employees. The Temporary Rule added detail for employers seeking to use the exception. In order to use the exception, the employer must satisfy **all** of the following four criteria:

1. The employee took leave to care for her son or daughter whose school or place of care was closed or whose child care provider was unavailable;
2. The employee's position no longer exists due to economic or operating conditions caused by a public health emergency (i.e., the COVID-19 pandemic) during the employee's leave;
3. The employer made reasonable efforts to restore the employee to the same or an equivalent position; and
4. If the employer's reasonable efforts to restore the employee fail, the employer makes reasonable efforts for a period of time to contact the employee if an equivalent position becomes available for one

year beginning either on the date the leave related to COVID-19 reasons concludes or the date twelve weeks after the employee's leave began, if earlier.

## Small Business Exemption

The Temporary Rule also provides additional guidance on the small business exemption under the FFCRA. A small business with fewer than 50 employees can deny an employee EPSL or PHEL to care for the employee's son or daughter whose school or place of care is closed or child care provider is unavailable, for COVID-19-related reasons only if:

1. Providing the leave would cause the small employer's expenses and financial obligations to exceed available business revenue and cause the small employer to cease operating at a minimal capacity;
2. The absence of the employee or employees requesting such leave would pose a substantial risk to the financial health or operational capacity of the small employer because of their specialized skills, knowledge of the business, or responsibilities; or
3. The small employer cannot find enough other workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services the employee or employees requesting leave provide, and these labor or services are needed for the small employer to operate at a minimal capacity.

A small employer who decides to deny EPSL or PHEL must document the facts and circumstances that satisfy these criteria. Documentation need not be provided to the DOL, but should be retained by the employer.

NOTE: A business claiming the exemption is not entitled to tax credits for any qualified leave wages that it is exempt from providing.

## Notice Requirements

### *Employer Notice*

Employers required to provide leave must post on their premises in conspicuous places a notice explaining the FFCRA's leave provisions, including information concerning procedures for filing complaints with the DOL. The DOL has created a model notice that employers may use for this purpose. Employers may use another format for the notice as long as the employer's notice includes all of the information contained in the DOL's model notice. An employer is not required to provide the notice in any language other than English; however, the DOL has posted model notices available in Spanish and Korean. The employer may also mail or email the notice to employees or it may post the notice on an internal or external website. For employers that are required to provide FFCRA leave, but are not subject to the FMLA, this notice will satisfy their notice obligation.

### *Employee Notice*

An employer may require an employee to follow reasonable notice procedures after the first workday for which an employee takes EPSL. Whether a procedure is reasonable will be determined based on the facts and circumstances of each case. Generally, it will be reasonable for notice to be given by the employee's spouse or an adult family member if the employee is unable to do so. If an employee fails to give notice, the employer should notify the employee of the failure and give the employee an opportunity to provide the necessary documentation before denying a request. A similar rule applies if the employee requests leave in order to care for a child whose school or place of care is closed, or if the child care provider is unavailable, due to COVID-19.

The employee must provide basic information to document the need for leave, such as the dates for which leave is requested, the qualifying reason for the leave, and an oral or written statement that the employee is unable to work because of the qualified reason. If the reason for the leave is related to quarantine, the employee must provide the name of the health care provider who advised the employee (or individual for whom the employee is caring) to self-quarantine due to COVID-19 or the name of the government entity that issued the quarantine or isolation order, as applicable. If the leave is due to the closure of the employee's son or daughter's school or the unavailability of the child care provider, the employee must provide the name of the child being cared for and the name of the school or child care provider. In addition, the employee must provide a statement that no other suitable person will be caring for the employee's child while the employee is on EPSL or PHEL, and, if the leave is needed to care for a child older than fourteen during daylight hours, the employee should provide a statement that special circumstances exist requiring the employee to provide care.

*Employees must provide basic information to document the need for leave.*

## Recording Keeping

An employer is required to retain all documentation concerning leaves – whether granted or denied – for a period of four years. If the employer denies an employee's request for leave based on the small business exemption, the employer's authorized officer must make the determination using the specified criteria and must retain documentation of that determination for four years. The employer will also need to create and maintain documentation needed to support its application for tax credits from the Internal Revenue Service using Forms 7200 and 941. Instructions for Form 7200 include a list of required documentation

## Employer Action Steps

Employers should become familiar with the new rules as soon as they can. Several concrete action steps that employers can take now include:

- Communicate with employees using the DOL's model poster. For employers that are open, the notice should be posted in conspicuous locations at their worksites. For employers not currently open and for employers with employees who are working remotely, determine the best method to provide this information to employees – e.g., mail, email, or sending a link to your intranet or website.
- Create procedures to handle requests for EPSL and PHEL. Determine who will be responsible for receiving, reviewing, and responding to requests for leave.
- Use existing FMLA processes (or create a process if you are not subject to the FMLA) for handling health coverage continuation during approved leaves, such as collecting employee contributions. For non-health coverage, discuss any available coverage continuation options with insurers.
- Begin the process of documentation and record keeping that will be needed to claim the tax credit for paid leave expenses and to substantiate your leave decisions.
- Prepare for activities that will need to be undertaken once quarantine and isolation orders are lifted and employees who have been working remotely return to the worksite. If actions such as furloughs, reduced hours, unpaid leaves, or layoffs were needed, have a strategy in place for returning those employees to the workplace, or if employees will not be returning, determine how to handle the termination process.
- Review new information as the DOL provides additional guidance.
- Become familiar with the IRS rules and forms to be used to claim the tax credit for qualifying EPSL and PHEL.

# COVID-19 and Qualifying Leave

After the passage of the Families First Coronavirus Response Act (the FFCRA), many employers face questions about whether their employees will qualify for either leave under the Act or "traditional" leave under the Family and Medical Leave Act (FMLA). "Traditional" FMLA leave includes leave for an eligible employee's own serious health condition that makes the employee unable to perform the functions of his or her job.

- An employee is "unable to perform the functions of the position" when a health care provider finds that the employee is unable to work at all or is unable to perform any one of the essential functions of the employee's position, within the meaning of the Americans with Disabilities Act (ADA), as amended.
- An employee who must be absent from work to receive medical treatment for a serious health condition is considered to be unable to perform the essential functions of his or her position during the absence for treatment.

"Traditional" FMLA leave also allows leave for an eligible employee when the employee is needed to care for certain qualifying family members (child, spouse or parent) with a serious health condition. (The definition of son or daughter includes individuals for whom the employee stood or is standing "in loco parentis". The definition of parent includes individuals who stood "in loco parentis" to the employee.)

"Needed to care for" encompasses both physical and psychological care. It includes, for example:

- Providing care for a qualifying family member who, because of a serious health condition, is unable to care for his or her own basic medical, hygienic, nutritional or safety needs, or is unable to transport himself or herself to the doctor, etc.;
- Providing psychological comfort and reassurance that would be beneficial to a child, spouse or parent with a serious health condition who is receiving inpatient or home care; or
- Filling in for others who normally care for the family member or to make arrangements for changes in care (transfer to a nursing home, for example).

The employee need not be the only individual or family member available to care for the qualifying family member.

In addition to "traditional" FMLA leave, Congress introduced two types of leave through the Families First Coronavirus Response Act – Public Health Emergency Leave and Emergency Paid Sick Leave. To qualify for Public Health Emergency Leave, an individual must require time off to care for the son or daughter under 18 years of age of such employee if the school or place of care has been closed, or the child care provider of such son or daughter is unavailable, due to a public health emergency.

In contrast, to qualify for Emergency Paid Sick Leave, the employee must establish a need because of one of the following:

- The employee is subject to a Federal, State, or local quarantine or isolation order related to COVID-19.
- The employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19.
- The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis.
- The employee is caring for an individual who is subject to a quarantine or isolation order as described in (1), above, or has been advised as described in (2), above.
- The employee is caring for a son or daughter whose school or place of care has been closed, or the child care provider is unavailable, due to COVID-19 precautions.
- The employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services in consultation with the Secretary of the Treasury and the Secretary of Labor.

Below, we highlight some frequently asked questions about which type of leave may apply in the context of COVID-19. Note that for purposes of these examples, we have assumed that both the employer and the employee are covered for purposes of the applicable leave with regard to employer size and employment history. For more information about the leave applicability for Public Health Emergency Leave and Emergency Paid Sick Leave, please see our article, Family First Response Act Becomes Law.

| | **"Traditional FMLA"** | **Public Health Emergency Leave** | **Emergency Paid Sick Leave** |
|---|---|---|---|
| **I have a cough and fever and I'm self-isolating, do I qualify for leave?** | No.<br><br>Unless you receive inpatient care (i.e., you're hospitalized) or are under continuing care (i.e., you visited a doctor AND received prescription treatment OR you have visited a doctor two or more times for the same cough and fever) for more than three days, then even if you have a cough and fever for more than three days, it does not qualify for "traditional" FMLA leave. | No. | No.<br><br>Unless you are advised by a health care provider to self-quarantine due to concerns about COVID-19 or are seeking a medical diagnosis due to COVID-19 symptoms. |
| **I've been diagnosed with COVID-19 and my doctor told me to remain in self-isolation for 14 days, do I qualify for leave?** | No.<br><br>Unless you receive inpatient care (i.e., you're hospitalized) or are under continuing care (i.e., you visited a doctor AND received prescription treatment OR you have visited a doctor two or more times for the cough and fever) for more than three days, then even if you are ill with COVID-19 for more than three days, it does not qualify for "traditional" FMLA leave. | No. | Yes.<br><br>You qualify because you have been diagnosed with COVID-19 and are quarantined or isolated under a doctor's recommendation. |
| **I've been diagnosed with COVID-19 and my doctor told me to remain in self-isolation for 14 days, do I qualify for PAID leave?** | No. | No. | Yes.<br><br>You qualify because you are experiencing symptoms associated with COVID-19 and are self-isolated on a health care provider's advice. |

| | "Traditional FMLA" | Public Health Emergency Leave | Emergency Paid Sick Leave |
|---|---|---|---|
| **My child's middle school has suspended classes for an indefinite period because of COVID-19, do I qualify** | No. | Yes.<br><br>You qualify because the leave is to care for a son or daughter under 18 years of age of because the child's school or place of care has been closed due to a public health emergency so long as a co-parent, co-guardian or your normal caregiver is not available to care for the child. However, the first two weeks are unpaid unless you are able to substitute some other form of paid leave or Emergency Paid Sick Leave. | Yes.<br><br>You qualify because the leave is to care for your child because the child's school or place of care has been closed due to the coronavirus so long as a co-parent, co-guardian or your normal caregiver is not available to care for the child. |
| **My mother-in-law has been hospitalized with COVID-19, do I qualify for leave?** | No.<br><br>"Traditional" FMLA leave does not extend to in-laws. | No. | Probably not.<br><br>Although you could obtain leave to care for her if your mother-in-law was self-isolated due to her diagnosis with COVID-19, this scenario involves hospitalization rather than a doctor's recommendation for self-isolation, so you would not be needed to care for your mother-in-law. |
| **My employer has ordered me to stay home for the next 30 days, do I qualify for leave?** | No.<br><br>Unless you or a family member has a "serious health condition," you do not qualify for "traditional" FMLA leave. | No. | Maybe.<br><br>If your employer ordered you to stay home because it does not have work for you to do, you do not qualify. If your employer ordered you to stay home and you are unable to work or telework because of a federal, state, or local shelter-in-place or stay-at-home order and your employer has work for you, you will qualify, but paid leave is only available for two weeks. |
| **I have been furloughed by my employer, do I qualify for leave?** | No.<br><br>A furlough, unfortunate as it is, is not a serious health condition. | No.<br><br>A furlough, unfortunate as it is, is not a qualifying reason for Public Health Emergency Leave. | No.<br><br>A furlough, unfortunate as it is, is not a qualifying reason for Emergency Paid Sick Leave. |
| **I've been diagnosed with COVID-19 and hospitalized, do I qualify for leave?** | Yes.<br><br>Your own inpatient care in a hospital, hospice, or residential medical care facility is considered to qualify you as | No. | Presumably yes.<br><br>Emergency Paid Sick leave applies to individuals who seek a diagnosis after experiencing |

| | "Traditional FMLA" | Public Health Emergency Leave | Emergency Paid Sick Leave |
|---|---|---|---|
| | having a serious health condition. | | symptoms associated with COVID-19. |
| **My father was diagnosed with COVID-19 and hospitalized, do I qualify for leave?** | Maybe.<br><br>You may qualify for "traditional" FMLA leave in order to care for certain family members, such as a spouse, a child, or a parent, but you must establish that you are needed to care for that family member. Since your father would be hospitalized, it is not likely that a healthcare provider would certify that you are needed to care for your father. However, you may be able to qualify after your father is released in order to help him recover. | No. | Probably not.<br><br>Although you could obtain leave to care for him if your father was self-isolated due to his diagnosis with COVID-19, this scenario involves hospitalization rather than self-isolation, so you would not be needed to care for your father. |
| **My spouse was exposed to COVID-19 as part of his job and has been ordered by his doctor to self-isolate because he poses a threat to the community, do I qualify for leave?** | No.<br><br>Unless your spouse has a "serious health condition" as defined by FMLA, you do not qualify for leave. | No. | Probably, if you've been advised by a health care provider to self-quarantine and are unable to work or telework.<br><br>If your spouse has COVID-19, but is still asymptomatic, you may also have been exposed to the virus through him, and a healthcare provider may also order you to self-isolate. |
| **I have flu-like symptoms and I think I may have COVID-19 and am waiting on test results, do I qualify for leave?** | No.<br><br>Unless you have a serious health condition that lasts more than three days, you do not qualify. However, you may become qualified if you are under continuing treatment or inpatient care. | No. | Yes.<br><br>If you self-isolate while waiting for a diagnosis, you qualify for Emergency Paid Sick Leave, even if it is later determined that you do not have COVID-19. |

# COVID-19 and Reductions in Hours, Furloughs, and Layoffs

As the nation responds to the multi-faceted effects of COVID-19, many employers have faced temporary closures and the grim decision of reducing employee hours, introducing furloughs, or laying off employees. Employers have a number of issues to consider as a result of reducing the size of their workforce, such as application of the WARN Act or the size of severance packages to offer. Also important to understand and consider is the impact that these actions will have on health and welfare benefits. This article from Gallagher discusses some of the significant employee benefit considerations associated with staffing reductions faced by employers and their employees in the midst of this pandemic.

## Reductions in Hours, Furloughs, and Layoffs: A Menu of Terms

*Employers have options when facing work stoppage.*

Although each employer in a given industry may be faced with the same reality – a temporary work stoppage or reduction due to COVID-19 – the path chosen in furtherance of that necessity may differ based on the individual employer. Employers have a number of options available to them when it comes to work stoppages or reductions in workforce. An employer may choose to reduce the hours of service for some or all of its employees. An employer can also downsize its workforce by laying off employees, resulting in a permanent reduction in its workforce through terminations. Employers looking for a solution that does not permanently terminate employment relationships can turn to furloughs, which allow employees to return after a temporary unpaid leave, generally lasting a few weeks to a few months.

## Counting Hours for Furloughed Employees or Employees with Reduced Hours

Employers who have implemented or intend to implement furloughs or reducing employees' work hours must consider how such a decision impacts their employees' status as full-time or not full-time for purposes of the Patient Protection and Affordable Care Act (ACA). Under the ACA's Employer Mandate, employers of a certain size must offer affordable, minimum value coverage to their full-time employees to avoid Employer Shared Responsibility penalties. In the case of a reduction in hours or a furlough, it would seem that an employee whose hours are reduced such that he or she is no longer considered to be a full-time employee would no longer be offered health coverage. However, depending on the method used to determine full-time status (monthly measurement method or look-back method), an employee's status as full-time (or not) may be locked in for a period of time.

*Employers must consider how their decisions impact their employees' status for purposes of the ACA.*

With the monthly measurement method, an employee's hours of service are calculated for a given month and an offer of coverage must be made for any month in which the employee has at least 130 hours of service to avoid an ACA Employer Shared Responsibility penalty associated with that employee. For example, an employee has at least at least 130 hours of service from January through March, but is furloughed for two weeks in April, and then resumes normal working hours for May through December. To avoid a penalty, the employer must offer coverage for January through March and May through December, but does not have to offer coverage for April.

In contrast, an employer using the look-back measurement method may find an employee's full-time status is protected. Using the look-back measurement method, an employee's full-time status is determined during a measurement period for a corresponding stability period (following the measurement period). Therefore, when an employee has been determined to be a full-time employee during the measurement period, his or her full-time status during the corresponding stability period is protected. This means an employee who originally met the full-time employee threshold under the look-back measurement period will continue to be considered a full-time employee for

the corresponding stability period even if his or her hours are reduced or he or she is furloughed and no longer meets the full-time hours of service threshold.

## Eligibility for Benefits Where there is a Reduction in Hours or Furlough

Employers who reduce employees' hours or implemented furloughs in response to COVID-19 should consider how that will affect employees' eligibility for benefits. Plan terms govern plan eligibility. For example, a plan may have an "actively at work" requirement or may require full-time status (as defined in the plan) for an employee to be eligible for coverage. An employee who has a reduction in hours or is furloughed may cease to satisfy the eligibility definition and consequently no longer be eligible for coverage.

*Employers should consider the impact on benefits eligibility.*

Depending on the terms of the plan, the carrier or stop-loss carrier may take the position that employees lose their eligibility for coverage during a work stoppage. Alternatively, a plan could include a provision that permits continued eligibility in the event of a temporary layoff. In either case, the determination is governed by plan terms. Further, in the absence of such a provision, it is possible that the carrier would agree to continue coverage during a COVID-19-related temporary work stoppage. Similarly, a carrier may be willing to allow continued coverage for employees whose hours are temporarily reduced to the extent that they no longer satisfy the plan's hours worked requirement. In that case, the plan may need to be amended and a summary of material modification delivered to participants to explain the change.

Note that for an employer who uses the look-back measurement method, as noted above, employees who remain employed during a stability period (notwithstanding a temporary period of low or no hours) if determined to be full-time during a measurement period would still be considered full-time during the subsequent stability period. In that case, removing such individuals from coverage during a furlough or reduction in hours would not be optimal and could result in ACA penalties. To protect against that possibility, the employer may be able to arrange continued coverage with the carrier for the temporary period of absence.

Employers should review their plan documents for each benefit offered to determine employees' eligibility for coverage and should discuss with their carriers the implications of a reduction in hours or furlough in response to COVID-19. Employers have flexibility to determine eligibility for their plans and may choose to be more generous than the law requires in this unique situation, but should do so with agreement from their carriers.

## Cafeteria Plan Elections

If a furlough or reduction in hours causes an employee to lose eligibility for a benefit under a plan, that constitutes a change in election event allowing that individual to change his or her salary reduction election. Under prior rules, if the furlough or reduction in hours did not impact eligibility, there was no change in election event and, therefore, no change in election or coverage would be permitted. However, under IRS Notice 2020-29, for mid-year elections made during the calendar year 2020, a cafeteria plan may permit employees to make any of the following election changes on a prospective basis:

- An employee who initially declined to enroll in health coverage may be permitted to enroll in the plan.
- Employees who enrolled in a health plan option may change to a different health plan option.
- An employee who enrolled in a health plan option may drop coverage, but only if the employee will immediately enroll or is enrolled in other comprehensive health coverage such as: (1) another employer's plan such as the spouse's employer; (2) individual Marketplace coverage; (3) Medicaid; (4) Medicare; (5) TRICARE; (6) CHAMPVA; or (7) other coverage that provides comprehensive health benefits (such as health insurance provided through a student health plan).

- Employees may enroll in a health FSA, end enrollment, or they may increase or decrease existing health FSA elections.
- Employees may enroll in a DCAP, end enrollment, or they may increase or decrease existing DCAP elections.

Employers must require a written attestation from employees who want to drop coverage. The Notice includes the following sample attestation:

> Name: _____(and other identifying information requested by the employer for administrative purposes).
>
> I attest that I am enrolled in, or immediately will enroll in, one of the following types of coverage: (1) employer-sponsored health coverage through the employer of my spouse or parent; (2) individual health insurance coverage enrolled in through the Health Insurance Marketplace (also known as the Health Insurance Exchange); (3) Medicaid; (4) Medicare; (5) TRICARE; (6) Civilian Health and Medical Program of the Department of Veterans Affairs (CHAMPVA); or (7) other coverage that provides comprehensive health benefits (for example, health insurance purchased directly from an insurance company or health insurance provided through a student health plan).
>
> Signature: _____

Employers may permit some or all of these changes in their cafeteria plans. For example, employers may:

- permit employees to drop health coverage if they have other coverage, but not enroll;
- limit elections to those that would result in increased coverage, to prevent adverse selection under their health plans; or
- adopt all of the health plan changes and the DCAP changes, but not permit changes in health FSA elections.

Employers that choose to permit any of these changes must formally amend their cafeteria plan document no later than December 31, 2021. In addition, employers that make a change will need to notify all cafeteria plan participants. Note that these changes apply only to mid-year elections made in 2020.

New elections must be effective on a prospective basis. Employees may not be permitted to make retroactive elections. However, it appears that the relief provided in this Notice is available retroactively to cafeteria plans that had already permitted election changes this year as long as the changes that were permitted are consistent with the requirements of this Notice.

It would be prudent for employers that want to relax election rules for health plan coverage under their cafeteria plans to confirm that their insurers (or stop loss insurers) are willing to permit new elections. Without insurer agreement, an employer that permits an employee who declined health coverage to enroll or to change plan options based on Notice 2020-29, may find itself unintentionally self-insuring the coverage if the insurer is not willing to amend its contract.

An employer may want employees to be able to drop health flexible spending account (health FSA) coverage during a furlough. In that case, the plan's eligibility provisions must state that coverage under the health FSA ends when an employee is no longer actively working, or the employer must adopt the relaxed 2020 cafeteria plan permissible change in status for health FSAs as noted above.

## Applicable Large Employers Must Include Laid Off Employees in Their IRS Reporting

*Applicable Large Employers must include laid off employees in IRS reporting.*

Section 6056 of the ACA requires every applicable large employer (ALE) to file a form (i.e., a Form 1095) with the IRS to report information about its full-time employees and to furnish each full-time employee with a statement containing similar information. These forms must be filed regardless of whether the ALE offers coverage or whether the employee enrolls in any coverage offered.

In completing a Form 1095-C, an employer must indicate on Part II of the form whether it offered coverage for all days of the calendar month to a particular individual (and any dependents). However, if an employee terminates employment with the ALE before the last day of a month and the coverage (or offer of coverage) expires upon termination of employment, but the coverage would have otherwise continued until the end of the month, then the ALE should report that month as an offer of coverage using code 2B. If the coverage (or offer of coverage) would have continued had the employee not terminated employment during the month, then the ALE will be eligible for relief under the Employer Mandate for that employee's last month of employment.

## COBRA Notices for Employees No Longer Covered

For some employees, coverage will end as employers make tough decisions to terminate employment or cut employees' hours to handle the COVID-19 crisis. The requirements under COBRA are clear– continuation coverage must be offered when qualified beneficiaries (certain employees, terminated employees, retirees, spouses, former spouses, and dependent children) lose coverage due to a triggering event (called a "qualifying event"), such as a termination of employment or a reduction in hours worked. Plan sponsors and plan administrators are required to provide qualified beneficiaries with COBRA election notices upon the loss of coverage triggered by qualifying events. The election notice describes the ensuing COBRA rights and obligations to which a qualified beneficiary is entitled, as well as the procedures necessary to make an election of COBRA coverage. COBRA coverage is not automatic; it must be affirmatively elected. Without a timely provided notice, the employer is exposed to lawsuits and fines. When instituting large scale layoffs or terminations, human resources departments may be increasingly prone to costly failures to timely provide the COBRA election notice.

*Furloughs or reductions in hours may trigger COBRA continuation obligations.*

The election notice must be furnished by the plan administrator to qualified beneficiaries within 14 days after the plan administrator receives the notice of a qualifying event (from either the employer or the qualified beneficiary). If the qualifying event is one where the employer has the obligation to notify the plan administrator of the event (such as a termination of employment or a reduction in hours) and the employer is the plan administrator, then the election notice must be provided to the qualified beneficiaries within 44 days from the date that the qualifying event occurs.

In late April, 2020, the DOL, IRS, and HHS (the Agencies) issued regulations extending certain timeframes related to special enrollment rights, COBRA deadlines, and claims that would otherwise apply. Under the regulations, group health plans, disability, and other employee welfare benefit plans subject to ERISA or the Internal Revenue Code (Code) must disregard a period called the Outbreak Period when calculating certain time periods. The Outbreak Period is the period from March 1, 2020 until 60 days after the announced end of the National Emergency (or such other date announced by the Agencies). For example, if the announced end of the National Emergency is April 30, 2020, the Outbreak Period will be March 1, 2020 through June 29, 2020 (i.e., through 60 days after April 30, 2020). Thus, a plan would not include any dates from March 1, 2020 through June 29, 2020 when counting days indicated by the Agencies' guidance. Note, however, that the Outbreak Period may end at different times for different parts of the country. The Agencies will issue additional guidance, if needed, on that topic.

As related to COBRA, the Outbreak Period should be excluded when counting days for the following periods and dates—

- The 60-day election period for COBRA continuation coverage;
- The date for making COBRA premium payments; and
- The date for individuals to notify the plan of a qualifying event or determination of disability for purposes of COBRA.

The Agencies provided an example of the relief as it applies to COBRA. Note: The example assumes that the National Emergency ends on April 30, 2020 and thus that the Outbreak Period ends on June 29, 2020.

> *Facts*. 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*. In this Example, 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.
>
> *Comment: Because the individual's COBRA qualifying event occurred after the Outbreak Period began (i.e., after March 1, 2020), the plan does not begin counting days for the COBRA election period until the end of the Outbreak Period.*

In addition to the deadline relief noted above, the DOL's Employee Benefits Security Agency (EBSA) issued two revised model COBRA notices and three FAQs on May 1. The new model notices are intended to help Medicare eligible individuals make decisions about their health coverage. Notably, the new model notices do not include information about the impact of the Outbreak Period on deadlines. Thus, employers with employees impacted by the expanded timeframes should provide an additional communication to employees to notify them of the extended timeframes – possibly through a cover letter or other communication.

Although compliance may be difficult for employers with employees spread across multiple locations, the alternative may prove to be immensely costly. Employers who violate COBRA requirements could face penalties under the Internal Revenue Code and ERISA. Further, employers are at risk of lawsuits filed by the Department of Labor and/or qualified beneficiaries. The compounding effect of COBRA penalties creates an environment that strongly encourages compliance.

# Employees Who Cannot Cover Salary Reduction Elections During the COVID-19 Pandemic

With the rapidly changing business environment in the midst of the 2019 Novel Coronavirus (COVID-19) pandemic, many employers have been faced with having to furlough employees or otherwise reduce employee hours. One issue that may arise as a result of those actions is that some employees may not earn enough compensation to cover a salary reduction election for benefits. This article from Gallagher discusses issues to consider in addressing potential pay shortages.

## Options for Funding Benefits during a Pay Shortage

As employers monitor the economic implications of COVID-19 for their employees, they might consider paying the employee's portion of benefits premiums if an employee has a pay shortage due to reduced hours or a furlough. An employer can pay the employee's portion of the premium, but should consult with its tax advisor about any potential tax implications.

*Employers have options on handling employee premiums during furloughs or leaves.*

Other options exist if paying the employee's portion of the premium is not feasible. While the IRS has not provided specific guidance regarding situations where, due to a furlough or a reduction in employee hours, there is a pay shortage without loss of benefit eligibility, it has issued regulations that address how an employee may pay for benefits during an FMLA leave. Those regulations provide three options for handling the contribution obligations of employees who continue group health coverage during an unpaid FMLA leave: (1) prepayment with a special salary reduction; (2) pay-as-you-go on an after-tax basis; or (3) catch-up salary reductions (or after-tax payment) upon return from the leave. Thus, the IRS has indicated that salary reduction elections for group health coverage, at least in the context of FMLA leave, can be accelerated, deferred, or paid on an after-tax basis when there is no pay. It seems reasonable to apply similar concepts in the non-FMLA context as well. Moreover, no requirement exists that salary reduction contributions be made on a ratable basis in equal amounts every pay period. Of course, the plan document should contain language flexible enough to accommodate the employer's method for handling pay shortages.

The first option under the FMLA regulations – prepayment by acceleration of the salary reduction – is not likely to be useful in this COVID-19 situation because the pay shortage is not necessarily anticipated in advance. It's more helpful in situations where the pay shortage is predicted, as in the event of a planned leave. It is worth noting, though, that the FMLA regulations do not allow prepayment to be the sole option made available to employees on unpaid FMLA leave. Further, the prepayment option cannot be used to pay for benefits in a subsequent plan year. The second option – pay-as-you-go on an after-tax basis – will only be useful for participants with additional resources to pay the amount out-of-pocket. Thus, the third option – catch-up salary reductions – is most likely to work when the pay shortage is unexpected or occurs suddenly, such as in response to COVID-19. Note that if an employer allows catch-up contributions upon an employee returning to work, those can be made on a pre-tax basis under a Section 125 cafeteria plan.

The risk in allowing catch-up salary reductions is that the employer may not be able to recoup the deferred salary reductions if the employee does not return to work or is unable to make a payment. An employer permitting this option might consider establishing an outside limit for the deferral (e.g., 30 or 60 days) and then stopping or reducing coverage at the end of the time period if the catch-up salary reduction is not made or is insufficient to cover the amount due.

## Order of Funding Benefits during a Pay Shortage

In situations where the pay shortage is enough to cover some, but not all, of an employee's salary reduction elections, the employer will be confronted with the issue of the order in which the elected benefits should be funded. Should cafeteria plan benefits or retirement benefits be funded first? The plan sponsor should address the issue by establishing a uniform administrative practice. Even though no guidance exists, it seems reasonable, based on the fact that a lapse in payment could cause a cancellation of coverage, that the plan sponsor should first take salary reductions for health, disability, and life insurance benefits. But other ordering rules may be reasonable, too. Irrespective of what ordering rules are adopted, the relevant cafeteria plan documents must be amended and the adopted policy must be communicated to employees.

*Plan sponsors should determine in what order benefit premiums should be funded during a shortfall period.*

## Cafeteria Plan Considerations

In general, once an employee elects coverage offered through a Section 125 plan, the employee may not drop or change such coverage until the next open enrollment. This general rule could be problematic for employees whose full-time status, and corresponding benefits eligibility, is based on a stability period under the Patient Protection and Affordable Care Act (ACA) Employer Shared Responsibility rules. For example, consider an employee who achieves full-time employee status during a measurement period and elects benefits for the corresponding stability period (e.g., plan year). However, during the stability period, the employee's hours are reduced so that he is no longer full-time. Assume that the employee does not lose eligibility for the group health plan because he is in a stability period and is thus locked into the coverage for the remainder of the stability period. With the employee's reduced hours, he may no longer earn enough money to cover the salary reduction contributions for his coverage. To address such situations, the IRS rules include a permitted election change that would allow affected employees (i.e., employees who worked more than 30 hours per week and drop below 30 hours per week) to drop the employer-sponsored coverage elected, provided they intend to immediately enroll in other "minimum essential coverage." As with any Section 125 plan permitted election change, this permitted election change must be reflected in the Section 125 plan document.

The IRS granted additional relief through Notice 2020-29. Under Notice 2020-29, for mid-year elections made during the calendar year 2020, a cafeteria plan may permit employees to make any of the following election changes on a prospective basis:

- An employee who initially declined to enroll in health coverage may be permitted to enroll in the plan.
- Employees who enrolled in a health plan option may change to a different health plan option.
- An employee who enrolled in a health plan option may drop coverage, but only if the employee will immediately enroll or is enrolled in other comprehensive health coverage such as: (1) another employer's plan such as the spouse's employer; (2) individual Marketplace coverage; (3) Medicaid; (4) Medicare; (5) TRICARE; (6) CHAMPVA; or (7) other coverage that provides comprehensive health benefits (such as health insurance provided through a student health plan).
- Employees may enroll in a health FSA, end enrollment, or they may increase or decrease existing health FSA elections.
- Employees may enroll in a DCAP, end enrollment, or they may increase or decrease existing DCAP elections.

Employers must require a written attestation from employees who want to drop coverage. The Notice includes the following sample attestation:

Name: _____(and other identifying information requested by the employer for administrative purposes).

I attest that I am enrolled in, or immediately will enroll in, one of the following types of coverage: (1) employer-sponsored health coverage through the employer of my spouse or parent; (2) individual health insurance coverage enrolled in through the Health Insurance Marketplace (also known as the Health Insurance Exchange); (3) Medicaid; (4) Medicare; (5) TRICARE; (6) Civilian Health and Medical Program of the Department of Veterans Affairs (CHAMPVA); or (7) other coverage that provides comprehensive health benefits (for example, health insurance purchased directly from an insurance company or health insurance provided through a student health plan).

Signature: _____

Note that adoption of the relaxed election rules is not mandatory. An employer may choose to adopt some, all, or none of the new relaxed rules.

*If a furlough or reduction in hours does not impact eligibility, there's no change in election event.*

Additionally, if a furlough or reduction in hours causes an employee to lose eligibility for a benefit under a plan, that constitutes a change in election event allowing that individual to change his or her salary reduction election. If the furlough or reduction in hours does not impact eligibility, there is no change in election event and, therefore, no change in election or coverage may be permitted. Further, an employer may want employees to be able to drop health flexible spending account (health FSA) coverage during a furlough. In that case, the plan's eligibility provisions must state that coverage under the health FSA ends when an employee is no longer actively working.

## Implications for the ACA Employer Mandate

Employers who are faced with employees who cannot cover their salary reduction elections will not be subject to a penalty under the ACA Employer Mandate. IRS guidance indicates that employers will not be penalized for employees whose coverage is canceled because they cannot cover their salary reduction elections as long as certain requirements are met, including the mandatory "grace period," which allows employees additional time to make premium payments.

# Top 10 Employer FAQs

## Is our plan required to cover testing for COVID-19?

Yes. The Families First Coronavirus Response Act, passed by the Senate on March 18, 2020, requires private health plans to cover testing for COVID-19 without cost sharing. In addition, some states have announced that insured health plans in their states are required to waive cost-sharing for costs related to the testing and treatment of COVID-19; some states have strongly recommended carriers and plans waive all cost-sharing, and many national and local carriers have chosen to comply voluntarily.

## Is our plan required to cover treatment for COVID-19?

Maybe. Some states have announced that insured health plans in their states are required to waive cost-sharing for costs related to the treatment of COVID-19; additionally, some states have strongly recommended carriers and plans waive all cost-sharing, and many national and local carriers have chosen to comply voluntarily.

## Is our organization permitted to resume regular operations?

*For Gallagher's comprehensive FAQ in response to the COVID-19 pandemic, please click here.*

Undoubtedly, the first question on employers' minds when contemplating a return to work is whether they are permitted to resume regular operations. The White House issued federal guidelines in the form of "Opening Up America Again" with recommended practices for employers. However, employers should be aware that the power to ease restrictions remains at the state and local level, so employers must also be aware of city, state, county or parish modifications to state-at-home or shelter-in-place orders.

## What workforce screening measures should we introduce when bringing employees back?

After consideration for how facilities will be handled, employers must turn to the workers themselves and develop a plan for screening measures for symptoms of COVID-19. Employers who wish to do so should remain apprised of guidelines from the EEOC. Under EEOC guidelines, an employer may ask specific questions about COVID-19 and screen job applicants for symptoms of COVID-19 after making a conditional job offer, so long as it follows the same practice for all offerees in the same type of job. The ADA prohibits employee disability-related inquiries or medical examinations unless they are job-related and consistent with business necessity. Generally, a disability-related inquiry or medical examination of an employee is job-related and consistent with business necessity when an employer has a reasonable belief, based on objective evidence, that:

1. An employee's ability to perform essential job functions will be impaired by a medical condition; or
2. An employee will pose a direct threat due to a medical condition.

According to the EEOC, based on CDC guidance and public health authorities' statements as of March 2020, the COVID-19 pandemic meets the direct threat standard. The CDC and public health authorities have acknowledged the community spread of COVID-19 in the United States and have issued precautions to slow the spread. Those actions, along with actions taken by state and local authorities, support an EEOC finding that a significant risk of substantial harm would be posed by having someone with COVID-19, or symptoms of it, present in the workplace.

EEOC rules would thus permit an employer to implement screening questions seeking to determine whether an employee has experienced flu-like symptoms associated with COVID-19 in the past 14 days and whether an

employee has traveled in the previous 14 days. Employers may wish to use written questionnaires, which should be maintained as any other confidential medical record following guidelines under the Americans with Disabilities Act (ADA). More specifically, under EEOC ADA guidance, all information about applicants or employees obtained through disability-related inquiries or medical examinations must be kept confidential. Information regarding the medical condition or history of an employee must be collected and maintained on separate forms and in separate medical files and be treated as a confidential medical record.

### Can we exclude employees from the workplace if they are sick and we suspect they have COVID-19? Can we take their temperatures or ask them to take a physical exam? How much can we ask?

The EEOC has confirmed that the guidance it issued for the Americans with Disabilities Act (ADA) in connection with pandemic influenza applies to the COVID-19 pandemic. This guidance is designed to help employers implement strategies to navigate the impact a pandemic in the workplace.

Under EEOC Guidance, if an employee becomes ill with symptoms of a current pandemic disease, an employer can ask the employee not to come to work or to leave the workplace. More generally, the ADA permits an employer to ask an employee to leave a workplace if the employee's illness is serious enough to pose a direct threat to the workplace and its employees.

The EEOC guidance provides that you may ask employees if they are experiencing symptoms associated with COVID-19, such as sore throat, coughing, or shortness of breath, in order to determine whether you can exclude them from the workplace.

Measuring an employee's body temperature is considered to be a medical examination (that is generally prohibited under EEOC rules). If pandemic COVID-19 becomes widespread in your community (as assessed by state or local health authorities or the CDC), you may be permitted to take employees' body temperature, but you should check with your legal counsel before you take that step.

### If we become aware that an employee is ill with or has been exposed to COVID-19, what are our privacy responsibilities?

The first concern is often whether the information is subject to the HIPAA Privacy Rule. Whether something is protected health information (PHI) and thus protected by the HIPAA Privacy Rule depends on the source of the information. If you as an employer receive health-related information from a covered entity (for example, your health plan or your insurer), then it is PHI, and the rules governing use or disclosure of that information will apply. For example, if you receive information about a claim for COVID-19 testing under your health plan, then that is PHI. On the other hand, if an employee discloses information about his or her health – including being sick or having been exposed to COVID-19 – to you, then that information is not PHI, but may be protected under the confidentiality provisions of FMLA and/or the ADA.

It is important for you to work with your privacy officer or legal counsel when making decisions about using or disclosing information about the health of your employees in a manner that is different than what you normally do in the typical course of your plan's healthcare operations (as specified by your plan's own HIPAA Privacy and Security policies and procedures and any other privacy policies you may have in place).

## Employee Benefits

### If an employee is not credited with enough hours of service to maintain eligibility for benefits due to COVID-19 closures, can we terminate coverage for that employee from the plan and offer COBRA?

How a reduction in hours will affect an employee's benefits under your plan depends on the written terms of your plan document. Private sector employers should continue to administer their plan in accordance with its terms to avoid any fiduciary problems under ERISA.

If you are an applicable large employer and use the look-back measurement period to count hours under the ACA, you should generally continue offering coverage to any full-time employees who are currently in a stability period for the remainder of that period to avoid potential penalties. (A reduction in hours or furlough will generally be reflected in an employee's current measurement period, which will dictate whether coverage should be offered for the next stability period.) If you use the monthly measurement method to count hours under the ACA, and an employee experiences a reduction in hours, an offer of coverage could be terminated so long as that reduction in hours triggers a loss of coverage under your plan terms, but you may be required to offer COBRA or other continuation coverage.

### Is there any relief because of COVID-19 with respect to furnishing ERISA-required materials, such as benefit statements?

Yes. Under Disaster Relief Notice 2020-21, the Department of Labor's (DOL's) Employee Benefits Security Administration (EBSA) has provided relief to plan sponsors with respect to the timing of furnishing ERISA-required benefit statements and other notices and disclosures during the COVID-19 National Emergency. The Notice provides that a plan will not violate ERISA for failing to timely furnish a notice, disclosure, or document required to be furnished during the Outbreak Period (the period from March 1, 2020 until 60 days after the announced end of the National Emergency (or such other date announced by the Agencies)), if the plan acts in good faith and furnishes the notice, disclosure, or document as soon as administratively practicable under the circumstances.

For example, relief is available for benefit statements, annual funding notices, and other notices and disclosures required by ERISA (such as Summary Annual Reports (SARs)) that would otherwise be due to participants and beneficiaries during the Outbreak Period. Good faith acts include use of electronic alternative means of communicating with plan participants and beneficiaries who the plan reasonably believes have effective access to electronic means of communication. According to the Notice, this may include email, text messages, and continuous access websites. This will provide welcome flexibility to plan sponsors in communicating plan information to participants.

## Returning Employees to the Workplace

### Can we require a doctor's note or physical exam before allowing an employee to return to work after recovering from COVID-19?

Under both the ADA and Family and Medical Leave Act (FMLA), an employer generally may require an employee to provide a doctor's note, submit to a medical exam, or remain symptom-free for a specified amount of time before returning to work, if the employer has a reasonable belief that the employee's present medical condition would impair the employee's ability to perform essential job functions. EEOC guidance may permit you to take employees' temperatures during a pandemic as an exception to the regular rules prohibiting workplace medical exams. However, the CDC discourages employers from requiring return-to-work notices from their doctors. See also Q&A 30.

Again, you should work with your legal counsel if you are considering requiring physical exams or taking employees' temperatures before returning to work after leave associated with COVID-19.

### How do reductions in hours of service, furloughs, or layoffs impact employee status for purposes of the ACA?

Under the ACA, Applicable Large Employers (employers with 50 or more full-time employees and full-time equivalent employees) must offer affordable, minimum value coverage to at least 95% of their full-time employees to avoid

Employer Shared Responsibility penalties. In addition to avoiding penalties, it is important for employers to know who their full-time employees are for purposes of ACA reporting.

For ACA purposes, an employee is considered to be full-time if he or she works an average of at least 30 hours per week (or 130 per month). An employer determines whether an employee is full-time based on the employee's hours of service. Generally, an hour of service includes any hour for which an employee is paid or entitled to payment when duties are not performed such as vacation, holiday, illness, incapacity (including disability), layoff, jury duty, military duty, or leave of absence. Thus, for example, the time during which an employee was furloughed (i.e., had zero hours of service) would not count toward an individual's status for ACA purposes. In contrast, an employee who experiences a reduction of hours, continues to accrue hours of service that count toward an individual's status for purposes of the ACA. An employee who was laid off will not be considered to be employed for the period between layoff and rehire, and thus will not accrue hours of service.

Some employees will be treated as "new" employees for purposes of the ACA, but many others will be treated as "continuing" employees. Employers should be aware of the distinction, not only for purposes of the ACA, but also for purposes of health plan eligibility if eligibility is tied to ACA status.

For more information on important consideration, see Gallagher's ACA Implications for Employees Returning to Work.

***For Gallagher's comprehensive COVID-19 Q&A, please click here.***

# Employer Considerations for Returning to the Workplace

As employers enter the next phase of the COVID-19 pandemic, many questions may arise regarding how to keep organizations running while practicing sound risk management. Below, we outline some important considerations as your organization tackles returning to work.

## Can we return to work?

*Is our organization permitted to resume regular operations?*

Undoubtedly, the first question on many employers' minds when contemplating a return to work is whether they are even permitted to do so. The White House issued federal guidelines in the form of "Opening Up America Again" with recommended practices for employers. However, employers must understand that the power to ease restrictions remains at the state and local level, so they must be aware of any state, city, county or parish modifications to stay-at-home or shelter-in-place orders.

*Which employees should return to onsite work?*

Many employers were able to shift most, if not all, of their workforce to telework. As a result, those employers must ask themselves whether it is necessary to return those same individuals to a physical workspace. Issues that must be considered include: whether employees who can only work in a physical space need the physical presence of teleworking employees to continue their own work; whether technology can support the integration of individuals who return to the physical worksite and those that continue to telecommute; and whether appropriate physical distancing precautions can be deployed to support continued efforts to reduce the spread of COVID-19.

## What preventive measures should we introduce?

*How do we bring employees back to work safely?*

After determining whether an organization can return to normal operations and which employees to return to a physical worksite, the next consideration is how to return employees safely to work. Many employers will be faced with bringing teleworking employees, reinstated employees (e.g., employees who were on FMLA or FFCRA leave), new hires (e.g., employees who were laid off and are now rehired), and returning employees (e.g., those who were furloughed) back into the workplace. Consideration should be giving to whether the workspace should undergo a deep cleaning or additional daily cleaning, and what information should be collected from employees.

*What cleaning measures should we institute?*

With the emphasis on preventive measures to reduce the spread of COVID-19, employers should pay attention to daily activities, such as cleaning and disinfecting, that can help employees feel more secure about returning to work. The Centers for Disease Control and Prevention (CDC) released reopening guidance for cleaning and disinfecting facilities and specific guidance for employers on how to clean and disinfect facilities. These guidelines help employers determine how often and how to clean and disinfect facilities and provide suggestions on how to train employees to incorporate daily habits to reduce the spread of COVID-19. Prudent employers will not only establish a specific plan for cleaning, but also educate employees about their roles as part of that plan.

*What workforce screening measures should we introduce?*

After consideration for how facilities will be handled, employers must turn to the workers themselves and develop a plan for screening individuals for symptoms of COVID-19. Employers who wish to do so should remain apprised of guidelines from the EEOC, which allows an employer to ask specific questions about COVID-19, as well as screen

job applicants for symptoms after making a conditional job offer, so long as it follows the same practice for all offerees in the same type of job.

The ADA prohibits employee disability-related inquiries or medical examinations unless they are job-related and consistent with business necessity. Generally, a disability-related inquiry or medical examination of an employee is job-related and consistent with business necessity when an employer has a reasonable belief, based on objective evidence, that:

1. An employee's ability to perform essential job functions will be impaired by a medical condition; or
2. An employee will pose a direct threat due to a medical condition.

According to the EEOC, based on CDC guidance and public health authorities as of March 2020, the COVID-19 pandemic meets the direct threat standard. The CDC and public health authorities have acknowledged the community spread of COVID-19 in the United States and have issued precautions to slow the spread. Those actions, along with actions taken by state and local authorities, support an EEOC finding that a significant risk of substantial harm would be posed by having someone with COVID-19, or symptoms of it, present in the workplace.

EEOC rules permit an employer to ask employees questions to determine whether an employee has experienced flu-like symptoms associated with COVID-19 in the past 14 days or whether an employee has traveled in the previous 14 days. Employers may wish to use written questionnaires, which should be maintained as any other confidential medical record following federal guidelines. Specifically, under EEOC ADA guidance, all information about applicants or employees obtained through disability-related inquiries or medical examinations must be kept confidential. Information regarding the medical condition or history of an employee must be collected and maintained on separate forms and in separate medical files and must be treated as a confidential medical record.

*What steps should we take to implement temperature checks?*

Many employers are instituting daily temperature checks. Some employers are checking temperatures twice per day – at the beginning of an individual's workday and at the end of that individual's workday. As with questionnaires about symptoms and travel, employers should treat any information collected during temperature checks as confidential medical information, and distribute that information only to those with a legitimate need to know. Employers must be mindful of Fair Labor Standards Act (FLSA) requirements for time spent undergoing screening and should compensate non-exempt employees for that time. Moreover, employers should also decide how to handle employees who refuse to be screened. Employers should consult with their legal counsel to determine what steps they can take, in the event an employee refuses to be screened.

It will also be important to determine who will perform the temperature screening. Many organizations will rely upon their own employees to conduct such screening. In doing so, employers must take measures to protect the screeners. If an employer relies on its own employees to screen, they should limit who will perform the screening, provide them with proper PPE, and minimize physical contact with the employees being checked. In addition, employers should consider practical issues to ensure safe screening, including which type of thermometer to use, how to establish the physical layout of the screening area, and what steps to take to maintain proper sanitation.

*What information can we share with other employees?*

Under EEOC guidance, medical information for employees or applicants is confidential, except that: (1) supervisor(s) and managers may be told about necessary restrictions on work duties and about necessary accommodations; (2) first aid and safety personnel may be told if a disability might require emergency treatment; (3) government officials may access the information when investigating compliance with the ADA; (4) employers may give information to state

workers' compensation offices, state second injury funds, or workers' compensation insurance carriers in accordance with state workers' compensation laws; and (5) employers may use the information for insurance purposes.

If an employee tests positive for COVID-19, an employer may alert his co-workers that an individual has tested positive in their workplace, but the employer may not identify the employee who tested positive by name.

*What steps should we take to maintain social distancing in the workplace?*

Although employees may be returning to the workplace, that does not mean that social distancing should be ignored. In particular, employers must determine in advance how they will comply with their OSHA and other obligations to maintain a safe workplace. For example, employers should consider ingress and egress. Avoiding gathering points at entrances may require employers to develop alternate schedules to decrease the likelihood that employees are crowded when either entering or leaving the workplace. Employers should consider whether common areas, such as break rooms, conference rooms, kitchens, etc. should be temporarily closed. Employers should also develop a game plan to reduce contact between employees, such as reviewing how a facility's layout can affect contact between employees and whether certain daily functions, such as checking a common mail box, can be altered or eliminated. Lastly, employers should consider how their workplace may be configured to allow appropriate spacing between workstations.

In making these determination, employers may wish to consider other OSHA guidelines for the workplace.

*Should employees who had contracted COVID-19 be required to provide a return to work or fitness for duty report?*

The Centers for Disease Control (CDC) recommends that employers do not ask for return to work or fitness for duty reports. However, employers are permitted under federal law to ask for such documentation. Note, however, that it may be difficult for an employee to obtain a report from a physician at this time.

## What information should we communicate to employees?

*What information should we provide employees about our cleaning and disinfecting policies or processes?*

If an organization has specific cleaning or disinfecting policies or procedures, it may be helpful to share that information with employees. In addition, employers should take returning to work as an opportunity to remind employees about best practices, such as washing hands and avoiding contact with surfaces, to avoid the spread of COVID-19.

*What policy updates should we circulate to employees?*

As a result of COVID-19, many employers have implemented restrictions on in-person meetings and travel. If those policies have been modified or extended, employees should be made aware of the updates. In addition, many employers have adopted new telework policies. Any changes, extensions, or modifications of telework processes should also be communicated. Any new or additional information related to leaves of absence should also be distributed, and employers should make sure that they have complied with the notice requirements under the Families First Coronavirus Response Act (FFCRA).

*What employee benefits changes do we need to communicate to employees?*

*For information on plan document changes, please click here.*

Some changes to employee benefits, such as the requirement to provide coverage for COVID-19 testing and diagnosis, are short term changes, but other changes will have a longer life, such as the ability to obtain reimbursement from account-based benefits (such as health flexible spending accounts) for over-the-counter medications and drugs without a prescription. Although the governing agencies

have provided relief from the 60-day advance notice requirement to communicate changes to Summaries of Benefits and Coverage (SBCs) resulting from improvements to benefits, they have not specifically granted relief from any other communication requirements related to benefits changes, such as summaries of material modification (SMMs) or summaries of material reduction (SMRs) and updating SBCs, for example, in conjunction with annual enrollment. Thus, employers who make changes to their plans should consider what changes should be communicated in their SBCs and through SMMs or SMRs. Employers who have not yet communicated these changes should take the opportunity to communicate them and address any changes needed to their plan documents.

Employers should also take the opportunity to remind employees about any of their benefits that may provide them with additional support during these difficult times, particularly their employee assistance programs (EAPs) or telehealth services. Moreover, if an employer initiates a disaster relief payment program, information about the program should be clearly communicated to all beneficiaries. Lastly, employers may wish to structure their wellbeing or wellness programs to support employee efforts to re-engage in the workplace.

## What implications should we consider for employees' status under the ACA?

*How do reductions in hours of service, furloughs, or layoffs impact employee status for purposes of the ACA?*

Under the ACA, Applicable Large Employers (employers with 50 or more full-time employees and full-time equivalent employees) must offer affordable, minimum value coverage to at least 95% of their full-time employees to avoid Employer Shared Responsibility penalties. In addition, employers need to know who is a full-time employee for purposes of ACA reporting.

An employee is considered to be full-time if he or she works an average of at least 30 hours per week (or 130 per month). An employer determines whether an employee is full-time based on the employee's hours of service. Generally, an hour of service includes any hour for which an employee is paid or entitled to payment when duties are not performed such as vacation, holiday, illness, incapacity (including disability), layoff, jury duty, military duty, or leave of absence. Thus, for example, the time during which an employee was furloughed (i.e., had zero hours of service) would not count toward an individual's status for ACA purposes. In contrast, an employee who experiences a reduction of hours, continues to accrue hours of service that count toward the employee's status for purposes of the ACA.

*For more information on important ACA implications, please click here.*

Some employees will be treated as "new" employees for purposes of the ACA, but many others will be treated as "continuing" employees. Employers should be aware of the distinction, not only for purposes of the ACA, but also for purposes of health plan eligibility, primarily of the employee's eligibility for the health plan is tied to his ACA status.

*How does Public Health Emergency Leave (PHEL), Emergency Paid Sick Leave (EPSL), or Family and Medical Leave Act (FMLA) leave impact employees' hours of service under the ACA?*

In addition to determining how reductions in hours or service, furloughs, and layoffs impact employee status for purposes of the ACA, employers must also be aware of how PHEL, EPSL, and FMLA leave impact an employee's hours of service. PHEL and EPSL are paid leave, so any time on PHEL and EPSL should be treated as hours of service. However, the ACA provides for a special averaging rule when an employee is on "special unpaid leave," which is defined as unpaid leave under FMLA, USERRA, and jury duty. Employers should ensure that their payroll systems and HRIS can properly track such hours in order to ensure correct ACA reporting on Forms 1095. For more information, see ACA Implications for Employees Whose Hours of Service are Impacted by COVID-19.

## What should we consider when reinstating an employee's benefits coverage?

For a number of reasons, employee benefits coverage may have been terminated as a result of actions taken in response to COVID-19, such as a layoff, reduction in hours, or furlough. As a result, employers may have a large number of employees whose employee benefits coverage will need to be reinstated upon their return to work (or an increase in hours of service). However, reinstatement of coverage may not be a simple matter. Employers should consider, for example, whether any impediments exist to reinstating benefits, such as a new waiting period requirement. Below are some specific considerations.

*Should an employee be treated as a new employee or a continuing employee for purposes of health coverage?*

When eligibility for health insurance coverage is tied to ACA employment status, employers need to determine their employees' ACA status before reinstating coverage. Many employees who were laid off may have been in stability periods as full-time employees. As a result, employers may be required to treat those employees as continuing employees after they are rehired, entitled to reinstatement of health coverage as soon as practicable.

Even health plans that have not adopted ACA status for eligibility purposes may have specific rules about how employees who have been laid off or furloughed should be treated once they resume full-time services. Thus, all employers should be careful to check plan eligibility language. Plans that do not address these situations may have to be amended prior to the reinstatement period.

Note that an employee may choose not to retain group health plan coverage while that employee is taking EPSL, PHEL, or FMLA leave. However, when the employee returns from leave, she is entitled to be reinstated on the same terms that existed before taking leave, without any additional qualifying period, physical examination, exclusion of pre-existing conditions, etc.

It is also important for employers to consider the impact, if any, that reinstatement of health coverage may have on any COBRA continuation coverage the employee may have elected as the result of a reduction in hours, furlough, or layoff.

*What issues should we take into account before the reinstatement of non-health coverage?*

Employees whose employment was terminated or who experienced a lengthy furlough or unpaid leave of absence may have lost eligibility for their non-health benefits, such as life insurance or long term disability. Thus, an evidence of insurability requirement may apply for certain non-health benefits, which may come as a surprise for both employers and employees alike. For that reason, it is important to review benefits eligibility requirements in this context before considering reinstating non-health benefits.

Furloughed employees may also have evidence of insurability or waiting periods associated with their non-health benefits, which may have lapsed because of the reduction in their hours of service to zero. As a result, employers should have a game plan in place to communicate applicable issues to employees, and coordinate with carriers or administrators to ensure a smooth return to work transition.

*How will Section 125 rules and/or our cafeteria plan document impact employee elections upon their return?*

In connection with reinstatement of benefits coverage, employers should also consider how their Section 125 plan documents may impact whether their coverage may be paid on a pre-tax or post-tax basis and whether a particular employee's prior elections should simply be reinstated. Under IRS rules, for example, an employee's salary reduction election should be reinstated if the employee returns to active service within 30 days. If the employee returns after more than 30 days, the IRS rules permit a Section 125 plan to reinstate the employee's prior elections, permit new elections, or require the employee to wait until the next plan year.

*What other impact on benefits should we consider?*

In addition to reinstatement (or continuation) of coverage, employers should also consider the impact, if any, that any actions taken in response to COVID-19 have on other benefits, such as vacation accrual, sick leave benefits, paid time off, retirement, or other benefits that accrue over a period of time. Employers should also determine whether state or local law impacts prior sick leave balances.

Employers should assess how PHEL and EPSL impact employee paid time off balances and clearly communicate any remaining balances. Indeed, because some period of time elapsed between when employees were first eligible for time off under the FFCRA and when the governing agencies were able to issue guidance (and sometimes issued conflicting guidance), employers may not have followed the proper processes when administering PHEL and EPSL immediately after it was introduced. Thus, employers should consider performing an audit of their records to ensure that the appropriate leave was provided to employees.

## Should we recoup missed premium contributions?

*Should we recoup missed premium payments for employees that were on furlough or a leave of absence?*

Employers subject to FMLA have long wrestled with the decision of whether to recover missed employee contributions for the coverage provided during unpaid FMLA leave. Typically, employers will recoup such missed premium payments through additional salary reductions from employee paychecks after they return. Whether employers will take such steps when employees return from furlough, FMLA leave, PHEL, or EPSL may depend upon their past experiences with recouping payments from employees. Employers may also wish to consider the economic impact of failing to recoup contributions on the organization, potential decline in employee morale as a result of recoupment, and any administrative issues related to obtaining additional salary reductions. Regardless of the decision, employers should carefully communicate the implications to employees.

If the decision is made to recoup missed premium contributions, employers should work with their payroll departments to ensure that appropriate processes are followed.

## What other issues should we consider?

*What upcoming filing deadlines apply to employee benefits?*

IRS Notice 2020-23 postpones the Form 5500 due date for employee benefit plans due on or after April 1, 2020, and before July 15, 2020. Plans with original due dates or extended due dates falling within this period now have until July 15, 2020, to file their information reports. However, other deadlines may remain in effect for your benefits, so you should review any upcoming deadlines as soon as possible.

*What employee benefits deadlines have been impacted by disaster relief?*

Employees may be aware that the IRS has extended the deadline for the filing of personal income taxes from April 15, 2020 to July 15, 2020, but they may not be aware that additional relief may also apply. For example, the Department of Labor (DOL), IRS, and the Department of Health and Human Services (HHS) issued Disaster Relief that impacts timeframes for COBRA, HIPAA special enrollments, and claims and appeals deadlines for related employee benefits. Specifically, the tri-agencies released guidance requiring plans to ignore a certain period of time, called the Outbreak Period for specific timeframes related to COBRA, HIPAA special enrollments, and claims and appeals deadlines. For more information, see Gallagher's article, Agencies Extend Deadlines for Employee Benefit Plans, Participants, and Beneficiaries Affected by the COVID-19 Outbreak.

In addition, employees may have more time to use their health FSA and DCAP funds if they would otherwise be required to forfeit funds remaining in their accounts due to the end of the plan year. Under IRS Notice 2020-23,

certain “Specific Time-Sensitive Actions” occurring between April 1, 2020, and July 15, 2020, which cross-references IRS Revenue Procedure 2018-58, have been delayed. The deadline is thus extended for health FSA or DCAP forfeitures that would occur during that period. This additional time period coupled with the ability, beginning in 2020, to seek reimbursement for over-the-counter medications and drugs without a prescription and menstrual products, may be a significant bonus to employees who have been unable to obtain elective surgery or otherwise use their health FSA funds.

*What records should be maintained?*

As a result of COVID-19, employers are faced with even more record keeping requirements than before. For example, employers subject to the FFCRA and thus responsible for providing PHEL and EPSL must maintain documentation of their employee’s leave as established by the DOL. Employers seeking to obtain tax credits for providing paid leave under FFCRA must maintain documentation sufficient to fulfill IRS requirements. Fortunately, the subject matter for the documentation is the same. (However, note that the IRS and DOL guidance differ slightly as to whether an employee may provide the underlying information orally or if it must be in writing. Regardless, the employer must keep all of its documentation in written format.)

# COVID-19 and Employee Benefits Return to Work Action Items

As employers seek to reopen operations and have their workforce return to work, many questions may arise regarding how they can continue to support employees. Below, we outline some important items that you may want to consider as your organization decides what your workplace will look like going forward.

## Preventive Measures

- **What information, if any, will we collect from employees returning to our premises about their exposure or potential exposure to COVID-19?**

  The EEOC has a resource to aid employers.

- **What information can we share with other employees if an employee has tested positive for COVID-19 or has a known exposure?**

  The EEOC has a resource to aid employers.

- **Should we take employees' temperatures on a daily basis?**

  The EEOC has a resource to aid employers.

- **What information should we provide to our supervisors about employees returning from leave due to COVID-19?**

  The Centers for Disease Control (CDC) recommends that employers do not ask for return to work or fitness for duty reports.

- **Should we restrict visitors from entering our premises?**

- **If we wish to permit visitors, should we ask them to complete a COVID-19 health check questionnaire prior to entering our premises?**

- **If we collect information on visitors, what privacy laws impact the receipt and retention of that information?**

## Communications

- **What information should we provide to employees on applicable cleaning and disinfecting policies or processes?**

- **What updates should we circulate on any policies related to in-person meetings, travel, and teleworking?**

- **What reminders should we provide to employees about relevant policies on illness and leaves of absence?**

- **What reminders should we provide to employees about ongoing cybersecurity threats, such as targeted scams and phishing emails claiming to be related to COVID-19?**

- **What information should we share with employees on how to reduce the spread of COVID-19?**

  The CDC guidelines are helpful.

- **What communications should we create to explain to our employees related to benefits changes that occurred because of the COVID-19 pandemic?**
- **Are there any plan changes occurred that would require the release of a Summary of Material Modification (SMM) or a new Summary of Benefits and Coverage (SBC)?**
- **Are there any reduction in benefits occurred that would require a Summary of Material Reduction (SMR)?**

  If an SMR is required, then the plan only has 60 days from the date the decision was made to adopt the reduction to provide the applicable SMR.

- **What process will we use to communicate with employees?**

  Some required notices (e.g., SMMs and SBCs) must follow special rules when employers wish to provide those notices electronically.

- **Have we posted the applicable DOL notice for FFCRA leave?**
- **What information should we provide to employees about how to access our EAP and available benefits under the EAP?**

## ACA Status Issues

- **Which of our employees experienced breaks in service (13 weeks or 26 weeks, as applicable) under the ACA?**

  Under the ACA, a break in service is a period of 13 weeks (26 weeks for academic employees) during which an employee is not credited with an hour of service. Note that paid time off will count as hours of service, so if an employee was on PHEL or EPSL, that time will count as hours of service.

  Tip: If an employee had a break in service, you may treat the employee as a new employee and apply a new initial measurement period or waiting period. If an employee has not experienced a break in service, upon return to work, he should be treated as a continuing employee.

- **What impact, if any, does PHEL, EPSL, or FMLA leave have on our employees' hours of service?**

  PHEL and EPSL are paid leave, so time on PHEL and EPSL should be treated as hours of service.

  The ACA provides for a special averaging rule for when an employee is on "special unpaid leave," which is defined as unpaid leave under FMLA, USERRA, and jury duty. For more information, see ACA Implications for Employees Whose Hours of Service are Impacted by COVID-19.

- **Which of our employees should be treated as continuing employees under the ACA?**

  A continuing employee is an employee who did not have a break in service, which may occur even if an employee was laid off.

- **Which of our employees should be treated as new employees under the ACA?**

  Remember that even if you terminated the employment of an individual (e.g., through a layoff), that individual may not necessarily be a "new" employee for purposes of the ACA. That employee may be a "continuing"

employee and thus should be offered coverage as of the first day the employee is credited with an hour of service, or, if later, as soon as administratively practicable (i.e., no later than the first day of the calendar month following return to work) in order to avoid ACA penalties.

## Reinstatement of Coverage

- **Which of our employees are new employees versus continuing employees for purposes of health coverage?**

- **Are there any requirements employees must meet before reinstatement of health insurance coverage?**

  Tip: If your health plan uses ACA status for eligibility purposes, then you must consider the impact of stability periods and ACA break in service rules when determining how soon to reinstate coverage, if it was discontinued during furlough or leave of absence.

  An employee may choose not to retain group health plan coverage while that employee is taking EPSL, PHEL, or FMLA leave. However, when the employee returns from leave, she is entitled to be reinstated on the same terms that existed before taking leave, including family or dependent coverages, without any additional qualifying period, physical examination, exclusion of pre-existing conditions, etc.

- **What requirements, if any, apply to reinstatement of non-health coverage, such as life insurance or long term disability?**

  Employees whose employment was terminated or who experienced a lengthy furlough or unpaid leave of absence may have lost eligibility. An evidence of insurability requirement may apply for certain non-health benefits.

  Furloughed employees may have evidence of insurability or waiting periods associated with their non-health benefits. Be sure to have a game plan in place to communicate applicable issues to employees, and coordinate with carriers or administrators to ensure a smooth return to work.

## Premium Contributions

- **Will we recoup missed premium payments for employees on furlough or leave of absence?**

- **If we decide to recoup missed premium payments or payments our organization made on behalf of employees, which employees missed premium payments (or for whom did we make payments)?**

- **How can we coordinate with payroll to collect missed premiums from paychecks or arrange for payment by check or other means?**

## Other Considerations

- **Are there any upcoming filing deadlines for our plans?**

  The CARES Act amended ERISA to provide the Department of Labor (DOL) the ability to postpone certain ERISA filing deadlines and to provide other relief for a period of up to one year in the case of a public health emergency. IRS Notice 2020-23 postpones the Form 5500 due date for employee benefit plans due on or

after April 1, 2020, and before July 15, 2020. Plans with original due dates or extended due dates falling within this period now have until July 15, 2020, to file their information reports.

Ã **How will DOL, IRS, and HHS Disaster Relief timeframes for COBRA, HIPAA special enrollments, and claims and appeals deadlines impact our benefits?**

The tri-agencies released guidance requiring plans to ignore a certain period of time, called the Outbreak Period for specific timeframes related to COBRA, HIPAA special enrollments, and claims and appeals deadlines.

Ã **Are our employees eligible for any relief available for health FSA and DCAP forfeitures?**

Under IRS Notice 2020-23, certain “Specific Time-Sensitive Actions” occurring between April 1, 2020, and July 15, 2020, which cross-references IRS Revenue Procedure 2018-58, have been delayed. The deadline is thus extended for health FSA or DCAP forfeitures that would occur during that period.

# Additional Resources

DOL, Families First Coronavirus Response Act: Questions and Answers: https://www.dol.gov/agencies/whd/pandemic/ffcra-questions

IRS, COVID-19-Related Tax Credits for Required Paid Leave Provided by Small and Midsize Businesses FAQs: https://www.irs.gov/newsroom/covid-19-related-tax-credits-for-required-paid-leave-provided-by-small-and-midsize-businesses-faqs

WHO, Coronavirus Disease (COVID-19) Advice for the Public: https://www.who.int/emergencies/diseases/novel-coronavirus-2019/advice-for-public

WHO, Q&A on Corona Viruses: https://www.who.int/news-room/q-a-detail/q-a-coronaviruses

CDC, Interim Guidance for Businesses and Employers to Plan and Respond to Coronavirus Disease 2019 (COVID-19): https://www.cdc.gov/coronavirus/2019-ncov/specific-groups/guidance-business-response.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fguidance-business-response.html

OSHA, Guidance on Preparing Workplaces for an Influenza Pandemic: https://www.osha.gov/Publications/influenza_pandemic.html

EEOC, What You Should Know About the ADA, the Rehabilitation Act and the Coronavirus: https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws

HHS, Bulletin: HIPAA Privacy and Novel Coronavirus: https://list.nih.gov/cgi-bin/wa.exe?A2=ind2002&L=OCR-PRIVACY-LIST&P=69

IRS, Notice 2020-15, High Deductible Health Plans and Expenses Related to COVID-19: https://www.irs.gov/pub/irs-drop/n-20-15.pdf

Department of Labor, COVID-19 or Other Public Health Emergencies and the Family and Medical Leave Act Questions and Answers: https://www.dol.gov/agencies/whd/fmla/pandemic

For further information on organizational responses to COVID-19, please see Gallagher News & Insights: https://www.ajg.com/us/news-and-insights/2020/mar/gallagher-report--responding-to-the-coronavirus/