For Companies Affected by the 2020 COVID 19 Virus Pandemic

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Does an employer have to pay for sick leave due to COVID-19?

- Yes to the extent the employer has a sick leave or paid-time-off policy, the employee has any leave time accrued, and the employee elects to take that time under the policy. But refer to the FFCRA, below.

- No, at least not under the employer's policy, if the employee has exhausted the time accrued under the policy.

- Remember, in many cases employers can change their sick leave policies to adapt to the current crisis if they wish to do so or if they need to do so in order to adapt to circumstances and/or changes in the law.

How does the Families First Coronavirus Response Act (the "FFCRA") change normal paid leave questions?

On March 18, 2020, the FFCRA became law. Paid leave provisions became effective on April 1, 2020, and apply to leave taken between April 1, 2020, and December 31, 2020. The U.S. Department of Labor has issued the following guidance concerning the FFCRA:

- On April 1, 2020, the Wage and Hour Division of the U.S. Department of Labor issued a Temporary Rule which can be found at: https://www.dol.gov/sites/dolgov/files/WHD/Pandemic/FFCRA.pdf

- On June 23, 2020, the U.S. Department of Labor launched an interactive online tool to help employers and employees determine if an employee qualifies for paid sick leave or extended family and medical leave to cover time away from work for reasons related to COVID-19. The tool guides users through a series of questions to help them determine if the paid leave provisions of the FFCRA apply. If the provisions do apply, the tool helps a user learn whether an employee qualifies for either paid sick leave or extended family and medical leave under the Act. The on-line tool offered by the DOL can be found at: https://www.dol.gov/agencies/whd/ffcra/benefits-eligibility-webtool

- On July 20, 2020, the Wage and Hour Division of the U. S. Department of Labor published updated guidance to explain the FFCRA and reminders of past guidance:

    - A Fact Sheet for Employees explaining leave rights under the FFCRA: https://www.dol.gov/agencies/whd/pandemic/ffcra-employee-paid-leave
    - A Fact Sheet for Employers which is very similar to the Fact Sheet for Employees but which adds employer-specific information: https://www.dol.gov/agencies/whd/pandemic/ffcra-employer-paid-leave
    - FAQs that address paid sick and expanded family and medical leave under the FFCRA: https://www.dol.gov/agencies/whd/pandemic/ffcra-questions
    - A poster that fulfills notice requirements for employers obligated to inform employees about their rights under the FFCRA: https://www.dol.gov/sites/dolgov/files/WHD/posters/FFCRA_Poster_WH1422_Non-Federal.pdf
    - FAQs regarding posting requirements for the FFCRA poster including a statement that an employer may satisfy its duty to display the poster by emailing it to employees or posting it on an employee information website: https://www.dol.gov/agencies/whd/pandemic/ffcra-poster-questions
    - A one-page "Simple Quick Benefits Tips" reference for determining how much paid leave employees may take under the FFCRA: https://www.dol.gov/sites/dolgov/files/WHD/Pandemic/Quick%20Tip%20Poster%20FFCRA.pdf

- On September 11, 2020, the Wage and Hour Division posted revisions to its regulations that implemented the paid sick leave and expanded family and medical leave provisions of the FFCRA. The revisions made by the new rule clarify workers' rights and employers' responsibilities under the FFCRA's paid leave provisions, in light of the U.S. District Court for the Southern District of New York's August 3, 2020 decision that found portions of the regulations invalid. The revisions do the following:

    - Reaffirm and provide additional explanation for the requirement that employees may take FFCRA leave only if work would otherwise be available to them.
    - Reaffirm and provide additional explanation for the requirement that an employee must have employer approval to take FFCRA leave intermittently.
    - Revise the definition of "health care provider" to include only employees who meet the definition of that term under the Family and Medical Leave Act regulations or who are employed to provide diagnostic services, preventative services, treatment services, or other services that are integrated with and necessary to the provision of patient care which, if not provided, would adversely impact patient care.
    - Clarify that employees must provide required documentation supporting their need for FFCRA leave to their employers as soon as practicable.
    - Correct an inconsistency regarding when employees may be required to provide notice of a need to take expanded family and medical leave to their employers.

The revisions from the US Department of Labor are scheduled to be published on September 16, 2020, in the Federal Register.

Can an employer terminate employees for taking leave under the FFCRA?

No. The Temporary Rule published by the Wage and Hour Division of the US DOL, cited above, provides clear guidance on this question: The FFCRA amends the Family Medical Leave Act, and therefore employers are subject to the same prohibitions that apply with respect to all FMLA leave. Under the FMLA, employers are prohibited from interfering with, restraining, or denying an employee's exercise of or attempt to exercise any right under the FMLA.

If a governmental authority issues a quarantine, isolation, or "stay at home" order and the employer closes its business to comply, do employers have to pay employees under the FFCRA since the order is COVID-19 related?

No. The Temporary Rule published by the Wage and Hour Division of the US DOL, cited above, provides clear guidance on this question: "An employee subject to …[the FFCRA]… may not take paid sick leave where the employer does not have work for the employee. This is because the employee would be unable to work even if he or she were not required to comply with the quarantine or isolation order. For example, if a coffee shop closes temporarily or indefinitely due to a downturn in business related to COVID-19, it would no longer have any work for its employees. A cashier previously employed at the coffee shop who is subject to a stay-at-home

order would not be able to work even if he were not required to stay at home. As such, he may not take paid sick leave 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."

Are the rules different for employers of health care providers, and is my company defined as a "health care provider"?

Yes, there are different rules applicable to health care providers. Per DOL Regulations issued under the FFCRA, an employer whose employee is a health care provider may exclude such employee from the leave requirements of the FFCRA. For the purposes of the FFCRA, a health care provider is anyone employed at any doctor's office, hospital, health care center, clinic, post-secondary educational institution offering health care instruction, medical school, local health department or agency, nursing facility, retirement facility, nursing home, home health care provider, any facility that performs laboratory or medical testing, pharmacy, or any similar institution, employer, or entity. This includes any permanent or temporary institution, facility, location, or site where medical services are provided that are similar to such institutions. The term "heath care provider" also includes any individual employed by an entity that contracts with any of these institutions described above to provide services or to maintain the operation of the facility where that individual's services support the operation of the facility. This also includes anyone employed by any entity that provides medical services, produces medical products, or is otherwise involved in the making of COVID-19 related medical equipment, tests, drugs, vaccines, diagnostic vehicles, or treatments. *See* 29 C.F.R § 826.30(c)

Will employers receive reimbursement for the payment of sick days taken under the FFCRA?

Employers which pay their employees for leave within the limits of the FFCRA are allowed a 100% tax credit for each calendar quarter in which payments were made. For more information about these credits and other relief, go to: https://www.irs.gov/coronavirus

Is there IRS Guidance to help employer's through the process of claiming the tax credits under the FFCRA?

Yes, the IRS maintains a webpage that addresses numerous permeations of the claims process; go to https://www.irs.gov/newsroom/covid-19-related-tax-credits-for-required-paid-leave-provided-by-small-and-midsize-businesses-faqs

Do employers have a notice obligation in the event of a layoff or a reduction in hours?

Notices under the WARN Act (for worksite closings and partial layoffs), COBRA notices under ERISA (for terminations and reductions in hours), and notices to the local State Employment Security Commission (or equivalent) will still be necessary in most employment actions outside of the FFCRA.

- Under the Workers Adjustment and Retraining Notification (WARN) Act, an employer subject to the WARN Act may order a plant closing or mass layoff without giving the otherwise mandatory 60-day notice if the closing or mass layoff is caused by business circumstances that were not reasonably foreseeable (such as the affect upon the employer of COVID-19), provided the employer gives the employees as much notice as is practicable and explains why a 60-day notice was not given.

- COBRA – the Consolidated Omnibus Budget Reconciliation Act – requires group health plans to offer continuation coverage to covered employees and others when group health coverage would otherwise be lost due to a covered employee's job loss or reduction in hours of more than 50%. However, on May 4, 2020, the US DOL provided guidance that group health plans must take into account the COVID-19 pandemic and therefore suspend time limits when determining the 60-day deadline for individuals to elect COBRA continuation coverage, make COBRA premium payments, and notify the plan of certain qualifying events (such as divorce or a dependent child aging out of plan coverage) or determination of disability as it relates to COBRA coverage. *See*: https://www.federalregister.gov/documents/2020/05/04/2020-09399/extension-of-certain-timeframes-for-employee-benefit-plans-participants-and-beneficiaries-affected

If teleworking is an alternative to worksite attendance by non-exempt employees, what documentation does the Fair Labor Standards Act require from an employer?

Whether or not the teleworking arrangement is related to COVID-19, employers have an obligation under the Fair Labor Standards Act (FLSA) to track the number of hours of compensable work performed by employees who are teleworking or otherwise working remotely away from any worksite or premises controlled by the employer. Without setting minimum requirements or standards, the Wage and Hour Division of the US Department of Labor on August 24, 2020, issued a Field Assistance Bulletin (FAB) that addresses an employer's duty to pay for time worked that is known to, or made known to, the employer. Without going into specifics, the FAB uses the word "reasonable" many times. An employer has the duty to implement a "reasonable reporting procedure" and must use "reasonable diligence" to verify accurate reporting of time worked by non-exempt employees. The FAB can be found at: https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/fab_2020_5.pdf

In light of the FFCRA, what actions can employers take with their employees and benefit plans?

These are challenging times and every employer has to look first to its business forecast for the coming months in order to determine how best to react. Benefit plans can be amended to provide for suspension of employer contributions, and workforces can be furloughed, reduced, or laid off. The U.S. Department of Labor, Employee Benefits Security Administration issued FAQs for plan participants and beneficiaries on April 28, 2020, which may be helpful to employers; *see* https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/our-activities/resource-center/faqs/covid-19.pdf Before an employer takes any action with respect to its benefits plans, however, an attorney knowledgeable in employment and benefits law should be consulted.

What IRS changes have been implemented for plan Participants during the COVID-19 pandemic regarding qualified plans?

- IRS Notice 2020-50 provides guidance relating to qualified individuals and eligible retirement plans and the CARES Act. Under the CARES Act, qualified individuals receive favorable tax treatment with respect to distributions from eligible retirement plans that are coronavirus-related distributions. A coronavirus-related distribution is not subject to the 10% additional tax under § 72(t) of the Internal Revenue Code (Code) (including the 25% additional tax under § 72(t)(6) for certain distributions from SIMPLE IRAs), generally is includible in income over a 3-year period, and, to the extent the distribution is eligible for tax-free rollover treatment and is contributed to an eligible retirement plan within a 3-year period, will not be includible in income. The CARES Act also increases the allowable plan loan amount under § 72(p) of the Code and permits a suspension of payments for plan loans outstanding on or after March 27, 2020, that are made to qualified individuals. *See* https://www.irs.gov/pub/irs-drop/n-20-50.pdf

- The IRS has also issued FAQs entitled "Coronavirus-related relief for retirement plans and IRAs questions and answers" which can be found at: https://www.irs.gov/newsroom/coronavirus-related-relief-for-retirement-plans-and-iras-questions-and-answers

- IRS Notice 2020-51 addresses distributions from qualified plans during the COVID-19 pandemic. Section 401(a)(9) of the Code requires a stock bonus, pension, or profit-sharing plan described in Code § 401(a) (or an annuity contract described in § 403(a)) to make minimum distributions starting by a required beginning date (as well as minimum distributions to beneficiaries if the employee dies before a required beginning date). The Notice provides guidance relating to the waiver of required minimum distributions in 2020. *See* https://www.irs.gov/pub/irs-drop/n-20-51.pdf

Will workers' compensation insurance apply for COVID-19 related claims at the workplace?

Generally there has to be some connection to the workplace or job in order to support a claim for unemployment benefits based upon COVID-19. There may be exceptions (for example, as in the case of a healthcare worker who contracted the virus at work). Also, some States have adopted positions that address COVID-19 and its implications for workers compensation laws and regulations; for example, see this Executive Order from the Governor of Arkansas: https://governor.arkansas.gov/images/uploads/executiveOrders/EO_20-35.pdf

Will a COVID-19 illness qualify as a "disability" under the ADA?

Illnesses generally do not satisfy the definition of "disability" under the Americans with Disabilities Act. The EEOC on September 8, 2020, released updated technical assistance entitled "What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO

Laws". The advice pertains to taking temperatures of employees, maintaining medical information in a confidential manner, sharing COVID-19 test results with public health authorities, and accommodations of employees under the ADA. For more information, go to: https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws?utm_content=&utm_medium=email&utm_name=&utm_source=govdelivery&utm_term=

Will employers be allowed to test employees for COVID-19 and who will pay for those tests?

Under the FFCRA, an employer's health insurance will generally be required to reimburse insured employees for the costs of testing for COVID-19. On April 11, 2020, the US Departments of Labor, Health and Human Services, and Treasury jointly published a set of Frequently Asked Questions and responses, which can be found using this link: https://www.cms.gov/files/document/FFCRA-Part-42-FAQs.pdf Those FAQs address what kinds of health insurance may be affected (most are) by the FFCRA and CARES Act, the duration of this requirement (currently open-ended), what kinds of test will be covered, and related issues. On July 3, 2020, the Centers for Disease Control and Prevention issued additional guidance for employers not engaged in healthcare: https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/testing-non-healthcare-workplaces.html .

Are costs for testing and treatment regarding COVID-19 allowed to be paid out of an HSA without regard to the deductible for that Plan?

Yes. The IRS issued Notice 2020-15 ("HIGH DEDUCTIBLE HEALTH PLANS AND EXPENSES RELATED TO COVID-19") that reads in part: "Due to the unprecedented public health emergency posed by COVID-19, and the need to eliminate potential administrative and financial barriers to testing for and treatment of COVID-19, a health plan that otherwise satisfies the requirements to be an HDHP under section 223(c)(2)(A) will not fail to be an HDHP merely because the health plan provides medical care services and items purchased related to testing for and treatment of COVID-19 prior to the satisfaction of the applicable minimum deductible. As a result, the individuals covered by such a plan will not fail to be eligible individuals under section 223(c)(1) merely because of the provision of those health benefits for testing and treatment of COVID-19."

Must health plans cover testing costs for COVID-19? The U.S. Departments of Health and Human Services, Labor, and Treasury issued joint guidance on June 23, 2020, that addresses the costs of COVID-19 testing and how health plans are to absorb those costs; see https://www.cms.gov/files/document/FFCRA-Part-43-FAQs.pdf . The guidance provides, among other things, that tests administered to screen employees returning to work are not covered by the Families First and CARES Acts requirements (and therefore health plans do not have to pay for those costs) but plans are required to cover an unlimited number of COVID-19 tests for individuals if the tests are approved and are being taken for diagnostic purposes under the Families First or Cares Acts.

Have there been other developments based upon COVID-19 concerning Section 125 Cafeteria Plans?

Yes. IRS Notice 2020-29 ("COVID-19 GUIDANCE UNDER § 125 CAFETERIA PLANS AND RELATED TO HIGH DEDUCTIBLE HEALTH PLANS") addresses the following: (1) for mid-year elections made during calendar year 2020, a § 125 cafeteria plan may permit employees who are eligible to adjust or revoke their prior elections; (2) for unused amounts remaining in a health FSA or a dependent care assistance program under the § 125 cafeteria plan as of the end of a grace period or plan year ending in 2020, a § 125 cafeteria plan may permit employees to apply those unused amounts to pay or reimburse medical care expenses or dependent care expenses, respectively, incurred through December 31, 2020; and (3) the relief previously provided in IRS Notice 2020-15 (see above FAQ) regarding high deductible health plans and expenses related to COVID-19 may be applied retroactively to January 1, 2020.

What will be the impact of COVID-19 disruptions in the workplace upon employer sponsored health and other benefit plans?

Generally, the US Department of Labor, Employee Benefit Security Administration (EBSA) has published several FAQs that address employer-sponsored health plans during the pandemic at: https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/our-activities/resource center/faqs/covid-19.pdf
Also, the EBSA announced the extension of certain timeframes under the Employee Retirement Income Security Act and the Internal Revenue Code for group health plans, disability and other welfare plans, pension plans, and participants and beneficiaries of these plans during the COVID-19 national emergency in the Federal Register on May 3; to read more go to: https://www.govinfo.gov/content/pkg/FR-2020-05-04/pdf/2020-09399.pdf

Has there been any change to the requirements for employers to collect I-9 forms from new employees?

On March 20, 2020, the Department of Homeland Security (DHS) announced changes to the Employment Eligibility Verification (Form I-9) process: "Employers with employees taking physical proximity precautions due to COVID-19 will not be required to review the employee's identity and employment authorization documents in the employee's physical presence. However, employers must inspect the Section 2 documents remotely (e.g., over video link, fax or email, etc.) and obtain, inspect, and retain copies of the documents, within three business days for purposes of completing Section 2. Employers also should enter "COVID-19" as the reason for the physical inspection delay in the Section 2 Additional Information field once physical inspection takes place after normal operations resume. Once the documents have been physically inspected, the employer should add "documents physically examined" with the date of inspection to the Section 2 additional information field on the Form I-9, or to section 3 as appropriate. These provisions are now set to expire on September 19, 2020; see: https://www.ice.gov/news/releases/ice-announces-another-extension-i-9-compliance-flexibility. Employers who avail themselves of this option must provide written documentation

of their remote onboarding and telework policy for each employee. This burden rests solely with the employers. Once normal operations resume, all employees who were onboarded using remote verification, must report to their employer within three business days for in-person verification of identity and employment eligibility documentation for Form I-9, Employment Eligibility Verification. Once the documents have been physically inspected, the employer should add "documents physically examined" with the date of inspection to the Section 2 additional information field on the Form I-9, or to section 3 as appropriate." Go to https://www.uscis.gov/i-9-central to obtain the latest guidance regarding E-Verify in response to the COVID-19 pandemic; for example, the USCIS on May 1 addressed the temporary use of out-of-date identification documents.

Do employers have to worry about OSHA reporting?

On May 19, 2020, the Occupational Safety and Health Administration ("OSHA") issued revised enforcement guidance stating OSHA now requires employers to record cases in the employer's OSHA 300 log if all of the following conditions are fulfilled: (1) the case is a confirmed medical diagnosis of COVID-19 as defined by the Centers for Disease Control and Prevention, and (2) the case is "work-related," which means the employee became infected at the workplace or the workplace somehow contributed to the employee's contracting COVID-19. See: https://www.osha.gov/memos/2020-05-19/revised-enforcement-guidance-recording-cases-coronavirus-disease-2019-covid-19

On September 30, 2020, OSHA published FAQs regarding reporting of COVID-19 hospitalizations and fatalities. For reporting, OSHA stated an "incident" is "an exposure to SARS-CoV-2 in the workplace." As a result, employers must report for its employees (a) hospitalization due to COVID-19 if the employee is hospitalized within 24 hours of an exposure to COVID-19 at the workplace or work or (b) fatality resulting from COVID-19 if the employee dies within 30 days of an exposure to COVID-19 at the workplace. This and other COVID-19 guidance from OSHA can be found at: https://www.osha.gov/SLTC/covid-19/covid-19-faq.html#reporting

Can employees drop medical, dental, and vision insurance due to a reduction in hours?

Many benefit plans will define an unexpected reduction in a participant's hours as a qualifying event; check the plan's language as it will be controlling. The plan may allow for temporary suspension of participation or contributions. Employees should consider reenrollment impediments if they drop coverage, particularly with regard to health insurance. Employers may wish to consider amending plans to address COVID-19 issues; relevant IRS guidance, if available, should be consulted before amending plans.

Can employees make salary reduction contributions from the amounts paid as qualified leave wages for their employer sponsored health plan, a 401(k) or other retirement plan, or any other benefits?

Yes. The FFCRA does not distinguish qualified leave wages from other wages an employee may receive. To the extent that an employee has a salary reduction agreement in place with the employer, the FFCRA does not explicitly prohibit making salary reduction contributions from qualified sick leave wages or qualified family leave wages paid under the FFCRA. The IRS has issued guidance on this and many more aspects of sick leave and family leave under the FFCRA at https://www.irs.gov/newsroom/covid-19-related-tax-credits-for-required-paid-leave-provided-by-small-and-midsize-businesses-faqs

What does the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act"), which was signed onto law on March 27, 2020, do and will it help employers?

The CARES Act is lengthy (approximately 850 pages) and contains so much that many (if not most) employers will be affected by it. Here are some of things it contains:

- A Paycheck Protection Program ("PPP") for employers having fewer than 500 employees that provided federally guaranteed loans for companies to maintain their payroll levels. The PPP loans did not require collateral or personal guaranties. Most importantly, PPP loans can be forgiven if employees are retained. Until August 8, 2020, the Small Business Administration offered the following PPP loans under the CARES Act:
    - A 2-year term (decreased from the maximum maturity of 10 years under the CARES Act);
    - An interest rate of 1% (increased from prior Treasury guidance that set the interest rate at 0.5%);
    - Principal and interest deferred for 6 months;
    - Interest subject to forgiveness along with principal;
    - The SBA issued an Interim Rule on April 2, 2020, that addressed its administration of the Paycheck Protection Program and that Interim Rule can be found here: https://content.sba.gov/sites/default/files/2020-04/PPP--IFRN%20FINAL.pdf ;
    - On April 3, 2020, the SBA issued "Affiliation Guidance" which addressed the SBA's measurement of the total number of employees that an applicant has (only employers having fewer than 500 employees are eligible under the Paycheck Protection Program); that Guidance can be found here: https://home.treasury.gov/system/files/136/Affiliation%20rules%20overview%20%28for%20public%29.pdf ;
    - For more information, we suggest the following from the U.S. Chamber of Commerce:https://www.uschamber.com/sites/default/files/023595_comm_corona_virus_smallbiz_loan_final_revised.pdf .
    - On April 24, 2020, the IRS issued guidance on how to maximize PPP loans: https://home.treasury.gov/system/files/136/How-to-Calculate-Loan-Amounts.pdf
    - On April 30, 2020, the IRS issued guidance on the tax treatment of PPP loan money: https://www.irs.gov/pub/irs-drop/n-20-32.pdf

- On May 3, 2020, the US Treasury released FAQs concerning PPP loans and credits: https://home.treasury.gov/system/files/136/Paycheck-Protection-Program-Frequently-Asked-Questions.pdf
- On June 1, 2020, the SBA released an Interim Final Rule that addresses PPP loan forgiveness; see: https://home.treasury.gov/system/files/136/PPP-IFR-Loan-Forgiveness.pdf .
- On June 5, 2020, the Payroll Protection Program Flexibility Act was signed into law; see: https://www.congress.gov/bill/116th-congress/house-bill/7010/text It amends the CARES Act in three important ways:

    - First, instead of being limited to spending the PPP funds in just 8 weeks, borrowers now have 24 weeks after the origination of the loan (or until December 31, 2020, whichever occurs first) to spend the loaned money.
    - Second, the percentage of the loaned money that must be spent on payroll was reduced from 75% to 60%.
    - Third, borrowers of PPP loans now have five years (not the previous two years) in which to repay any amounts that are not forgiven through use of the PPP funds.

- On October 9, 2020, the SBA announced that it is adopting a simpler loan forgiveness application for PPP loans of $50,000 or less. This action is intended by the SBA to streamline the PPP forgiveness process and provide administrative relief to smaller businesses; the press release can be viewed at: https://www.sba.gov/article/2020/oct/08/sba-treasury-announce-simpler-ppp-forgiveness-loans-50000-or-less?utm_medium=email&utm_source=govdelivery
- On November 17, 2020, the IRS issued Revenue Ruling 2020-27, https://www.irs.gov/pub/irs-drop/rr-20-27.pdf, which explained why an employer cannot deduct expenses for which PPP loan money was used, ruling that an employer that obtained a PPP may not deduct expenses which supported the employer's PPP loan "… in the taxable year in which the expenses were paid or incurred if, at the end of such taxable year, the taxpayer reasonably expects to receive forgiveness of the covered loan … even if the taxpayer has not submitted an application for forgiveness of the covered loan by the end of such taxable year."
- Also on November 17, 2020, the IRS issued Revenue Procedure 2020-51, https://www.irs.gov/pub/irs-drop/rp-20-51.pdf, which explains the circumstances in which an employer whose PPP loan forgiveness was denied may be able to deduct those business expenses that were incurred using PPP loan funds.

- An Employee Retention Tax Credit, which is a tax credit of up to $5,000 per employee for employers impacted by COVID-19 for wages and health plan expenses paid after March 12, 2020, and before January 1, 2021. For more information on the Employee Retention Tax Credit go to: https://www.irs.gov/newsroom/faqs-employee-retention-credit-under-the-cares-act

- Assistance to healthcare providers and medical suppliers.

- Direct payments to many Americans.

- Expanded eligibility for unemployment insurance for many Americans.

What is the Federal Pandemic Emergency Unemployment Compensation Program that provides an extra $600 on top of the normal State unemployment compensation weekly payment?

Under the Pandemic Emergency Unemployment Compensation program, the Federal Government provided funds to States for additional unemployment benefits to be paid at the rate of $600 per applicant per week for up to 13 weeks to "qualified individuals" who:

- had exhausted all rights to regular compensation under State law or Federal law with respect to a benefit year that ended on or after July 1, 2019;
- had no rights to regular compensation with respect to a week under any other State or Federal unemployment compensation law, or to compensation under any other Federal law; and
- were able to work, available to work, and actively seeking work, although States had to offer flexibility on "actively seeking work" where there were COVID-19 impacts and constraints.

States could not charge employers for any benefits paid under this program. Implementation costs and ongoing administrative costs were also 100% Federally funded. Note that the State agency, department, or commission that normally administers unemployment compensation administered this program. The Pandemic Emergency Unemployment Compensation program ended for weeks of unemployment ending on or before July 31, 2020.

Was the Federal Pandemic Emergency Unemployment Compensation Program extended?

No, but on August 8, 2020, the President of the United States issued a "Memorandum on Authorizing the Other Needs Assistance Program for Major Disaster Declarations Related to Coronavirus Disease 2019" (also referred to as the "Lost Wages Program") in which $44 Billion of emergency funds under the Disaster Relief and Emergency Assistance Act will be made available through the Federal Emergency Management Agency to persons affected by COVID-19 in much the same manner as Pandemic Emergency Unemployment Compensation (see above). The unemployment compensation available to claimants under this emergency relief program will be paid out at a rate of $300 per week with another $100 per week coming from the State which elects to participate in this program. FEMA issued FAQs in August; to review them, go to: https://www.fema.gov/sites/default/files/2020-08/fema_supplement-lost-wages-payments-under-other-needs-assistance_faq.pdf All but the States of Nevada and South Dakota elected to

participate; States and territories had until September 10, 2020, to apply for these funds. Payments under this program are scheduled to end when the repurposed FEMA disaster relief funds are exhausted or on December 6, 2020, whichever occurs first.

Is unemployment compensation subject to taxation?

Yes, and this may surprise some recipients. Recipients should consider setting aside some of the receipts for purposes of making quarterly estimated income tax payments (using Form 1040-ES) or implementing voluntary withholding. The Internal Revenue Service issued a statement on August 18, 2020, that read in part: "With millions of Americans now receiving taxable unemployment compensation, many of them for the first time, the Internal Revenue Service today reminded people receiving unemployment compensation that they can have tax withheld from their benefits now to help avoid owing taxes on this income when they file their federal income tax return next year. By law, unemployment compensation is taxable and must be reported on a 2020 federal income tax return. Taxable benefits include any of the special unemployment compensation authorized under the Coronavirus Aid, Relief, and Economic Security (CARES) Act, enacted this spring. Withholding is voluntary. Federal law allows any recipient to choose to have a flat 10% withheld from their benefits to cover part or all of their tax liability. To do that, fill out Form W-4V, Voluntary Withholding Request, and give it to the agency paying the benefits. Don't send it to the IRS. If the payor has its own withholding request form, use it instead."

What is a "Shared Work" or "Workshare" Program and does it interact with the Federal Emergency Unemployment Compensation Program?

A Shared Work or Workshare Program is a variation on unemployment compensation. It provides an alternative for employers faced with layoffs. It allows an employer to divide available work or hours of work among employees in lieu of a layoff, and it allows the employees to receive a portion of their unemployment benefits while working reduced hours. Many States have a "Shared Work" or "Workshare" program. In this program an employer submits a plan to the State regulatory authority (a Department of Labor, an Employment Security Commission, or a similar agency) for approval and must then adhere to the approved plan; during the program employees can receive unemployment compensation from the State and pay from the employer for the reduced hours worked. Under the Federal Emergency Unemployment Compensation Program, the employees who work reduced hours under a Shared Work or Work Share program will receive an additional $600 per week until the Federal program ends (on July 31, 2020); the employee's partial pay, plus partial unemployment compensation, plus the $600 additional Federal unemployment compensation added together should result in the employee's equaling or exceeding the amount of pay the employee received prior to the reduction in hours. In the Southeast, the following States have these programs:

Arkansas: https://www.dws.arkansas.gov/employers/shared-work-program/

Missouri: https://labor.mo.gov/shared-work

Texas: https://www.twc.texas.gov/businesses/shared-work

Have employment taxes been changed?

No, but they have been deferred. On August 8, 2020, the President of the United States issued a "Memorandum on Deferring Payroll Tax Obligations in Light of the Ongoing COVID-19 Disaster" which tells the Secretary of the Treasury not to collect taxes under 26 U.S.C. 3101(a), which are commonly referred to as FICA taxes imposed upon employers and employees (currently at the rate of 6.2% each). Per the Memorandum, the "deferral shall be made available with respect to any employee the amount of whose wages or compensation, as applicable, payable during any bi-weekly pay period generally is less than $4,000…." The period of deferment will end December 31, 2020. While the Memorandum states that the Secretary of the Treasury "shall explore avenues, including legislation, to eliminate the obligation to pay" those taxes, they will still be payable in 2021 unless there are further developments.

Returning to the Workplace

The Centers for Disease Control and Prevention ("CDC") maintains a website intended to address some of the issues concerning the return to work by employees. That website address is: https://www.cdc.gov/coronavirus/2019-ncov/community/general-business-faq.html

What are the symptoms of COVID-19 infection?

According to the U. S. Department of Labor, Occupational Safety and Health Administration ("OSHA"): "Infection with SARS-CoV-2, the virus that causes COVID-19, can cause illness ranging from mild to severe and, in some cases, can be fatal. Symptoms typically include fever, cough, and shortness of breath. Some people infected with the virus have reported experiencing other non-respiratory symptoms. Other people, referred to as asymptomatic cases, have experienced no symptoms at all. According to the CDC, symptoms of COVID-19 may appear in as few as 2 days or as long as 14 days after exposure."

How does COVID-19 infection spread?

According to OSHA: "The virus is thought to spread mainly from person-to-person, including:

- Between people who are in close contact with one another (within about 6 feet).
- Through respiratory droplets produced when an infected person coughs or sneezes. These droplets can land in the mouths or noses of people who are nearby or possibly be inhaled into the lungs.

It may be possible that a person can get COVID-19 by touching a surface or object that has SARS-CoV-2 on it and then touching their own mouth, nose, or possibly their eyes, but this is not thought to be the primary way the virus spreads. People are thought to be most contagious when they are most symptomatic (i.e., experiencing fever, cough, and/or shortness of breath). Some spread might be possible before people show symptoms; there have been reports of this type of asymptomatic transmission with this new coronavirus, but this is also not thought to be the main way the virus spreads. Although the United States has implemented public health measures to limit the spread of the virus, it is likely that some person-to-person transmission will continue to occur. The Centers for Disease Control and Prevention ("CDC") website provides the latest information about COVID-19 transmission: www.cdc.gov/coronavirus/2019-ncov/about/transmission.html ."

Generally, when should an employee who has been exposed to COVID-19 infection return to work?

Obviously it will be very difficult for anyone to know with certainty if exposure to the virus has occurred. This is why social distancing is being emphasized in our country. A person who has been exposed to the virus can be "asymptomatic" in that the person has no symptoms and may not know he or she has been exposed. Such a person can nevertheless pass along the virus to others. According to the CDC, a person is most likely to be contagious when exhibiting symptoms. So, the best an employer can hope to do is to emphasize social distancing, follow the sanitation protocols recommended by the CDC and other public health authorities, and implore each of its employees to stay away from work if there is any reason to suspect the employee has been in contact with a victim of the virus and especially if the employee has any flu-like symptoms.

Generally, when should an employee who has been diagnosed with COVID-19 infection return to work?

How long someone is actively sick can vary, so the decision on when a person who has had the virus may return to work will vary. The decision involves considering specifics of each situation including disease severity, illness signs and symptoms, and results of laboratory testing for that person. Getting a release from a doctor might be a good idea, but in the current crisis our medical caregivers are stressed, making medical releases temporarily unrealistic. On July 20, 2020, the CDC changed its recommendations concerning the length of time that that employees should stay away from work and self-quarantine. For those recommendations, go to: https://www.cdc.gov/coronavirus/2019-ncov/hcp/disposition-in-home-patients.html

Can an employer require employees to self-report regarding exposure to, symptoms of, or diagnosis of COVID-19 infection?

Yes, OSHA recommends that employers adopt policies and procedures for the prompt identification of employees who are sick or experiencing symptoms of COVID-19. According to

OSHA: "Employers should inform and encourage employees to self-monitor for signs and symptoms of COVID-19 if they suspect possible exposure."

Can an employer require employees to submit to testing for COVID-19?

Yes, if done properly and with planning. An employer may implement a screening process, such as taking each employee's temperature, before employees enter the workplace. If the employer elects to do this, the following should be considered:

- Where the tests will be conducted?
- How they will be conducted (for example, can the employer secure sufficient thermometers that do not require physical contact)?
- How will the privacy of the employee be maintained (remembering HIPAA requirements)?
- Who will conduct the tests?
- Will all employees be tested every day, or will there be a gating or screening process to determine who will be tested?
- How will social distancing be enforced while employees wait to be screened and tested?
- How much time will the process take (this is particularly important for pay purposes for non-exempt employees)?
- Will screening and testing extend to contractors, customers, vendors, and visitors?
- On July 3, 2020, the Centers for Disease Control and Prevention issued additional testing guidance for employers not engaged in healthcare: https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/testing-non-healthcare-workplaces.html
- On June 16, 2020, the EEOC added a new question to its publication, "What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws" (which can be found at: https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws?utm_content=&utm_medium=email&utm_name=&utm_source=govdelivery&utm_term=) in which it states (at Q&A 7) the ADA does not allow employers to require *antibody* testing before allowing employees to re-enter the workplace. The EEOC distinguishes antibody testing from testing to determine if a person has an active case of COVID-19; the latter testing, per the EEOC, may be permissible under the ADA.

Can an employer require employees to return to the workplace following a period of temporarily working remotely in response to the COVID-19 pandemic?

Yes, an employer that implemented a remote working arrangement in response, directly or indirectly, to the requirements of local civil authority can end that arrangement. The employees may be required to resume their normal duties at their normal workplaces. Generally, an employee who refuses to resume normal duties at the normal workplace may be terminated.

Can an employer require employees to return to the workplace following a period of working less than full-time (half days or reduced hours, either as part of a work-sharing program or not) in response to the pandemic?

Yes, the employer's returning to a full work schedule would end the employee's right to benefits under a work-sharing arrangement with the local Employment Security Commission or equivalent State administrator of unemployment benefits. Generally, an employee who refuses to resume normal duties during normal hours may be terminated.

Can an employer require employees to return to the workplace following a furlough, layoff, or termination in response to the pandemic?

No, the status of an employee who has been furloughed, laid off, or terminated is such that the employer may offer reemployment, which offer the employee may accept or decline. If the employee accepts, then the administrative burdens normally associated with new hires may be avoided in some cases. Of course an offer of rehire may under State law be required to be communicated to the local Employment Security Commission or equivalent State administrator of unemployment benefits, and an offer of reemployment would normally end the employee's right to unemployment compensation.

What should employers consider in the event an employee declines to return to work at the employee's normal workplace?

Generally, an employee who refuses to return to work can be terminated by the employer. There are, however, exceptions the employer should consider:

- What does the employer's normal leave (sick leave, vacation, or paid time off) policy allow? With various government agencies urging "flexibility" on the part of employers, employers should develop and implement a standard response to returning employees who request leave under a PTO or other policy. Employers may wish to consider temporarily suspending normal vacation and leave for reasons other than health or medical for a period of weeks or months to allow for recovery from the disruption caused by the COVID-19 pandemic.

- What are the employee's leave rights under current law? Under the FFCRA employees are entitled to paid leave for a variety of COVID-19 related reasons stated in that law. The law will continue in effect until December 31, 2020. The qualifying reasons for leave under the FFCRA are summarized by the U. S. Department of Labor at: https://www.dol.gov/agencies/whd/pandemic/ffcra-employer-paid-leave .

- What are the employee's leave or accommodation rights under the Americans with Disabilities Act ("ADA") if the employee refuses to return to work due to the risk of COVID-19 infection? Under the ADA a fear of COVID-19 infection is generally not a covered disability, and the ADA does not grant an employee a general right to refuse work due to

any disability (because that would mean the employee is refusing to perform the essential functions of the job). There may be situations in which the employee has some recognized disability that may need to be considered, however, and in that event the employer may need to grant accommodation to the employee; if such facts are encountered, the employer should engage in an interactive process with the employee to determine the proper course of conduct (and an experienced employment attorney should be consulted throughout the process). The Centers for Disease Control and Prevention has issued two recent notices regarding people who are at increased risk of contracting COVID-19 which employers should consider when an employee requests an accommodation.

- One addresses people over the age of 60: https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/older-adults.html.
- The other addresses people of any age who have underlying medical conditions: https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/older-adults.html.

Will an employee's return to work depend upon school re-openings?

Employees who have a child in school (pre-K through 12th grade) are dependent upon the re-opening schedules of their child's school. Some schools may re-open on a full-time basis, some may re-open on a modified basis, and some may not re-open. To the extent the child's school is closed, the extended leave provisions of the FFCRA will apply. For more detail, refer to Q & A 98 through 100 in the US Department of Labor's "Families First Coronavirus Response Act: Questions and Answers" at: https://www.dol.gov/agencies/whd/pandemic/ffcra-questions

How should an employer prepare the workplace for the return of employees?

Employers will need to adopt basic infection prevention measures and additional ones as may be appropriate for the specific workplace. For example, employers might:

- Promote frequent and thorough hand washing by providing employees and workplace visitors with a place to wash their hands. If soap and running water are not immediately available, the employer should provide alcohol-based hand sanitizers.

- Require employees to stay home if they are sick.

- Require companies that provide services and temporary staffing to keep their employees who are sick out of the employer's workplace.

- Encourage respiratory etiquette, including covering coughs and sneezes.

- Provide workplace visitors with tissues and trash receptacles.

- Discourage employees from using other employees' work spaces and equipment.

- Enhance housekeeping practices, including more frequent cleaning and disinfecting of surfaces, equipment, door handles, and other parts of the work environment.

- If the workplace is one that is normally deemed to be at higher risk for the spread of COVID-19 infection, such as a hospital, then provide adequate personal protective equipment (PPE) to appropriate employees.

- Limit the use of common and high-traffic areas in the workplace, such as cafeterias, breakrooms, conference rooms, and auditoriums.

- Limit face-to-face meetings and encouraging use of electronic communication.

- Minimize non-essential business travel and isolate employees following travel.

What about employees wearing facemasks?

On June 10, 2020, the Occupational Safety and Health Administration (OSHA) released new guidance, in the form of frequently asked questions and answers, regarding the use of masks in the workplace: https://www.osha.gov/SLTC/covid-19/covid-19-faq.html. Beyond the OSHA guidance, the Centers for Disease Control and Prevention has recommended cloth face coverings for everyone: https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/cloth-face-cover.html. While both OSHA and the CDC recommend masks, each employer has to determine whether or not to furnish masks to employees, and many employees will wish to bring their own masks to the workplace. In addition, a growing number of State and local laws may require employees to wear masks in the workplace.

Can an employer require employees to submit to COVID-19 vaccinations?

Absent a clear government mandate to require vaccination, it will be more prudent for an employer not to require COVID-19 vaccinations as a condition of employment. Currently there is no guidance from the Federal Government, but in the case of other influenza outbreaks the general guidance from the EEOC has been that employers should educate about the benefits of a vaccine and then solicit voluntary vaccination. Under the Americans with Disabilities Act, if an employee has a health condition that reasonably prevents vaccination, then the employer cannot require it. There are also religious objections to vaccinations by some employees to consider. Concerning workplace safety, in 2009 OSHA took the position that an employer could require employees to take flu shots, while at the same time warning "… an employee who refuses vaccination because of a reasonable belief that he or she has a medical condition that creates a real danger of serious illness or death (such as serious reaction to the vaccine) may be protected under Section 11(c) of the Occupational Safety and Health Act of 1970 pertaining to whistle

blower rights." *Go to:* https://www.osha.gov/laws-regs/standardinterpretations/2009-11-09; in other words, there could be a cause of action against the employer for mandating vaccinations.

Are there immunity protections in place that protect employers and businesses?

Some States (including Louisiana, North Carolina, and Oklahoma) have enacted laws that seek to shield employers and business from liability related to COVID-19. The legislation is generally designed to protect employers and businesses from civil liability related to the spread of COVID-19, except in limited situations such as those involving the gross negligence or intentional misconduct of the employer or business. Governors in other States (including Arkansas and Mississippi) have issued Executive Orders that attempt to do the same thing.