

Returning to Work After the COVID-19 Pandemic

A Resource Guide for Employers



ACRISURE® | COMPLIANCE
SOLUTIONS

May 8, 2020

TABLE OF CONTENTS

INTRODUCTION.....	3
GENERAL RETURN TO WORK CONSIDERATIONS.....	4
REOPENING THE PHYSICAL OFFICE AFTER A SHUTDOWN	4
<i>Determining When to Reopen</i>	4
<i>Conducting a Risk Assessment.....</i>	4
MAINTAINING WORKPLACE SAFETY	5
EMPLOYERS' AND EMPLOYEES' ROLES IN MAINTAINING A SAFE WORKPLACE.....	8
EMPLOYERS' ROLES AND RIGHTS.....	8
<i>Policy and Procedures.....</i>	8
<i>Screening employees.....</i>	8
<i>Taking temperatures</i>	8
EMPLOYEES' ROLES AND RIGHTS	9
<i>Voicing Concerns about Safety and Spotting Issues.....</i>	9
RESPONDING TO AN EMPLOYEE'S POSITIVE CORONAVIRUS TEST	9
<i>Responding to an Employee</i>	9
<i>Notifying Employees and Customers.....</i>	10
<i>Disinfecting the Office.....</i>	10
HANDLING EMPLOYEES RETURNING TO WORK AFTER A COVID-19-RELATED LEAVE	10
<i>Documentation</i>	10
<i>Payroll Implications</i>	11
TELEWORKING/ALTERNATE WORK ARRANGEMENTS	11
MANAGEMENT TRAINING AND COMMUNICATIONS	12
<i>Training</i>	12
<i>Communications</i>	12
COMPLIANCE CONSIDERATIONS	13
FAMILIES FIRST CORONAVIRUS RESPONSE ACT (FFCRA)	13
<i>EFMLA Eligibility.....</i>	13
<i>EPSLA Eligibility</i>	13
<i>EFMLA and Traditional FMLA.....</i>	14
<i>EPSLA Benefits for Multiple Employers</i>	14
<i>"Afraid" to Return to Work.....</i>	14
<i>FFCRA Job Protection.....</i>	14
<i>FFCRA Posting/Notice Requirement</i>	15
WAGE AND HOUR CONSIDERATIONS	16
NON-EXEMPT EMPLOYEES	16
<i>Lowered Hourly Rates.....</i>	16
<i>Retroactive Pay Increases</i>	16
<i>Tracking Hours During Telework.....</i>	16
<i>Monitoring Productivity During Telework</i>	17
EXEMPT EMPLOYEES	17
<i>Lowered Salaries.....</i>	17
<i>Change of Exempt/Non-Exempt Status</i>	18
<i>Recall at a Reduced Schedule</i>	18
<i>Increased Workload.....</i>	18

<i>Employment Agreements</i>	18
<i>Bonuses and Commissions</i>	19
<i>Pay Equity Audit</i>	19
WORKPLACE DISCRIMINATION/HARASSMENT	19
<i>Traditional Discrimination/Harassment Concerns</i>	20
<i>Create a Recall Plan</i>	20
<i>Document Recall Decisions</i>	20
<i>Utilize Objective Criteria for Recall</i>	20
<i>Recalling "Low Risk" Employees First</i>	21
<i>Monitor Potential Workplace Discrimination</i>	21
AMERICANS WITH DISABILITIES ACT (ADA)	21
<i>Direct Threat</i>	22
<i>Fitness for Duty</i>	22
<i>COVID-19 Testing</i>	22
<i>Consistent Application of Standards</i>	23
<i>Safety Protocols and Reasonable Accommodations</i>	23
<i>Request for Information</i>	23
<i>Interactive Process</i>	24
<i>Undue Hardship</i>	24
TALENT ACQUISITION	25
<i>Screening Job Applicants for COVID-19</i>	25
<i>Delaying an Applicant's Start Date</i>	25
<i>"High Risk" Applicants</i>	25
EMPLOYEE BENEFITS CONSIDERATIONS	26
AFFORDABLE CARE ACT	26
<i>Break-in-Service Rule</i>	26
<i>Future Eligibility and ALE Determinations</i>	26
<i>Affordability</i>	27
SECTION 125 PLANS	27
<i>"Catch-Up" Premium Contributions</i>	28
<i>Carrier Special Enrollment Periods (SEPs)</i>	28
<i>Dependent Care Assistance Programs (DCAPs)</i>	28
HIPAA	29
<i>Disclosure of an Employee's Positive Test for COVID-19</i>	29
<i>Temperature Screenings and other Wellness Examinations</i>	29
<i>Special Enrollment Rights</i>	30
ERISA	30
<i>Plan Amendments</i>	30
<i>Benefit Claims and Appeals</i>	31
<i>Premium Refunds and Credits</i>	31
COBRA	31
<i>Premium Subsidies</i>	31
<i>Administration Timeframes</i>	32
RESOURCES	33
SAMPLE EMPLOYEE SCREENING	34
PROCEDURES NOTICE	34
SAMPLE WORKPLACE CORONAVIRUS INFECTION EMAIL TO EMPLOYEES	35
SAMPLE TELEWORKING POLICY	36

Introduction

The COVID-19 pandemic has created previously unknown levels of disruption to businesses in the United States. Employers have dramatically shifted priorities as the entire economy came to an immediate halt. One of the unfortunate outcomes of this pandemic has been the need to furlough, layoff, or terminate employees in masses as well as require many employees who have stayed employed to work from home for extended periods. As the pandemic progresses and states begin to relax stay-at-home and quarantine orders, employers will be looking to restart their businesses and recall employees to work.

This guide is intended as an overview of the many issues employers may face during the recall process to provide a safe environment for their workers to return as well as to consider potential compliance concerns that may arise in the process. State and local governments often have different standards in place to combat the pandemic. As a result, employers utilizing this guide are encouraged to reach out to local professionals in their area to verify that they are also in compliance with their local requirements.

General Return to Work Considerations

Reopening the Physical Office after a Shutdown

When stay-at-home orders are lifted, and nonessential businesses are allowed to resume operations, employers will have a multitude of decisions to make and tasks to complete before they are ready to open. To keep their employees safe, organizations must first do their due diligence in preparing the physical workplace.

Determining When to Reopen

President Trump has recently released his guidelines for “Opening up America Again,” although reopening businesses will be the decision of state governors. Here are some considerations for reopening:

- **Reviewing Guidance from State and Local Governments.** Employers need to consider all relevant state and local orders to determine if and when a business is allowed to reopen.
- **Understanding the Risks.** A risk assessment is an essential part of preparing a workplace for reopening. Before conducting the risk assessment, employers should follow guidance from the Occupational Safety and Health Administration (OSHA), state and local agencies, industry associations as well as the local health department.

Conducting a Risk Assessment

Before reopening, employers should perform a risk assessment to determine what steps must be taken. Risk assessments typically involve the following steps:

- **Identifying the Hazards.** Employers need to think critically about their exposures, particularly if an infected person entered their facilities. The easiest way to identify hazards is to perform a walkthrough of the premises and consider high-risk areas (i.e., breakrooms and other areas where people may congregate).
- **Deciding Who May Be Harmed And How.** Certain employee groups may be especially exposed to COVID-19 risks when performing their duties, as well. It is crucial to make a note of high-risk individuals (i.e., employees who meet with customers or individuals with pre-existing medical conditions). As will be discussed in more detail later in this guide, employers need to be conscious of potential discrimination concerns relating to the recall of high-risk individuals.
- **Assessing Risks.** Next, employers should determine the possible consequences of the risk.

- *How likely is this particular risk to occur?*
- *What are the ramifications should this risk occur?*

Potential outcomes could be financial losses, compliance issues, employee safety concerns, business disruptions, reputational harm, and other consequences.

- **Controlling Risks.** There are many approaches to managing risk, including the following:
 - Risk avoidance — *Risk avoidance is when a business eliminates specific hazards, activities, and exposures from their operations altogether.*
 - Risk control — *Risk control involves preventive action to decrease the probability of the risk occurring (i.e., cleaning protocols, remote work, personal protective equipment (PPE) usage).*
 - Risk transfer — *Risk transfer is when a business transfers its exposures to a third party (i.e., insurance).*
- **Monitoring the Results.** Risk management is an evolving, continuous process. Once a risk management solution has been implemented, the answer should be monitored for effectiveness and reassessed. The situation and recommendations regarding COVID-19 risks can change over time.

Maintaining Workplace Safety

Once the risk assessment is complete, employers need to act to control COVID-19 risks. These risks and the solutions the organization implements may vary by business and industry.

OSHA and the Center for Disease Control and Prevention (CDC) have provided workplace controls to consider if a risk assessment determines that COVID-19 poses a threat to the employer's employees or customers, such as the following:

- **Implement Administrative Controls.** Administrative controls include changes in work policies or procedures that reduce or minimize an individual's exposure to a hazard (*i.e.*, establishing staggered shifts that reduce the total number of employees in a facility at any given time).
- **Utilize Personal Protective Equipment (PPE).** PPE is equipment, such as a mask, worn by individuals to reduce exposure to a hazard. Training should be conducted so that employees understand how to put on, take off, and care for the PPE.
- **Consider Engineering Controls.** Engineering controls involve the re-engineering of the workplace to protect workers by removing hazardous conditions or by placing a barrier between the worker and the hazard (*i.e.*, installing high-efficiency

air filters or clear plastic sneeze guards).

- **Change Business Practices.** To maintain critical operations, employers may need to identify alternative suppliers, prioritize existing customers, or suspend portions of its operations.
- **Collaborate With Vendors And Partners.** Employers are encouraged to talk with business partners about response plans and share best practices with other employers in the community, especially those within its supply chain.
- **Encourage Social Distancing.** Social distancing could include the following:
 - *Avoiding gatherings of 10 or more people*
 - *Instructing workers to maintain at least six feet of distance from other people*
 - *Hosting meetings virtually when possible*
 - *Limiting the number of people on the job site to essential personnel only*
 - *Encouraging or requiring staff to work from home when possible*
 - *Discouraging people from shaking hands*
- **Manage The Different Risk Levels Of Employees.** Older adults and those with chronic medical conditions may be at higher risk for severe illness if they contract COVID-19. Employers should consider minimizing face-to-face contact between these employees or assign work tasks that allow them to maintain a distance of six feet from other workers, customers, and visitors.
- **Separate Sick Employees.** Employees who appear to have symptoms (i.e., fever, cough or shortness of breath) upon arrival at work or who become sick during the day should immediately be separated from other employees, customers, and visitors, and sent home. If an employee is confirmed to have COVID-19, employers should inform fellow employees of their possible exposure to COVID-19. The employer should instruct fellow employees about how to proceed based on the CDC Public Health Recommendations for Community-Related Exposure.
- **Support Respiratory Etiquette And Hand Hygiene.** Employers should encourage proper hygiene to prevent the spread of COVID-19 by doing the following:
 - *Providing tissues and no-touch disposal receptacles*
 - *Providing soap and water in the workplace*
 - *Placing hand sanitizers in multiple locations to encourage hand hygiene*

- **Perform Routine Environmental Cleaning And Disinfection.** Employers should regularly sanitize their facilities to prevent the spread of COVID-19. Some best practices include the following:
 - *Cleaning and disinfecting all frequently touched surfaces in the workplace, such as workstations, keyboards, telephones, handrails, and doorknobs.*
 - *Discouraging workers from using other workers' phones, desks, offices, or other tools and equipment, when possible. If necessary, clean and disinfect them before and after use.*
 - *Providing disposable wipes so that commonly used surfaces can be wiped down by employees before each use.*

Employers' and Employees' Roles in Maintaining a Safe Workplace

Employers' Roles and Rights

Policy and Procedures

Employers owe it to their employees to provide resources and best practices for keeping each other safe and healthy. This could be accomplished by posters in the workplace (see Appendix). Employers should also craft detailed policies that layout expectations for employees, describe discipline for non-compliance, and contain mechanisms for reporting potential issues. The Occupational Safety and Health Act prohibits employers from retaliating against workers for raising concerns about safety and health conditions. In addition, OSHA provides recommendations intended to assist employers in creating workplaces that are free of retaliation and guidance to employers on how to appropriately respond to workers who may complain about workplace hazards or potential violations of federal laws. OSHA urges employers to review its publication: Recommended Practices for Anti-Retaliation Programs (OSHA 3905 – 2017).

Screening employees

In contrast to pre-COVID-19 workplaces, employers have gained several rights to keep their employee population safe and healthy. Screening employees will become much more common and acceptable. When employees enter the workplace or call in sick, employers are now allowed to ask the employee if he/she is experiencing symptoms related to COVID-19. Employers should rely on the CDC, other public health authorities, and reputable medical sources for guidance on emerging symptoms associated with the disease. For example, fever, chills, cough, shortness of breath, sore throat, loss of smell or taste as well as gastrointestinal problems, such as nausea, diarrhea, and vomiting are all possible symptoms. These sources may guide employers when choosing questions to ask employees to determine whether they would pose a direct threat to health in the workplace. If it is determined that the employee does have COVID-19-related symptoms, the employer may require the employee to leave work and stay home. The EEOC confirmed that advising workers to go home is permissible and not considered disability-related if the symptoms present resemble those of COVID-19. However, employers must maintain all information about employee illness as a confidential medical record in compliance with the Americans with Disability Act (ADA).

Taking temperatures

In addition to asking employees questions, employers are now allowed to measure an employee's body temperature since the CDC and state/local health authorities have

acknowledged the community spread of COVID-19 and issued attendant precautions. Employers should exercise some caution, though, since some people with COVID-19 do not register a fever. If an employer does decide to take temperatures and record them in a log, the employer still needs to maintain the confidentiality of this information. NOTE: If the company does business in the State of California, and the business is subject to the California Consumer Privacy Act (CCPA), then the company must provide employees with a CCPA-compliant notice before or at the same time as the information is collected.

Employees' Roles and Rights

Voicing Concerns about Safety and Spotting Issues

Employees need to understand that keeping the workplace safe is not just up to management. In addition to following the safety protocols set up by the company, employees are also encouraged to be on alert for potential safety hazards. Furthermore, they should be able to voice these concerns to the company and regulatory bodies without fear of retribution.

OSHA's Whistleblower Protection Program enforces the provisions of more than 20 industry-specific federal laws protecting employees from retaliation for raising or reporting concerns about hazards or violations of various airline, commercial motor carrier, consumer product, environmental, financial reform, food safety, health insurance reform, motor vehicle safety, nuclear, pipeline, public transportation agency, railroad, maritime, securities, and tax laws. OSHA encourages workers who suffer such retaliation to submit a complaint to OSHA as soon as possible to file their complaint within the legal time limits, some of which may be as short as 30 days from the date they learned of or experienced retaliation. An employee can file a complaint with OSHA by visiting or calling his or her local OSHA office, sending a written complaint via fax, mail, or email to the closest OSHA office; or filing a complaint online. No particular form is required, and complaints may be submitted in any language.

Responding to an Employee's Positive Coronavirus Test

Employers are responsible for handling the news of a positive coronavirus test swiftly to both protect the health of other employees while also preserving the affected employee's confidentiality. In addition to notifying the company and its customers, employers must also disinfect the office and evaluate next steps.

Responding to an Employee

When an employee notifies his/her manager that he or she is sick with COVID-19, the manager should respond calmly and empathetically. The company needs to ensure that the infected employee is treated with compassion, that his/her identity will remain confidential, and that he/she is made aware of the options for taking leave or paid time off until recovered.

The employer must also find out with whom the employee has been in contact in the last two weeks. Obtaining this information is essential so that employers can directly notify customers and other employees that they may have been directly exposed to COVID-19.

Notifying Employees and Customers

Without disclosing the identity of the infected employee, the employer needs to inform the person's coworkers, customers, and the rest of the company. In contrast, if the employer is in contact with a public health agency, the employer may disclose the name of the employee. The company should directly notify any coworkers or customers with whom the ill employee had been in contact. Those who have been in contact with the infected employee should self-quarantine for the next 14 days. During that time, the employee should monitor themselves for the symptoms of COVID-19. If feasible, employers should allow eligible employees to work from home during this time.

It is essential to notify the rest of the company by email or letter that an employee has tested positive for COVID-19. Again, employers should keep the employee's identity protected in all communication. The communication should include what steps the employer will be taking to protect the health of other employees. If the plan is to have employees work from home for the next 14 days or to close the office, this information should be communicated clearly in the email or letter.

Disinfecting the Office

According to the CDC, COVID-19 can remain on hard surfaces for up to 12 hours, creating a potential risk of transmission. Depending on the size of the organization, it may be necessary to close the office for a few days so that it can be thoroughly cleaned and disinfected. All surfaces that the infected employee may have touched should be disinfected, as well as other high-touch surfaces, which include countertops, cabinets, doorknobs, handles, and chairs.

Handling Employees Returning to Work after a COVID-19-Related Leave

Documentation

When employees who have been out on leave start returning to the office, it is especially important to make sure these employees are eligible to return. This process safeguards employers from liability and ensures the safety and health of your workforce as a whole.

Employers have every right to require a doctor's note certifying that an employee is fit for duty upon returning from leave. Realistically, however, it may not be possible to get that documentation promptly due to increased workload at health care facilities. Clinics may be able to provide a simple form letter or email that states that the employee does not have

the virus. It is essential that employers both make a good faith effort to receive this information yet remain flexible if obtaining the documentation is not possible.

Payroll Implications

With all of the additional employee leave provisions and tax credits, accurate payroll administration has become increasingly important. If an employee were on unpaid leave, it would be essential to make sure the employee's pay is re-initiated upon his/her return. If an employee was partially paid during leave, management must communicate with the payroll department to clarify exactly when and at what rate an employee should be paid upon his/her return. If an employee was not paying for benefits during the time the employee was not working, benefits deductions might need to be verified to make sure they are taken out of paychecks and caught up for the time on leave. Also, any paid time off accruals that were suspended should be restarted.

Teleworking/Alternate Work Arrangements

Many employers are using the "forced" telework experience during the pandemic as a test to see if such changes are possible with their business, and it is an opportune time to implement these changes if the results are favorable. Due to ongoing safety concerns and social distancing requirements, teleworking will likely become more prevalent, and employers may notice a marked increase in teleworking requests from employees out of employee concerns for their well-being. That being said, there are also many benefits to employees in a teleworking environment not related to health that makes the arrangement desirable, including added flexibility and lower commuting costs. Employers should be prepared for requests from employees that both target their fear of return as well as their desire to continue to telework for basic logistical reasons.

Due to the likelihood of such requests, employers are encouraged to conduct a cost/benefit analysis. They should determine which roles can be carried out at home on a long-term basis and whether the organization has the technology available to perform such work at home. Companies may find that the increase in employee morale coupled with decreased costs on various expenses (*i.e.*, office space, furniture, utilities, snacks/coffee, parking, etc.) could make teleworking an attractive option for employers to offer.

To decrease traffic in the workplace, employers may get creative in scheduling, as well. It might be worthwhile to entertain arrangements such as rotating schedules of when specific employees are in the office or part-time remote work on alternate weekdays. Many employers are targeting employees to be in the office on an alternating basis with another employee two days a week, with everyone being in the office one day a week for group meetings/discussions. Ultimately, any strategy utilized by an employer should be analyzed for efficacy before implementation based on the considerations addressed above.

Management Training and Communications

Training

Managers are vital to maintaining safety, productivity, and employee morale in the workplace. It is imperative that managers fully understand all safety protocols to help his or her employees comply. Managers should also be knowledgeable regarding all of the leave/benefits options available for an employee during this unique time. Lastly, it would be beneficial for managers to receive resources on handling and to support the various emotional responses that employees may experience during this tumultuous period.

Communications

With employees and their families experiencing a great deal of uncertainty, employees are looking for guidance wherever they can find it. Sending a responsible, transparent, unified message to employees is extremely important during this time of instability. Managers can help calm some of their employees' fears by taking the following actions:

- Acknowledge employee fears surrounding their jobs and the company, but also reassure them of their value to the company and the company's desire to keep them as members of the team.
- Remain open with employees about management decisions and ask for suggestions to rectify problems.
- Provide as much information as possible about the pandemic.
- Highlight employee benefits that employees might not know about to relieve any financial stress.
- Encourage employees to take advantage of any telehealth services to preserve their mental well-being.
- Communicate the future of the business with employees often — in meetings, on the company intranet site, in newsletters, and blogs.
- Show empathy in the communications, as every employee's situation may be different.

In these uncertain times, employers must clearly communicate their business's plans as frequently as possible. The company cannot control the pandemic, but management can help ease the stress their employees are experiencing.

COMPLIANCE CONSIDERATIONS

Families First Coronavirus Response Act (FFCRA)

On March 18, 2020 (effectuated on April 1, 2020), President Trump signed into law the FFCRA, which contains both the Emergency Family and Medical Leave Expansion Act (EFMLA) as well as the Emergency Paid Sick Leave Act (EPSLA) and applies to most employers with less than 500 employees.

EFMLA Eligibility

The EFMLA allows employees to take up to 12 weeks of paid leave; however, the first two weeks may be unpaid. For employees to be eligible, the employer must have employed them for at least 30 calendar days. Employees can use the EFMLA leave to care for their children if the children's school or place of care has been closed, or the childcare provider is unavailable, due to the COVID-19 outbreak.

EPSLA Eligibility

The EPSLA requires employers to provide up to 80 hours of paid sick time to any employees employed by the employer when (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 pertaining 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 Federal, State, or local quarantine or isolation order related to COVID-19 or has been advised by a health care provider to self-quarantine due to the concerns associated to COVID-19; (5) the employee is caring for a son or daughter of such employee if the school or place of care of the son or daughter has been closed, or the child care provider of such son or daughter is unavailable, due to COVID-19 precautions; or (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.

Importantly, employers that dropped below 500 employees due to layoffs and terminations during the pandemic became immediately covered under the statute. During the recall phase, if at any time an employer exceeds the 500 employee threshold, they are instantly no longer covered under the law, and employees would no longer be eligible for FFCRA benefits. Employers close to the 500 threshold should strategically factor this scenario into their recall plans.

The FFCRA benefits can only be triggered by work being available for the employee. When it became clear that the pandemic was significantly impacting the United States, there was an

initial rush to place employees on furlough or to lay them off indefinitely. In these scenarios, there was no work for employees to perform, and thus they were ineligible for the FFCRA benefits. Now that employers are beginning to recall employees from furlough and layoff, work is again being offered to those employees, which can now trigger the availability of FFCRA benefits as long as employees meet one of those above mentioned COVID-19 qualifying reasons for the leave and are recalled before December 31, 2020.

EFMLA and Traditional FMLA

Employees who attempt to claim EFMLA benefits can only obtain those benefits up to the point where he/she reaches 12 weeks of total FMLA leave, to include both traditional and EFMLA leave. As a result, it is imperative for employers to clarify internally how much leave an employee has utilized upon his/her return when combining both types of FMLA leave. It is also important to note that employees that were laid off or otherwise terminated on or after March 1, 2020, and are rehired by the employer on or before December 31, 2020, will be entitled to EFMLA as long as they were on the employer's payroll for 30 or more of the 60 calendar days before the date of layoff or termination.

EPSLA Benefits for Multiple Employers

Similarly, employees are limited to a maximum of 80 hours of EPSLA benefits, whether they received those hours at their current employer or a previous employer. If an employee did not utilize all 80 hours at a former employer, they are still entitled to the remainder of those hours with their new employer. Remember that none of these FFCRA benefits extend beyond December 31, 2020, so there is no carryover should an employee fail to utilize all of his/her benefits up to that deadline.

"Afraid" to Return to Work

Upon starting the recall process, employers are consistently hearing from employees that they are too "afraid" to return to work. Employees who have been offered work at the worksite and refuse it due to "fear" generally are not eligible for FFCRA benefits. However, if that employee is considered "particularly vulnerable to COVID-19" as noted by their health care provider, then it is possible to trigger EPSL benefits if the employee is required to self-quarantine at home and cannot report to the worksite as requested.

FFCRA Job Protection

Although it will be discussed more in the Workplace Harassment/Discrimination section later in this guide, it is imperative that employers recalling employees do so in a non-discriminatory and non-retaliatory way. Specifically, as it pertains to FFCRA, there is job protection written into the law. Should there be a legitimate, non-discriminatory and non-retaliatory basis for not recalling an employee that utilized FFCRA leave, then the employer can refuse to recall that employee, similar to the standards in the traditional FMLA analysis. That being said, the fact that an employee exercised his/her statutory right to receive the

FFCRA benefits should not be a factor in deciding whether he/she should be recalled and should not be the basis for any form of retaliation if he/she begins working again. As noted in the statute and the corresponding regulations, retaliation for exercising rights under the FFCRA is strictly prohibited.

FFCRA Posting/Notice Requirement

Employers covered by the FFCRA should continue to post the required poster in a conspicuous place on its premises, generally in the same locations where other Federal and State posters are placed. This poster will have to continue to be posted through December 31, 2020.

Wage and Hour Considerations

Numerous wage and hour compliance concerns have arisen for employers during the pandemic that must be addressed upon recalling employees to work. These issues arise both in the context of exempt and non-exempt employees.

Non-Exempt Employees

The Fair Labor Standards Act (FLSA) requires employers to pay non-exempt employees for all hours worked as well as overtime at time and one half for all hours worked over 40 in a workweek.

Lowered Hourly Rates

To minimize expenses, some employers lowered the hourly rates for non-exempt employees rather than furloughing those employees or instituting mass layoffs. Such a strategy is allowable under wage and hour law, with the only caveat potentially being those employees that signed employment agreements. However, employment agreements for non-exempt employees are generally less likely than in the exempt employee category. When non-exempt employees that received lowered hourly rates return to work, employers will have to assess if they have the working capital to be able to return those employees who received rate decreases back to their original levels, and if so, whether those increases should occur on a graduated scale or immediately.

Retroactive Pay Increases

Some employers are also considering increasing employees' pay retroactively to when the initial decreases occurred so that employees are made whole. Such a strategy is allowable, although employers need to be aware of the impact that such a one-time payment could have on the regular rate for previous weeks if the employee worked any overtime hours during that timeframe. It is also essential to assess whether these decreases had any impact on employee benefit plans that may base benefits on compensation level. Any compensation changes could also impact the affordability of medical coverage under the ACA.

Tracking Hours During Telework

Another wage and hour concern employers are facing regarding non-exempt employees is telework. Due to the prevalence of employees that are teleworking during the pandemic, tracking these hours has become a more significant compliance burden for employers to bear. The non-compliance logistical issues associated with ongoing telework programs will be discussed separately within this guide. Still, this section will focus on the compliance

concerns related to telework in the wage and hour context.

Employees that normally work in the office but are now required to work from home can create numerous compliance-related issues that must be addressed. The most important of these is verifying that the means of tracking time is accurate and easily understood by employees. If an employer has a software-based timekeeping system, the most logical approach for employers to take is for those employees working from home to login to the network/system through a VPN to be able to clock in and clock out as usual. If an employer does not yet have a software-based timekeeping system in place but instead has a time clock on-premises, then the employer needs to establish a consistent protocol for employees to follow that regularly utilize a time clock to track their hours.

To create uniformity, it is recommended that employers create a policy that specifically addresses how employees are to track their time during telework. This policy should include a discussion about tracking all hours worked as well as not performing any “off the clock” work, abiding by meal and rest breaks as mandated by state and local laws, and reiterating the approval process necessary for employees to work overtime. Although these are fundamental principles in a brick and mortar context, it is beneficial for employers also to reiterate these rules in a telework environment.

Monitoring Productivity During Telework

Not all employees thrive in a telework environment, and working from home during the pandemic is even more difficult because of all of the potential distractions that can arise. Some employees struggle with efficiency and time management, and deadlines can become more difficult for them to meet. As a result, it is incumbent upon supervisory employees to be extremely diligent in monitoring employee productivity by checking in frequently and making sure that employees understand they are expected to still be productive despite the changing environment. This approach should be addressed with managers through return-to-work training that addresses changed circumstances and policies as a result of the pandemic.

Exempt Employees

Lowered Salaries

Exempt employees do not have the same level of compliance risk that non-exempt employees do, but there are areas that employers need to be mindful of to avoid wage and hour pitfalls. Similar to non-exempt employees whose hourly rates were lowered as a result of cost-cutting measures during the pandemic, many exempt employees had their salaries reduced to minimize expenditures. Although employers are free to reinstate the old salary at any time, employers do not want to get in the habit of raising and lowering exempt salaries regularly. Because it is difficult to ascertain the full economic impact of the pandemic into the future, it is advisable to consider holding exempt employee salaries at the

lowered rate for approximately a quarter to verify that revenues will be able to sustain the increased wages continually and to avoid having to revert back to lower wages if future revenues do not meet expectations.

Change of Exempt/Non-Exempt Status

Along with lowering salaries, many employers also changed the status of exempt employees to non-exempt due to a likely reduced workload. Such a strategy is allowable, although it is recommended that employers not repeatedly move employees back and forth between exempt and non-exempt status as that will be an obvious red flag for the Department of Labor should they conduct an audit of the employer's wage and hour practices. The basis for any changes that are made between non-exempt and exempt status should be documented for purposes of the employer's legal defense should a lawsuit or investigation occur in the future. In a situation such as this, the objective business reason for the change is related to "changed economic conditions" of the organization, whether it was connected to an economic downturn or improvement.

Recall at a Reduced Schedule

Another approach that some employers are taking is to recall salaried exempt employees at a reduced amount of hours and a corresponding reduction in their salary. This is allowable from a compliance perspective, but employers should be aware of the amount of the reduction and whether the employee still meets the Federal salary minimum of \$684 to qualify for an exemption.

Increased Workload

Many employers have not reduced exempt employees' salaries. Still, due to a reduced workforce, the expectation is that exempt employees will be expected to work more hours for the same pay they had before the pandemic. From a compliance perspective, the only concern is to verify that if an exempt employee takes on more non-exempt tasks as part of their job duties that their primary duties remain exempt in nature to maintain the exemption. It is more likely that employers will face the non-compliance related hurdle of properly communicating this expanded workload without pay increase to exempt employees to assuage any frustration on the part of those employees about working harder and more frequently for no increase in pay.

Employment Agreements

Another issue that is more likely to arise with exempt employees is verifying that employment agreements do not impact any strategic decisions employers are attempting to institute. Specifically, employers should have already reviewed all employment agreements before taking any adverse actions against any employees regarding pay or other terms and conditions of employment. If a change needed to be made, employers should have discussed such change with the affected employee and made any necessary amendments

that were agreed to by both parties. Assuming that such amendments were properly prepared, any further changes that must be made, either for worsening or improving conditions, must similarly be consummated via contractual amendment agreed to by both parties.

Bonuses and Commissions

One issue that may arise as a result of diminished revenue for the organization is the payout of non-discretionary bonuses or commissions. If a non-discretionary bonus exists within an employment agreement and the parties have not agreed to amend that provision, the employer is still obligated to pay the bonus to the affected employee. Similarly, if a salesperson is owed a commission due to a policy, practice, or formal agreement, then the employer remains obligated to provide those wages to the affected employee despite diminished revenues. Bonus plans not spelled out in a formal agreement also must be considered. Although bonus plans that are delineated as discretionary can be safely withheld if necessary, those bonus plans where eligibility is not as easily defined can create liability for the employer. Before employees being recalled, employers should assess all potential bonuses, both discretionary and non-discretionary, to accurately determine what must be paid and what can be withheld. The results of this assessment should be appropriately communicated to the affected employees.

Pay Equity Audit

The final area of wage and hour liability worth noting involves a unique opportunity to rectify potential discriminatory pay practices within an employer's organization. The EEOC, in recent years, has taken an aggressive stance towards resolving pay equity concerns in the workplace. As a result of the pandemic, many employers have taken measures to address compensation through expense reduction. Employers that are recalling employees may want to use this opportunity to conduct a pay equity audit to assess whether it is an opportune time to balance out any pay disparities that may exist in their workforce. It is an issue employers should address soon regardless, so this scenario provides an opportunity to address those concerns at a time when employers may be reviewing compensation on an organization-wide scale. Should an employer decide to conduct a pay equity audit, it should be held in conjunction with internal or external counsel to obtain the protections of the attorney/client and work product privileges.

Workplace Discrimination/Harassment

Due to the significant number of employees furloughed, laid off, or terminated during the pandemic, there are substantial discrimination compliance concerns related to recalling employees back into the workforce. Secondly, once those employees are recalled, it will be exceedingly important that employers closely monitor potential harassment in the workplace as a result of biases that may have formed during the time employees were out of work during the pandemic.

Traditional Discrimination/Harassment Concerns

The first step an employer must take in returning employees to work is to assess liability in the context of traditional concepts of discrimination. Under federal, state, and local non-discrimination laws, employers generally are prohibited from discriminating against employees in regards to terms and conditions of employment based on any protected characteristics (*i.e.*, race, religion, gender, age, etc.). These traditional discrimination principles are exaggerated in the current environment due to the sheer volume of employees being recalled by employers.

Create a Recall Plan

Recalling employees should be an organized and analytical process that involves a well-thought-out plan for determining which employees will be recalled, in what order, and which employees may not be recalled at all. Failure to create an organized system for recall can open the door to extensive liability if an employer's recall plan negatively impacts a specific protected class, even unintentionally. Keep in mind that some workplaces will have pre-existing rules or procedures that outline a mandatory basis for the recall. These rules might be found in the employee handbook, standard operating procedures, past practice, collective bargaining agreement, or any combination of these sources. If any recall rules do exist, they should be utilized objectively to avoid any concerns about favoritism or discrimination.

Document Recall Decisions

The most critical component of any recall plan should be documenting the legitimate, non-discriminatory, non-retaliatory reasons for the timing of an employee's recall or why an employee was not recalled at all. If the employer intends to restart operations slowly due to lack of resources or customers, they should first prioritize those key employees that are required to get the business up and running again at a minimal level. Not only does that approach address the precise operational needs of the business, but it also provides the employer with a solid defense against discrimination claims. As business begins to increase, an employer can continue to recall employees based solely on their importance to the continued improvement of operations. Again, to avoid discrimination claims, the employer must document the non-discriminatory, non-retaliatory reasons for why and when employees were recalled.

Utilize Objective Criteria for Recall

If employees are going to be recalled in large numbers and it is difficult to objectively discern if one employee is more important to the organization than another, the employer should create an objective basis for selecting individual employees over others. Specifically, an employer could base recall on a seniority/tenure system, or they could recall based on merit if there is an objective merit-based system already in existence within the organization (such as written evaluations). Once an objective basis for recalling employees is determined, exceptions should be rarely utilized, if at all.

It is recommended that before any recall activity being implemented, employers should analyze which employees are being recalled and which are not. This analysis should contain the known protected characteristics of all affected employees to determine if certain protected classes are being disproportionately impacted negatively. At a minimum, such an analysis will give the employer an understanding of potential liability that may exist so that the employer can determine if defensible non-discriminatory, non-retaliatory reasons exist for the decisions it has made.

Recalling “Low Risk” Employees First

Some employers have considered the possibility of recalling “low risk” employees first for safety reasons. Considering the concerns associated with the pandemic, on its face, this appears to be a non-discriminatory basis for recalling employees. However, if an employer wants to pursue this type of recall strategy, it is recommended that they analyze those employees being recalled versus those not being recalled to see if there are any concerns. It is possible that “high risk” employees that may not be immediately recalled could include those employees that are older, disabled, or pregnant. Although the employer may have had no intent in attempting to discriminate against any individuals within those protected classes, the “low risk” recall strategy may have a disparate impact on those individuals and create liability for the employer in the process.

Monitor Potential Workplace Discrimination

Once employers recall their employees, they must continue to monitor their facilities closely for signs of discrimination and harassment. EEOC Chair Janet Dhillon recently made a statement that there have been reports of mistreatment and harassment of Asian Americans and other people of Asian descent in the workplace. These actions can result in unlawful discrimination based on national origin or race. As a result, employers that have employees in these protected classes need to be prepared to handle any potential complaints that may arise in the workplace as a result of these types of situations. To combat this, an employer should remind all employees that it is against the federal EEO laws to harass or otherwise discriminate against coworkers based on race, national origin, color, sex, religion, age (40 or over), disability, or genetic information. It may be particularly helpful for employers to advise supervisors and managers of their roles in watching for, stopping, and reporting any harassment or other discrimination. An employer should also make clear that it will immediately review any allegations of harassment or discrimination and take appropriate action.

Americans with Disabilities Act (ADA)

One of the biggest concerns most employees will have about returning to the workplace is whether the physical location will be a safe environment. Due to the extreme nature of the pandemic, normally stringent ADA rules about potentially discriminatory employment practices have been modified to allow employers to provide their employees with a safe

workplace.

Direct Threat

Specifically, the ADA permits employers to make disability-related inquiries and conduct medical exams if job-related and consistent with business necessity. Inquiries and reliable medical exams meet this standard if it is necessary to exclude employees with a medical condition that would pose a direct threat to health or safety. Direct threat is to be determined based on the best available objective medical evidence. The guidance from CDC or other public health authorities qualifies as such evidence. Therefore, employers will be acting consistently with the ADA as long as any screening implemented is consistent with advice from the CDC and public health authorities for that type of workplace at that time. For example, this may include continuing to take temperatures and asking questions about symptoms (or require self-reporting) of all those entering the workplace.

Fitness for Duty

As mentioned above, employers are permitted under the ADA to require a fitness for duty doctor's note from employees who return to work after having had COVID-19. As a practical matter, however, doctors and other health care professionals may be too busy during and immediately after the pandemic to provide fitness-for-duty documentation. Therefore, new approaches may be necessary, such as reliance on local clinics to provide a form, a stamp, or an e-mail to certify that an individual does not have the pandemic virus.

COVID-19 Testing

Employers are also permitted to administer a COVID-19 test (a test to detect the presence of the COVID-19 virus) before allowing employees to enter the workplace. The ADA requires that any mandatory medical test of employees be "job-related and consistent with business necessity." Applying this standard to the current circumstances of the COVID-19 pandemic, employers may take steps to determine if employees entering the workplace have COVID-19 because an individual with the virus will pose a direct threat to the health of others. Therefore an employer may choose to administer COVID-19 testing to employees before they enter the workplace to determine if they have the virus.

Consistent with the ADA standard, employers should ensure that the tests are accurate and reliable. For example, employers may review guidance from the U.S. Food and Drug Administration about what may or may not be considered safe and accurate testing, as well as guidance from the CDC or other public health authorities, and check for updates. Employers may wish to consider the incidence of false-positives or false-negatives associated with a particular test. Finally, note that accurate testing only reveals if the virus is currently present; a negative test does not mean the employee will not acquire the virus later.

Consistent Application of Standards

It is imperative that employers not engage in unlawful disparate treatment based on protected characteristics in decisions related to screening and exclusion. In other words, if testing or asking about symptoms, or requiring a fitness for duty note to return to the workplace, employers should be treating all employees equally and not singling out certain protected classes to be treated differently than other groups. Employers are also required to follow proper ADA protocols about the maintenance and storage of confidential medical information that may be obtained as a result of the expanded testing and medical information employers are obtaining during the pandemic. The ADA requires that all medical information about a particular employee be stored separately from the employee's personnel file, thus limiting access to this confidential information. An employer may store all medical information related to COVID-19 in existing medical files. This information includes an employee's statement that he/she has the disease or suspects he/she has the disease, or the employer's notes or other documentation from questioning an employee about symptoms.

Safety Protocols and Reasonable Accommodations

It is also likely that employers will institute other safety protocols in the workplace, such as requiring employees to wear protective gear (for example, masks and gloves) and observe infection control practices (for example, regular hand washing and social distancing protocols). These types of protocols, while likely necessary to provide a safe work environment, may cause issues to arise with certain protected classes such as employees with disabilities or specific religious beliefs. For example, where an employee with a disability needs a related reasonable accommodation under the ADA (i.e. non-latex gloves, modified face masks for interpreters or others who communicate with an employee who uses lip reading, or gowns designed for individuals who use wheelchairs), or an employee needs a religious accommodation under Title VII (such as modified equipment due to religious garb), the employer should discuss the request and provide the modification (or an alternative if feasible) as long as it is not an undue hardship on the operation of the employer's business under the ADA or Title VII.

Request for Information

As employees return to work, employers will also have to return to some of the traditional components of the ADA process to assess and potentially accommodate employee disabilities. For example, if upon return an employee requests an accommodation for a medical condition either at home or in the workplace, an employer is still allowed to request information to determine if the condition is a disability and if it is not obvious or already known, an employer may ask questions or request medical documentation to determine whether the employee has a disability as defined by the ADA (a physical or mental impairment that substantially limits a major life activity, or a history of a substantially limiting impairment).

Interactive Process

Similarly, an employer may still engage in the interactive process and request information from an employee about why an accommodation is needed. If it is not apparent or already known, an employer may ask questions or request medical documentation to determine whether the employee's disability necessitates an accommodation, either the one he requested or any other. Possible questions for the employee may include: (1) how the disability creates a limitation, (2) how the requested accommodation will effectively address the limitation, (3) whether another form of accommodation could effectively address the issue, and (4) how a proposed accommodation will enable the employee to continue performing the "essential functions" of his position (that is, the fundamental job duties).

Undue Hardship

Depending on the severity of the financial damage to the employer as a result of the pandemic, it could change the employer's ability to provide a reasonable accommodation to an employee without undue hardship. An employer does not have to give a particular reasonable accommodation if the undue hardship is created by "significant difficulty or expense." In some instances, an accommodation that would not have posed an undue hardship before the pandemic may pose one now.

Specifically, an employer may consider whether current circumstances create "significant difficulty" in acquiring or providing certain accommodations, considering the facts of the particular job and workplace. For example, it may be significantly more difficult during the pandemic to conduct a needs assessment or to acquire certain items, and delivery may be impacted, particularly for employees who may be teleworking. Or, it may be significantly more challenging to provide employees with temporary assignments, to remove marginal functions, or to readily hire temporary workers for specialized positions. If a particular accommodation poses an undue hardship, employers and employees should work together to determine via the interactive process if there may be an alternative that could be provided that does not pose such problems.

Before the COVID-19 pandemic, most accommodations did not pose a significant expense when considered against an employer's overall budget and resources (always considering the budget/resources of the entire entity and not just its components). But, the sudden loss of some or all of an employer's income stream because of this pandemic is a relevant consideration. Also applicable is the amount of discretionary funds available at this time - when considering other expenses - and whether there is an expected date that current restrictions on an employer's operations will be lifted (or new restrictions will be added or substituted). These considerations do not mean that an employer can reject any accommodation that costs money; an employer must weigh the cost of an accommodation against its current budget while taking into account constraints created by this pandemic. For example, even under present circumstances, there may be many no-cost or very low-cost accommodations.

Talent Acquisition

Much of the focus surrounding the recall of employees is centered on those employees that were already employed and are being recalled back to the same employer. However, it is just as essential to assess the liability concerns about new employees that will need to be hired once businesses begin to recover. There are several issues that employers will likely face when engaging in talent acquisition during the pandemic.

Screening Job Applicants for COVID-19

An employer may screen job applicants for symptoms of COVID-19 after making a conditional job offer, as long as it does so for all entering employees in the same type of job. This ADA rule applies whether or not the applicant has a disability. Similarly, any medical exams, including taking an applicant's temperature, are permitted after an employer has made a conditional offer of employment. Again, employers should be aware when taking an applicant's temperature that some people with COVID-19 do not have a fever.

Delaying an Applicant's Start Date

According to current CDC guidance, an individual who has COVID-19 or symptoms associated with it should not be in the workplace, which provides the employer with some flexibility in the hiring process. Specifically, an employer may delay the start date of an applicant who has COVID-19 or symptoms associated with it. An employer may also withdraw a job offer when it needs the applicant to start immediately, but the individual has COVID-19 or symptoms of it.

"High Risk" Applicants

As noted in the discrimination/harassment section of this guide, employers must be aware of the risks associated with recalling "low risk" employees first because it may disparately impact older employees, disabled employees, and pregnant employees. Similarly, an employer can create liability by attempting to postpone the start date or withdraw a job offer because an individual is 65 years old, disabled, or pregnant, all of which place them at higher risk from COVID-19. The fact that the CDC has identified those who are 65 or older, or pregnant women, as being at greater risk, does not justify unilaterally postponing the start date or withdrawing a job offer. However, an employer may choose to allow telework or to discuss with these individuals if they would like to postpone the start date.

EMPLOYEE BENEFITS CONSIDERATIONS

Affordable Care Act

Upon return to work following stay-at-home orders, certain employers (called applicable large employers or ALEs) who are subject to the Affordable Care Act's (ACA) employer shared responsibility provisions (the "employer mandate" or "pay or play provisions") will have important compliance considerations. Specifically, these employers will have to determine employee eligibility for benefits upon return to active employment and in their subsequent stability period, if applicable. Also, these employers should determine if a reduction in employees' work hours during a furlough or COVID-19-related leave may inadvertently expose them to penalty consequences under the employer mandate.

Break-in-Service Rule

As employees return to work following a period of leave (such as a furlough), the ALE will need to determine whether an offer of coverage must be immediately made, or whether a new waiting period or initial measurement period can be applied. To make this determination, the employer will need to follow the ACA's break-in-service rule:

- If the employee resumes active employment after at least 13 consecutive weeks, the employer can treat the employee as a new employee and apply new hire waiting period or measurement rules;
- If the employee resumes active employment after a period of fewer than 13 consecutive weeks, the employer must treat the employee as a continuing employee. If the employee had full-time status before the furlough or leave, the employer must offer coverage no later than the first day of the month following the return to work.

Finally, under a special rule called the rule of parity, an employee can be treated as a new hire if their break in service is at least four weeks long and exceeds the number of weeks of employment immediately preceding the break in service. Therefore, if an employee only worked three weeks before their break in service, and their break in service was four weeks, they can be treated as a new hire upon return to work.

Future Eligibility and ALE Determinations

Some ALEs may use the look-back measurement method to determine the full-time status of certain employees (such as part-time, variable hour, or seasonal employees). Under this method, an employer looks back over a defined period to determine if the employee averaged at least 30 hours of service per week. If it is determined that the employee averaged 30 hours per week during this measurement period, the employer offers the

employee coverage during the subsequent stability period. The employee's eligibility is then maintained for the full duration of the stability period.

An employee who experienced a reduction in work hours as a result of COVID-19 should have maintained eligibility for coverage for the full duration of the present stability period. However, the employee's continued eligibility into the next stability period will be adversely impacted. If the COVID-19-related reduction in hours results in the employee averaging less than 30 hours of service per week during the present measurement period, the employee will lose eligibility for coverage when the next stability period begins. Note that for purposes of determining eligibility, an hour paid is generally considered an hour of service. Thus, whether the period of leave was paid or unpaid will be an essential factor.

Additionally, a significant reduction in hours worked – or in headcount – due to COVID-19 may impact an employer's future status as an ALE. To be an ALE for a particular calendar year, an employer must have had an average of at least 50 full-time and full-time equivalent employees during the preceding calendar year. Therefore, a significant reduction in hours worked or in headcount will not impact an employer's present status as an ALE, but it may affect ALE status for future calendar years.

Affordability

Under the employer mandate, ALEs can be exposed to penalties where full-time employees do not receive an offer of affordable coverage. There are three methods of determining the affordability of coverage that an ALE may choose to use: federal poverty level, rate of pay, and the W-2 method. The first two methods are unaffected by a decrease in the hours worked by an employee. But an employer who utilizes the W-2 method may observe an unexpected impact on the affordability of its coverage as a result of reduced work hours during the COVID-19 health emergency.

The W-2 method determines the affordability of coverage by using an employee's W-2 reported wages at the end of the year. Where a reduction in hours results in a lower-than-expected annual wage, the employer's offer of coverage to the employee may be deemed unaffordable. Employers who rely on this safe harbor method should analyze whether any reduction in hours related to COVID-19 will result in an offer of unaffordable coverage to one or more full-time employees. If so, employers may have an opportunity to make changes to employee wages to minimize penalty exposure.

Section 125 Plans

A Section 125 plan, or cafeteria plan, allows employees to pay for certain benefits on a pre-tax basis by complying with the rules of the Internal Revenue Code. Participant elections generally must be irrevocable until the beginning of the next plan year. However, regulations permit employers to design their cafeteria plans to allow employees to change their elections during the plan year if certain conditions are met. Upon return to work,

employers may face various issues regarding their Section 125 plans.

"Catch-Up" Premium Contributions

If an employer continued to provide health coverage for employees during the furlough, it might have offered to cover the full cost of the premium on the condition that employees make up their share of the cost upon return to active employment. This arrangement, referred to as "catch-up" premium contributions, allows the employer to take accelerated payroll deductions until the amount that was advanced by the employer is fully recouped. As employees begin to return to work, the employer should be prepared to collect these catch-up contributions, which can be taken on a pre-tax basis in addition to the employee's normal deduction amount. In the event an employer chooses to forgive these advanced amounts, it should do so consistently for all similarly situated employees.

Carrier Special Enrollment Periods (SEPs)

Some carriers announced special enrollment periods in response to COVID-19 to allow employees who previously declined coverage a chance to enroll. The Section 125 rules have not been revised to allow for cafeteria plan election changes because of the COVID-19 public health emergency. As a result, these carrier special enrollment periods are not permitted election change events under Section 125. Accordingly, for employers that chose to offer a carrier-provided special enrollment opportunity to employees, these mid-year enrollees must participate on a post-tax basis outside of the employer's cafeteria plan until the next open enrollment period or upon experiencing a qualifying event, whichever is earlier.

Dependent Care Assistance Programs (DCAPs)

In general, an employee's DCAP election is fixed for the full duration of the plan year and cannot be changed. The exception to this general rule is where the employee experiences a recognized qualifying event. For DCAPs, these events can include mid-year changes to the cost of dependent care.

When stay-at-home orders commenced, employees may have experienced a decrease in their dependent care costs because of school and daycare closures. This type of change would have provided employees with an opportunity to decrease their elected DCAP contributions. And as stay-at-home orders are lifted, and employees return to work, dependent care costs may increase. This increase, too, presents an opportunity for employees to make a corresponding mid-year change to the amount of their DCAP contribution.

These election changes take effect on a prospective basis only. Therefore, employees should promptly request any mid-year election change to their DCAP contributions and should be mindful that unused funds remaining in the DCAP at the end of the plan year will be forfeited.

HIPAA

The Health Insurance Portability and Accountability Act of 1996 (HIPAA) applies to covered entities, including group health plans. It imposes rules on how these entities collect and maintain protected health information (PHI). In general, covered entities are prohibited from disclosing PHI for reasons other than treatment, payment, or health care operations. This prohibition may raise concerns for employers when balancing the need to provide a safe environment for employees upon return to work with the requirement to protect employee privacy in light of COVID-19.

Disclosure of an Employee's Positive Test for COVID-19

HIPAA provides some exceptions to the general prohibition on the disclosure of PHI, and these exceptions may be particularly relevant to a COVID-19 diagnosis. Under these exceptions, a disclosure may be made:

- To public health authorities for the purpose of preventing or controlling a disease;
- To individuals who are at risk of contracting or spreading the disease so long as another law permits the disclosure; and
- When necessary to prevent or lessen a serious or imminent threat to the health and safety of another person or the public.

In each instance, the covered entity must ensure that only the minimum necessary information is shared.

Importantly, employers are more likely to obtain information on the health status of an employee in their role as an employer rather than as a group health plan sponsor. For example, an employee who calls in sick with COVID-19 provides this information to the employer in the context of employment, and information obtained in this manner is not subject to HIPAA as it does not constitute PHI. Conversely, if an employer becomes aware of an employee's COVID-19 diagnosis through a claim submitted to the health plan, this information is considered PHI and is protected by HIPAA. However, even where HIPAA is not implicated, the information may nevertheless be subject to other state and federal regulations, and employers should take reasonable steps to protect an employee's privacy.

Temperature Screenings and other Wellness Examinations

Employers may be interested in taking steps to screen employees for COVID-19 as a condition of returning to the workplace. Typically, the Americans with Disabilities Act (ADA) prohibits medical inquiries unless the inquiry is job-related and consistent with business necessity. The ADA, then, would typically not permit temperature screening or wellness examinations, including COVID-19 testing, absent a legitimate business necessity.

However, in response to the public health emergency, the EEOC issued guidance allowing

employers to take the temperatures of employees and test for COVID-19 (without demonstrating a business necessity) to limit the spread of the virus. And while this information is collected in the course of employment and not directly subject to HIPAA, employers should exercise caution before implementing mandatory medical inquiries. A thorough policy should first be put into place to address how the screenings will be conducted, the frequency of the screenings, and the steps that will be taken to ensure employee privacy.

Special Enrollment Rights

In addition to HIPAA's privacy and security rules that address the handling of PHI, the portability provisions include special enrollment rights. These special enrollment rights provide employees with a mid-year opportunity to enroll in the group health plan upon the occurrence of a qualifying event. Normally, employees are required to request a special enrollment within 30-60 days of the qualifying event. Still, in response to the public health emergency, the U.S. Department of Labor (DOL) requires employer-sponsors to modify this timeframe. This mandatory modification calls for employers to disregard the period from March 1, 2020, until 60 days following the end of the public health emergency when determining whether an employee's request for a special enrollment is timely.

ERISA

Employer-sponsors of group health and welfare plans subject to the Employee Retirement Income Security Act of 1974 (ERISA) are required to provide detailed and timely plan disclosures to participants, and to adhere to a fiduciary code of conduct. Because of the impact of COVID-19 on health plans, employers should carefully assess any ERISA obligations that may arise as a result.

Plan Amendments

When an employer-sponsor adopts material plan modifications, the Summary Plan Description (SPD) and related plan documents must be updated to reflect the changes. Material modifications can include changes to the premium contribution schedule, the addition of a new benefits package, and adjusted eligibility provisions. In response to the public health emergency, employers may have initiated mid-year plan changes, or may have identified changes that they would like to make for the future – each requiring a plan amendment and a subsequent Summary of Material Modification (SMM) distribution to plan participants.

With the exception of plan changes that affect the contents of the Summary of Benefits and Coverage (SBC), employers are not required to distribute an SMM to participants prior to adopting the change. Nevertheless, employers should provide participants with as much notice as possible and, depending upon the type of change, advance notice may be in the best interest of participants.

Benefit Claims and Appeals

In response to COVID-19, the DOL requires employers to extend the timeframes for filing benefit claims and for appealing adverse benefit determinations made by the plan. Employers must disregard the period from March 1, 2020, until 60 days following the end of the public health emergency when considering whether a plan participant's claim or appeal is submitted timely. Critically, the deadlines under ERISA for plans to adjudicate claims and appeals are unaffected. Most employer-sponsors rely on an insurance carrier or other third party to manage the claims process, but employers should coordinate with these other parties to ensure compliance.

Premium Refunds and Credits

In response to the lack of provider access during the public health emergency, some insurance carriers are issuing premium refunds and credits to employers. Where the employer is issued a cash refund, the portion of the refund that is attributable to employee contributions (if any) is considered plan assets. These plan assets must be used to provide employees with either a portion of the cash refund or a future premium holiday.

Where the employer is instead provided with a discount on a future month's premium, the employer should consider how best to pass on this discount to employees. Depending upon how the carrier applies the credit, a premium holiday or fixed-dollar discount to employees' payroll deductions may be appropriate.

COBRA

Group health plans subject to the Consolidated Omnibus Budget Reconciliation Act (COBRA) are required to offer specific individuals the option to continue group health plan coverage when eligibility for coverage is lost due to a qualifying event. The COVID-19 stay-at-home orders resulted in the furloughing and laying off of many employees. Where these events triggered COBRA obligations due to a loss of eligibility for coverage, employers (and employees) may face important considerations upon the return to work.

Premium Subsidies

As employees return to work, many may also be returning to active-employee coverage under the employer's group health plan. Where the employer was providing a subsidy towards the cost of COBRA coverage during the period of furlough, the subsidy should cease as soon as employees become eligible once again for active-employee coverage. For employees who do not regain eligibility for coverage upon return to work, the employer may choose whether to continue the subsidy for COBRA coverage; advance notice should be provided to employees if the employer decides to terminate this subsidy.

Administration Timeframes

In an effort to provide relief to plan participants, the DOL imposed mandatory extensions to specific COBRA administration timeframes. For the following timeframes, the period from March 1, 2020, until 60 days following the end of the national health emergency must be disregarded:

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

Additionally, this period of time will be disregarded with respect to the plan sponsor's obligation to provide a COBRA election notice to qualified beneficiaries within no more than 44 days.

As a result of these extensions, some employees who regain eligibility for active-employee coverage may nevertheless still be within their COBRA election period. These employees will have an extended period of time to elect continuation coverage and make COBRA premium payments in order to avoid any gap in coverage from the time coverage was initially lost to the time it's regained.

RESOURCES

This section contains sample materials for employers to utilize when returning to work. In addition, some useful links are listed below:

Guidelines for Opening up America Again.

<https://www.whitehouse.gov/openingamerica/>

OSHA Guidance for Preparing Workplaces for COVID-19.

<https://www.osha.gov/Publications/OSHA3990.pdf>

Cleaning and Disinfecting your Facility.

<https://www.cdc.gov/coronavirus/2019-ncov/community/disinfecting-building-facility.html>

Department of Labor Coronavirus Resources.

<https://www.dol.gov/coronavirus>

CDC Public Health Recommendations for Community-Related Exposure.

<https://www.cdc.gov/coronavirus/2019-ncov/php/public-health-recommendations.html>

U.S Equal Opportunity Commission Coronavirus Resources.

<https://www.eeoc.gov/coronavirus/>

Recommended Practices for Anti-Retaliation Programs (OSHA 3905 – 2017).

<https://www.osha.gov/Publications/OSHA3905.pdf>

Department of Labor's COVID-19 FAQs for Participants and Beneficiaries.

<https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/our-activities/resource-center/faqs/covid-19.pdf>

Employee Benefits Security Administration Disaster Relief Notice 2020-01.

<https://www.dol.gov/agencies/ebsa/employers-and-advisers/plan-administration-and-compliance/disaster-relief/ebsa-disaster-relief-notice-2020-01>

Sample Employee Screening Procedures Notice

Effective [date], all employees reporting to work will be screened for respiratory symptoms and have their body temperature taken as a precautionary measure to reduce the spread of COVID-19.

Every employee will be screened, including having his or her temperature taken when reporting to work. Employees should report to [location] upon arrival at work and prior to entering any other areas of [company name] property.

Each employee will be screened privately by [insert name or position] using a touchless forehead/temporal artery thermometer. The employee's temperature and answers to respiratory symptom questions will be documented, and the record will be maintained as a private medical record.

Time spent waiting for the health screening should be recorded as time worked for non-exempt employees.

An employee who has a fever at or above 100.4 degrees Fahrenheit or who is experiencing coughing or shortness of breath will be sent home. The employee should monitor his or her symptoms and call a doctor or use telemedicine if concerned about the symptoms.

An employee sent home can return to work when:

- He or she has had no fever for at least three (3) days without taking medication to reduce fever during that time; AND
- Any respiratory symptoms (cough and shortness of breath) have improved for at least three (3) days; AND
- At least seven (7) days have passed since the symptoms began.

An employee may return to work earlier if a doctor confirms the cause of an employee's fever or other symptoms is not COVID-19 and releases the employee to return to work in writing.

An employee who experiences fever and/or respiratory symptoms while home should not report to work. Instead, the employee should contact his or her immediate supervisor for further direction.

Sample Workplace Coronavirus Infection Email to Employees

Dear [insert employee name],

[Company Name] recently discovered that one of our employees has tested positive for coronavirus disease 2019 (COVID-19). Your safety is our primary concern at all times, and this email continues our commitment to that goal.

We will continue to follow our workplace policies, which include proper disinfection and transparency with our employees. There is currently no reason to assume you are infected simply because this individual contracted COVID-19, but we understand your desire to be apprised to the situation.

To that end, please review these COVID-19 symptoms and monitor your health in the meantime:

- Difficulty breathing
- Rough, dry cough that hurts your chest
- Fever of at least 100 F
- Loss of taste or smell

Please continue to follow all workplace guidelines and speak with your manager with any questions or concerns related to this situation.

[Company Name] appreciates all your hard work and resilience during this uncertain period.

Best regards,

[Name]

[Job Title]

Sample Teleworking Policy

Purpose

This policy establishes the guidelines [Company Name] will use to select and manage those employees approved to work remotely.

Scope

This policy applies to all [Company Name] employees authorized to work remotely as a primary job function. This policy also includes those employees who are temporarily allowed by their managers to work from home or other locations due to extenuating circumstances, such as cases of public emergency and/or in compliance with public health guidance for contagious diseases.

Policy Guidelines

Definitions

Telework refers to an arrangement where an employee works from home or from another location away from the usual workplace. Depending on the details of the arrangement, telework constitutes either a portion of the employee's work time or all of it. Typically, the telework arrangement is initiated by an employee's request (although it can be a condition of employment).

Criteria for Selection

[Company Name] always strives to provide equal opportunities to all employees when it comes to working situations. However, remote work is not conducive to every employee and position. Keeping this in mind, [Company Name] will review all reasonable employee requests to work remotely using the following criteria:

- **Is the employee a good candidate for telecommuting?**

Criteria includes:

- *Dependability*
- *Flexibility*
- *Proven performance*
- *No record of disciplinary action*
- *Comprehensive knowledge of their position*

- **Can the duties of the position be successfully fulfilled through telecommuting?**

Criteria includes:

- *Measurable work activities*
- *Little need for face-to-face interaction with co-workers*
- *Clearly established goals and objectives*
- *Duties that can be performed alone*
- *Equipment needs that are limited and can be easily stored at the off-site location*

Note: The management of [Company Name] reserves the right to deny or revoke remote work privileges at their own discretion.

Responsibilities

Position requirements and responsibilities will not change due to telecommuting. Workers face the same expectations in relation to professionalism, work output, and customer service, regardless of where the work is being performed. The amount of time an employee is expected to work in a given week will not change, although the exact scheduling of allotted hours will be left up to the discretion of their direct supervisor(s). If an employee's physical presence is required at [Company Name]'s primary work location, he or she may be expected to report once given adequate notice.

Additionally, employees are expected to abide by the following general rules:

- Be transparent about your availability and keep your calendar and availability status up to date, indicating when you are online or offline.
- Maintain strong communication by conducting regular check-ins with your manager and co-workers.
- Utilize your webcam and phone instead of email as often as possible.
- Request PTO when you intend to be away from your work.
- Set up a dedicated workspace that allows you the most focus as possible.
- Prepare a child care strategy if needed. Don't work and parent at the same time.
- Be patient and understanding with co-workers who don't have ideal at home working conditions.

Contact with Primary Location

Employees approved for telecommuting are responsible for maintaining regular contact with their supervisor(s). The supervisor(s) will act as the employee's primary contact at [Company Name]. Both the employee and his or her supervisor(s) are expected to work together to keep each other informed of any developments that occur during the workday.

Employees must have approval from their supervisor(s) to:

- Alter their defined work schedules.
- Move company equipment to a new location.
- Transfer primary off-site operations to a new location.

Expenses

Working primarily at home could result in expenses not directly addressed by this policy. If such expenses are necessary for their official duties as prescribed, [Company Name] will reimburse the employees. However, since reimbursement is subject to management approval and is not guaranteed, potential expenditures should always be approved prior to the transaction being made.

Equipment

On a case-by-case basis, [Company Name] will determine, with information supplied by the employee and the supervisor, the appropriate equipment needs (including hardware, software, modems, phone and data lines, and other office equipment) for each telecommuting arrangement. The human resources and IT departments will serve as resources in this matter. Equipment supplied by the organization will be maintained by the organization. Equipment supplied by the employee, if deemed appropriate by the organization, will be maintained by the employee.

It must be kept in mind that:

- All equipment purchased by [Company Name] remains the property of [Company Name]. All equipment—including laptop and corresponding portable power supply, and voice devices such as a headset—is to be returned in a timely fashion should the employee cease telecommuting operations for any reason.
- Hardware is only to be modified or serviced by parties approved by [Company Name].
- Software provided by [Company Name] is to be used only for its intended purpose and should not be duplicated without consent.
- Any equipment provided by [Company Name] for off-site use is intended for legitimate business use only.

- All hardware and software should be secured against unauthorized access.

Employee Acknowledgement

I have read and agree to the terms of this remote work policy, and I agree to the duties, obligations, responsibilities, and conditions outlined herein.

Employee Signature: _____

Date: _____

National Coronavirus Guidelines for Americans



Stay home if:



You feel sick.
This applies to adults and children.



Someone in your home tested positive for the coronavirus.
Keep the entire household home.



You have a serious underlying health condition.



You are an older person.



You have the ability to work from home.

Follow the directions of your state and local authorities.
For more information, visit: **CORONAVIRUS.GOV**

Step Away for Safety

To limit the spread of coronavirus disease 2019 (COVID-19), the government is asking everyone to practice social distancing.

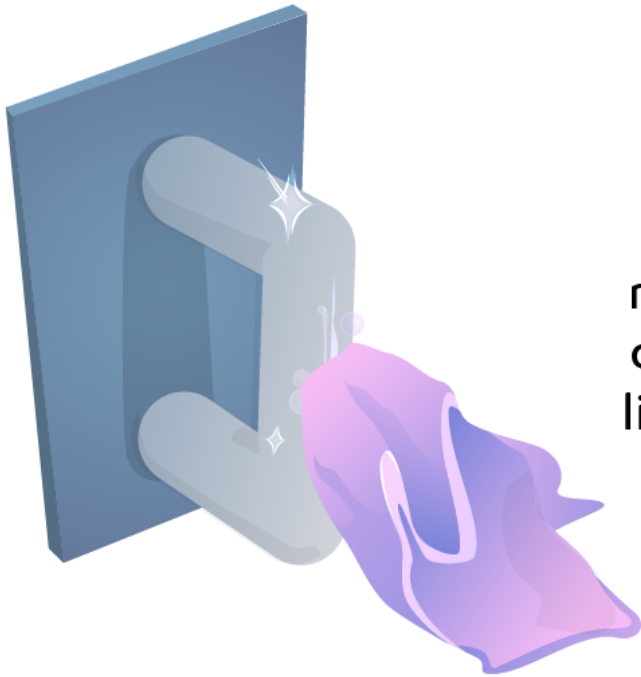


This means staying at least **6 feet** away from everyone at all times. All people should follow this guidance—not just those experiencing COVID-19 symptoms.

Visit [cdc.gov/COVID-19](https://www.cdc.gov/COVID-19) for more information.

Keep Surfaces Clean to Kill COVID-19

Coronavirus disease 2019 (COVID-19) can spread easily through shared surfaces. Be sure to clean and disinfect objects regularly to limit the spread of germs.

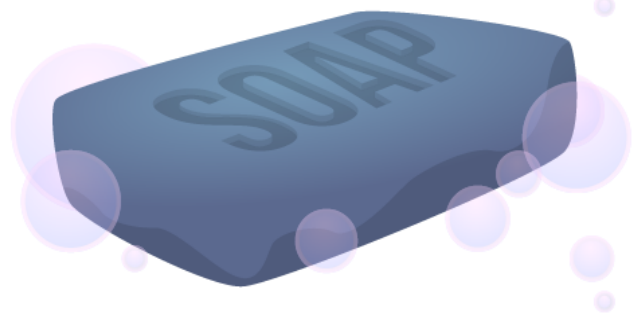


What should I disinfect?

Disinfect anything people regularly touch. Examples include doorknobs, toilet flushers, desks, light switches, computer mice and chair armrests.

How should I disinfect?

Use any product approved by the EPA to kill coronaviruses (check the label to be sure). Otherwise, you can use a diluted bleach solution. Read all product labels for more information on proper use.



10 Ways to Protect Against **Coronavirus**

The coronavirus disease 2019 (COVID-19) pandemic isn't slowing down.
Here are **10 ways** you can protect yourself.



1) Wash your hands often, for at least 20 seconds at a time.

2) Avoid touching your face.



3) Practice social distancing by staying at least 6 feet away from people.

4) Cover your coughs and sneezes.



5) Stay at home whenever possible, even if you don't feel sick.

6) Clean and disinfect frequently touched objects.



7) Avoid public transportation and trips out of your home.

8) Follow organizational guidance when it comes to school or workplace closures.



9) Call your doctor if you have a fever, cough and shortness of breath.

10) Keep up with current virus information at [cdc.gov/COVID-19](https://www.cdc.gov/COVID-19).

SOCIAL DISTANCING GUIDELINES AT WORK



1

Avoid in-person meetings. Use online conferencing, email or the phone when possible, even when people are in the same building.



2

Unavoidable in-person meetings should be short, in a large meeting room where people can sit at least three feet from each other; avoid shaking hands.



3

Eliminate unnecessary travel and cancel or postpone nonessential meetings, gatherings, workshops and training sessions.



4

Do not congregate in work rooms, pantries, copier rooms or other areas where people socialize. Keep six feet apart when possible.



5

Bring lunch and eat at your desk or away from others (avoid lunchrooms and crowded restaurants).



6

Avoid public transportation (walk, cycle, drive a car) or go early or late to avoid rush-hour crowding on public transportation.



7

Limit recreational or other leisure classes, meetings, activities, etc., where close contact with others is likely.