The information in this article is current through March 13, 2021. However, given the fast changing nature of the nation's response to the COVID-19 pandemic, we acknowledge that facts will change and invite you to visit our pandemic **site** where we maintain up-to-date information.

COVID-19 Employer

Frequently Asked Questions

March 13, 2021 (Updated from December 16, 2020)

Gallagher

Insurance | Risk Management | Consulting

Gallagher

Insurance | Risk Management | Consulting

Disclaimer

We share this information with our clients and friends for general informational purposes only. It does not necessarily address all of your specific issues. It should not be construed as, nor is it intended to provide, legal advice. Questions regarding specific issues and application of these rules to your plans should be addressed by your legal counsel.

Contents

Gallagher

Insurance | Risk Management | Consulting

Employee Benefits

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

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

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

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

3. If we change our plan to cover COVID-19 testing and/or treatment without cost sharing, do we have to amend our plan documents?

If you must change your plan terms to cover either COVID-19 testing or treatment without cost sharing, you must amend your plan documents and, if your plan is subject to ERISA, issue a summary of material modification (SMM).

4. If our plan waives employees' cost sharing associated with COVID-19 testing, will employees still be eligible to contribute to their HSAs?

On March 11, 2020, the IRS released IRS Notice 2020-15, which provides that a health plan may cover services related to COVID-19 under an HSA-compatible high deductible health plan (HDHP) before participants meet their deductibles without interfering with participants' HSA eligibility. The relief is applicable to any services related to COVID-19, including testing, non-preventive treatment, and hospitalization.

If you sponsor a self-insured plan that is meant to be compatible with an HSA (or an insured plan in a state whose insurance departments or carriers have not mandated waiver of cost-sharing for COVID-19-related treatment) and you wish to waive cost sharing for those expenses, you should amend your plan terms to allow this pre-deductible coverage.

5. **If our plan waives employees' cost sharing associated with COVID-19 treatment or hospitalization, will employees still be eligible to contribute to their HSAs?**

On March 11, 2020, the IRS released IRS Notice 2020-15, which provides that a health plan may cover services related to COVID-19 under an HSA-compatible high deductible health plan (HDHP) before participants meet their deductibles without interfering with participants' HSA eligibility. The relief is applicable to any services related to COVID-19, including testing, non-preventive treatment, and hospitalization.

If you sponsor a self-insured plan that is meant to be compatible with an HSA (or an insured plan in a state whose insurance departments or carriers have not mandated waiver of cost-sharing for COVID-19-related treatment) and you wish to waive cost sharing for those expenses, you should amend your plan terms to allow this pre-deductible coverage.

6. **Are we required to offer employees telemedicine benefits?**

Current federal law does not require employers to offer telemedicine benefits. However, if a plan provides coverage for telemedicine visits resulting in COVID-19 testing, those services would be covered at no cost under the FFCRA. Some states may require insurers to offer telemedicine visits as well.

7. **5/20/20 UPDATED: If a telemedicine provider waives copays for calls related to COVID-19 AND for all telemedicine encounters, how will this impact HSA eligibility?**

IRS Notice 2020-15 provides an exception to the rule that HSA-compatible HDHPs may not reimburse, except for preventive services, before applicable deductibles are met. The exception applies only for calls related to the diagnosis and treatment for COVID-19. However, the CARES Act, passed on March 27, 2020, allows HDHPs with health saving accounts (HSAs) to cover telehealth services before a patient reaches the deductible, without regard to whether the telehealth services relate to COVID-19. IRS Notice 2020-29 clarifies that this treatment of telehealth and other remote health services applies with respect to services provided on or after January 1, 2020 and is available for plan years that begin on or before December 31, 2021.

8. 2/12/20 REVISED: Can we extend telemedicine to all employees as a result of COVID-19?

Depending on the structure of your program, offering telemedicine as a stand-alone benefit to all employees may violate the Public Health Service Act mandates under the ACA, such as the requirement to cover preventive services with no cost sharing and the prohibition against annual and lifetime dollar limits. However, in June 2020, the DOL issued an FAQ providing temporary relief from some of the market reform provisions for plans that solely provide benefits for telehealth or other remote care services and that are sponsored by a large employer. This relief applies for plan years that begin before the end of the public health emergency, and allows such an employer to offer a standalone telemedicine benefit to employees (or their dependents) who are not eligible for coverage under any other group health plan. Under the relief, standalone telemedicine plans are still required to comply with the prohibition on preexisting condition exclusions, rules prohibiting discrimination based on a health factor, the prohibition on rescissions of coverage, and mental health parity requirements.

Even if a standalone telemedicine plan qualifies for this relief, employers may also find it difficult to comply with other laws that would apply to a stand-alone telemedicine benefits, including ERISA, COBRA, HIPAA, and others. A telemedicine program that is integrated with major medical coverage, or that is only offered to employees who are enrolled in minimum essential coverage, could be structured to avoid violating these mandates.

Note that the CARES Act allows high-Deductible health plans (HDHP) with a health saving account (HSA) to cover telehealth services before a patient reaches the deductible, without regard to whether the telehealth services relate to COVID-19. IRS Notice 2020-29 clarifies that this treatment of telehealth and other remote health services applies with respect to services provided on or after January 1, 2020 and is available for plan years that begin on or before December 31, 2021.

9. 4/13/20 ADDED: We want to expand eligibility under our health plan to include employees who are on a furlough. Do I need to amend my plan document and deliver a summary of material modification (SMM)?

Yes. Whenever there is any material modification to the terms of the plan or the information required to be in a summary plan description (SPD), the plan sponsor must amend the plan and let participants know about the change through a Summary of Material Modification (SMM). Whether a change is material depends on the facts and circumstances, but a general rule of thumb is that if a change would be important to a

participant, the change is material. Expanding eligibility to include employees who otherwise would not be eligible under the current plan terms would be a material modification that would require an amendment and SMM.

To be effective for a particular plan year, the plan must be amended on or before the last day of the plan year. Additionally, the plan amendment must be in writing and be completed in accordance with the plan's amendment procedure (as set out in the governing plan documents) and any applicable corporate or other business law requirements. To communicate the change to participants, the plan administrator must distribute an SMM to covered participants within 210 days after the end of the plan year in which the change is formally adopted. Although the rules provide plenty of time to accomplish a plan amendment and provide an SMM, as a practical matter, because a change is not truly effective until it is communicated to participants, the SMM should be provided as soon as possible after the change is adopted.

As an alternative to amending the plan and issuing an SMM, the plan could be amended and restated in its entirety and an updated SPD could be delivered to participants so long the SPD is distributed within the SMM deadline. Otherwise, an SMM must still be distributed to participants. This is sometimes a good option when several changes are being made to a plan or if the plan has distributed SMMs in the past communicating changes.

10. 4/13/20 ADDED: Our health plan will be covering COVID-19 testing without cost-sharing and expanding telemedicine coverage. Do we need to amend our plan documents to address this?

Yes. Whenever there is any material modification to the terms of the plan or the information required to be in a summary plan description (SPD), the plan sponsor must amend the plan and let participants know about the change through a Summary of Material Modification (SMM). Whether a change is material depends on the facts and circumstances, but a general rule of thumb is that if a change would be important to a participant, the change is material. Offering COVID-19 testing without cost-sharing and expanding telemedicine coverage would be a material modifications that would require an amendment and SMM.

To be effective for a particular plan year, the plan must be amended on or before the last day of the plan year. Additionally, the plan amendment must be in writing and be completed in accordance with the plan's amendment procedure (as set out in the governing plan documents) and any applicable corporate or other business law requirements. To communicate the change to participants, the plan administrator must

distribute an SMM to covered participants within 210 days after the end of the plan year in which the change is formally adopted. Although the rules provide plenty of time to accomplish a plan amendment and provide an SMM, as a practical matter, because a change is not truly effective until it is communicated to participants, the SMM should be provided as soon as possible after the change is adopted.

As an alternative to amending the plan and issuing an SMM, the plan could be amended and restated in its entirety and an updated SPD could be delivered to participants so long the SPD is distributed within the SMM deadline. Otherwise, an SMM must still be distributed to participants. This is sometimes a good option when several changes are being made to a plan or if the plan has distributed SMMs in the past communicating changes.

11. 4/13/20 ADDED: How Do I send the SMM or updated SPD to Participants especially since many employees are unable to come to work?

Employers have flexibility in the delivery method of the SMM to plan participants, including hand delivery, first class mail, email, and posting on the company's intranet site. During the COVID-19 pandemic, electronic delivery may be the most efficient method, but keep in mind that when issuing the SMM or SPD through electronic means, the DOL electronic safe harbor must still be met. In addition, it is important that plan sponsors provide their SMMs or SPDs not just to active employees, but also to former employees (i.e., COBRA participants), employees on leave, furloughed employees covered under the plan, covered spouses and dependents, and alternate recipients (i.e., those covered pursuant to a Qualified Medical Child Support Order or National Medical Support Notice).

An employer may have to use multiple forms of delivery depending on how that employer is continuing business operations during the pandemic. If employees are teleworking, using electronic delivery may be the best option to ensure receipt of the SMM or SPD. However, if employees are unable to telework, do not have access to the company's intranet site, or are subject to a "stay-at-Home" order and unable to work, employers may need to rely on first class mail.

12. 3/13/21 UPDATED: With our company virtually closed during the COVID-19 state of emergency, we're concerned about plan participants having trouble meeting the time deadlines for making claims or filing appeals of adverse benefit determinations. Is there any guidance on how we should handle this?

Yes. The IRS and Department of Labor (DOL) issued regulations extending certain timeframes that would otherwise apply with respect to claims and appeals. Under the

regulations, group health plans subject to ERISA and the Internal Revenue Code must disregard a period called the Outbreak Period when calculating certain time periods. On May 14, 2020, the Centers for Medicare & Medicaid Services (CMS) issued guidance stating that it concurs with the relief provided in those regulations. However, self-insured nonfederal governmental plans are not required to comply with the relief, but CMS highly recommends that they do.

The Outbreak Period is the period from March 1, 2020 until 60 days after the announced end of the National Emergency (or such other date announced by the Agencies). The Outbreak Period should be excluded when counting days for the following:

- The date within which individuals may file a benefit claim under the plan's claims procedure;
- The date within which claimants may file an appeal of an adverse benefit determination under the plan's claims procedure;
- The date within which claimants may file a request for an external review after receipt of an adverse benefit determination or final internal adverse benefit determination; and
- The date within which a claimant may file information to perfect a request for external review upon a finding that the request was not complete.

EXAMPLE: Facts. Individual D is a participant in a group health plan. On March 1, 2020, Individual D received medical treatment for a condition covered under the plan, but a claim relating to the medical treatment was not submitted until April 1, 2021. Under the plan, claims must be submitted within 365 days of the participant's receipt of the medical treatment. Was Individual D's claim timely?

Conclusion. Yes. For purposes of determining the 365-day period applicable to Individual D's claim, the Outbreak Period is disregarded. Therefore, Individual D's last day to submit a claim is 365 days after June 29, 2020, which is June 29, 2021, so Individual D's claim was timely.

Comment: Because the treatment occurred during the Outbreak Period, the deadline to submit a claim is calculated as if the treatment occurred on the last day of the Outbreak Period.

Comment: On February 26, 2021, the DOL issued guidance clarifying the Outbreak Period Relief. Under that guidance, applicable timeframes and deadlines are tolled until the earlier of (a) one year from the date an individual was first eligible for relief, or (b) 60

days after the announced end of the National Emergency (i.e., the end of the Outbreak Period). Thus, the relief period is based upon an individualized assessment.

13. 3/13/21 UPDATED: Is there any relief because of COVID-19 with respect to furnishing ERISA-required materials, such as benefit statements?

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

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

Comment: On February 26, 2021, the DOL issued guidance clarifying the Outbreak Period Relief. Under that guidance, applicable timeframes and deadlines are tolled until the earlier of (a) one year from the date an individual was first eligible for relief, or (b) 60 days after the announced end of the National Emergency (i.e., the end of the Outbreak Period). Thus, the relief period is based upon an individualized assessment.

14. 3/13/21 UPDATED: Because our offices are closed due to our state's stay at home order, we're concerned that employees might have trouble requesting HIPAA special enrollment when needed. Is there any guidance on this?

Yes. The Department of Labor (DOL) and the IRS issued regulations extending certain timeframes that would otherwise apply with respect to exercising special enrollment rights. Under the regulations, group health plans subject to ERISA and the Internal Revenue Code must disregard a period called the Outbreak Period when calculating certain time periods. On May 14, 2020, the Centers for Medicare & Medicaid Services

(CMS) issued guidance stating that concurs with the relief provided in those regulations. However, self-insured nonfederal governmental plans are not required to comply with the relief, but CMS highly recommends that they do.

The Outbreak Period is the period from March 1, 2020 until 60 days after the announced end of the National Emergency (or such other date announced by the Agencies). The Outbreak Period should be excluded when counting days for the 30-day period (or 60-day period, if applicable) to request HIPAA special enrollment.

EXAMPLE: *Facts*. Individual B is eligible for, but previously declined participation in, her employer-sponsored group health plan. On March 31, 2020, Individual B gave birth and would like to enroll herself and the child into her employer's plan; however, open enrollment does not begin until November 15. When may Individual B exercise her special enrollment rights?

Conclusion. In Example 2, the Outbreak Period is disregarded for purposes of determining Individual B's special enrollment period. Individual B and her child qualify for special enrollment into her employer's plan as early as the date of the child's birth. Individual B may exercise her special enrollment rights for herself and her child into her employer's plan until 30 days after June 29, 2020, which is July 29, 2020, provided that she pays the premiums for any period of coverage.

Comment: Because the individual's special enrollment event (i.e., the birth of her child) occurred after the Outbreak Period began (i.e., after March 1, 2020), the plan does not begin counting days for her special enrollment period following the birth of her child until the end of the Outbreak Period.

Comment: On February 26, 2021, the DOL issued guidance clarifying the Outbreak Period Relief. Under that guidance, applicable timeframes and deadlines are tolled until the earlier of (a) one year from the date an individual was first eligible for relief, or (b) 60 days after the announced end of the National Emergency (i.e., the end of the Outbreak Period). Thus, the relief period is based upon an individualized assessment.

15. 3/13/21 UPDATED: During the pandemic, how should we handle the timing of COBRA actions such as election notices, the period of time during which COBRA can be elected, and payment of premiums?

The IRS and Department of Labor (DOL) issued regulations extending certain timeframes related to COBRA deadlines that would otherwise apply. Under the regulations, group health plans subject to ERISA and the Internal Revenue Code must disregard a period called the Outbreak Period when calculating certain time periods. On

May 14, 2020, the Centers for Medicare & Medicaid Services (CMS) issued guidance stating that concurs with the relief provided in those regulations. However, self-insured nonfederal governmental plans are not required to comply with the relief, but CMS highly recommends that they do.

The Outbreak Period is the period from March 1, 2020 until 60 days after the announced end of the National Emergency (or such other date announced by the Agencies). The Outbreak Period should be excluded when counting days for the following:

- The 60-day election period for COBRA continuation coverage;
- The date for making COBRA premium payments;
- The date for individuals to notify the plan of a qualifying event or determination of disability for purposes of COBRA; and
- For group health plans and their sponsors and administrators, the date for providing a COBRA election notice.

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

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

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

Comment: On February 26, 2021, the DOL issued guidance clarifying the Outbreak Period Relief. Under that guidance, applicable timeframes and deadlines are tolled until the earlier of (a) one year from the date an individual was first eligible for relief, or (b) 60 days after the announced end of the National Emergency (i.e., the end of the Outbreak Period). Thus, the relief period is based upon an individualized assessment.

16. **3/13/21 UPDATED: I understand that new COBRA notices were released. If I provided an employee who lost coverage because of COVID-19 with a COBRA**

election notice modeled on the prior DOL model notice, do I have to send that employee an updated notice?

The DOL released new model notices in early May 2020. According to unofficial comments from an IRS representative, employers who provided COBRA notices prior to the date the new model notices were released, based upon the DOL model notices previously in effect, are not required to provide new notices based upon the updated model notices. However, the representative encouraged employers to use the new model language to update their current initial and election notices.

Additionally, if the plan administrator or other responsible plan fiduciary knows, or should reasonably know, that the end of the Outbreak Period relief period for an individual action may expose a participant or beneficiary to a risk of losing protections, benefits, or rights under the plan, the administrator or other fiduciary should consider affirmatively sending a notice regarding the end of the relief period.

17. **3/13/21 UPDATED: The new DOL model COBRA notices do not include information about the COVID-19-related relief available for certain COBRA timeframes. Do we have to update our initial and election notices to include that information?**

According to unofficial guidance from a DOL representative, employers do not have to include such language in their notices, but it is recommended that employers provide the information in a cover letter or other communication explaining the relief available. However, if a plan administrator knows, or reasonably should know, that the end of the Outbreak Period relief for an individual may cause that individual to lose protections, benefits, or rights under the plan, then the administrator should consider affirmatively sending notice about the end of the relief period.

18. **Are there any state-specific coverage requirements for COVID-19?**

Throughout the COVID-19 pandemic, State agencies and insurance carriers have been providing additional guidance with respect to payments and coverage for both diagnosis and treatment of COVID-19. This is an evolving issue with state responses to COVID-19 happening quickly, but Gallagher has created a chart to highlight some important state-level insurance department actions related to COVID-19 testing and treatment coverage. NOTE: The chart is not an exhaustive list of state responses to COVID-19. Please review State Department of Insurance websites with your consulting team for additional details.

Gallagher

Insurance | Risk Management | Consulting

19. 5/20/20 ADDED: If our medical or dental carrier provides us with a premium credit for the upcoming four months, what are our responsibilities and/or options for handling the credits?

It's first important to review your plan document and/or SPD to determine whether either one discusses premium credits or rebates. The plan documents may have specific language stating that premium credits or rebates are not plan assets – in which case, your organization, as the plan sponsor, may be able to argue that the premium credit amount will not be an asset of the Plan, but instead will be retained by you, as the employer, as part of your general assets. If you conclude that the refund is not a plan asset but instead a general asset of the organization, then you can use it for any purpose you see fit. Since this determination is heavily dependent upon the plan language and the facts, and potentially other communications to participants, it is highly recommended that you engage legal counsel when deciding whether a particular refund is regarded as a plan asset in whole or in part.

However, if the governing plan documents do not address the allocation of insurance credits or rebates (in other words, the plan document and participant communications are silent on the matter), then you must determine whether some or all of the credit must be distributed between you and participants. Generally that determination will be based on how the insurance premiums were paid – in accordance with DOL and IRS guidance.

For example, if the employees paid 100% of the premiums, then the employees would be entitled to the entire applicable premium credit. If you paid 75% of the premium and the covered employees paid 25% of the premium, both you and the covered employees may be entitled to a corresponding portion of the premium credit.

As for how the portion of the credit that is determined to be a plan asset can be used, you must follow DOL (if you plan is subject to ERISA) and IRS rules. As a general rule, plan assets are subject to the "exclusive benefit rule" and must be used for the exclusive benefit of plan participants and beneficiaries for the purpose of paying claims and the reasonable expenses of administering the plan. For example, you may use the credit to reduce future premiums for current plan members or provide cash payments to current plan participants.

20. 5/20/20 ADDED: If our medical or dental carrier provides us with a premium credit for the next four months, can we use the credit to pay for basic life/AD&D and coverage that is not cost-shared with the employees?

You can use your portion of the credit for this purpose (in other words, the amount that you have determined to be your proportionate share of the premium paid to be general assets, rather than plan assets). In contrast, any portion attributable to plan assets can be used only for the plan to which the credit is applied, so the portion representing employee contributions could not be used to pay for basic life/AD&D coverage.

21. 5/20/20 ADDED: Has the DOL provided any guidance on how employers are supposed to determine what portion of a carrier credit is a plan asset?

Yes. The Department of Labor issued a Memorandum on Legal Analysis of Premium Refunds, Credits, or Dividends on Experience-Rated Insurance Contracts, which provides insight on this topic.

Employee Contributions and Cafeteria Plan Issues

22. 3/13/21 UPDATED: If we reduce employees' pay during the COVID-19 pandemic, will that give employees the right to drop their existing benefit elections?

Under existing rules, a reduction in pay is not a valid mid-year election change event under cafeteria plan rules. (Contrast this with a reduction in hours that causes a loss of eligibility – which is of course a valid mid-year election change event, i.e., a change in employment status). As a result, if employees continue to work full-time hours (i.e., they meet plan eligibility criteria) during a period of decreased pay, they will remain eligible for active benefits during that period. Their coverage elections will remain irrevocable under cafeteria plan rules, unless some other valid mid-year election change event occurs. However, note that in the event that an employee discontinues a required employee premium contribution (for example, if wages are insufficient to permit the required salary reduction contribution), then ultimately coverage could be terminated due to nonpayment. For further information on that, please see the following Gallagher resource on "Employees Who Cannot Cover Salary Reduction Elections During the COVID-19 Pandemic."

Note, however, that IRS Notice 2020-29 provides that, for mid-year elections made during the calendar year 2020, a cafeteria plan may permit employees to make any of the following election changes on a prospective basis:

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

Employers may permit some or all of these changes in their cafeteria plans. For example, employers may permit employees to drop health coverage if they have other coverage, but not enroll. In Notice 2020-29, the IRS comments that in order to prevent adverse selection under their health plans, employers may limit elections to those that would result in increased coverage. Or an employer may adopt all of the health plan changes and the DCAP changes, but not permit changes in health FSA elections. Employers that choose to permit any of these changes must formally amend their cafeteria plan document no later than December 31, 2021. In addition, employers that make a change will need to notify all cafeteria plan participants. These changes apply only to mid-year elections made in 2020.

Additionally, IRS Notice 2021-15 provides additional relief with respect to mid-year elections for employer-sponsored health coverage (i.e., medical, dental, and vision coverage). For plan years ending in 2021, an employer may permit an eligible employee to:

1. Make a new election on a prospective basis, if the employee initially declined to elect employer-sponsored health coverage.

2. Revoke an existing election and make a new election to enroll in different health coverage sponsored by the same employer on a prospective basis.

3. Revoke an existing election on a prospective basis, provided that the employee attests in writing that the employee is enrolled, or immediately will enroll, in other health coverage not sponsored by the employer.

In adopting this relief, the IRS referenced its earlier relief in Notice 2020-29. To accept an employee's revocation of an existing election for employer-sponsored health coverage when the employee does not make a new election to enroll in different health coverage, the employer must receive from the employee an attestation in writing that the employee is enrolled, or immediately will enroll in, other comprehensive health coverage not sponsored by the employer.

23. **4/21/20 ADDED: An employer's plan provides that a new employee will become eligible for benefits on the first of the month following 30 days after the date of hire. An employee was hired on March 10th and was temporarily furloughed (i.e., placed on an unpaid leave of absence) on March 20th. The employee would become eligible for benefits on May 1st. If the employee remains furloughed until mid-May, when should benefits begin for the employee?**

If the individual continues to be an employee while furloughed, then you should review the terms of the plan document for each of the benefit options to determine if the employee continues to be eligible for that benefit option and if there are any provisions that require the employee to be actively at work for that coverage to begin. Please note that if the employee is unable to work temporarily due to a medical condition, then the coverage start date cannot be delayed.

If the individual is no longer an employee (i.e., is laid off), then the employee would not be eligible for benefits until rehired.

24. **3/13/21 UPDATED: Is it possible for an employee to discontinue or change his DCAP election mid-year if he stays at home to take care of his children during the COVID-19 pandemic?**

Yes. IRS regulations support an election change to stop DCAP contributions in this scenario. For example, where the cost of dependent care changes, the employee is permitted to revoke the DCAP election and replace it with a new DCAP election to reflect the change in cost. IRS officials have indicated that the permitted election change rules for DCAPs in particular are intended to be liberally interpreted. And in this case, the cessation of dependent care is arguably either a significant cost change or a fundamental loss of coverage that could warrant a corresponding election change (to revoke contributions, since the cost of dependent care is now zero). In addition, IRS guidance under Notice 2020-29 permits employees to enroll in a DCAP, end enrollment, or increase or decrease existing DCAP elections on a prospective basis, if these are permissible election changes adopted by an employer for the 2020 calendar year.

IRS Notice 2021-15 provides additional relief with respect to mid-year elections for employer-sponsored health coverage. For plan years ending in 2021, an employer may permit an eligible employee to:

1. Make a new election on a prospective basis, if the employee initially declined to elect employer-sponsored health coverage.

2. Revoke an existing election and make a new election to enroll in different health coverage sponsored by the same employer on a prospective basis.

3. Revoke an existing election on a prospective basis, provided that the employee attests in writing that the employee is enrolled, or immediately will enroll, in other health coverage not sponsored by the employer.

In adopting this relief, the IRS referenced its earlier relief in Notice 2020-29. To accept an employee's revocation of an existing election for employer-sponsored health coverage when the employee does not make a new election to enroll in different health coverage, the employer must receive from the employee an attestation in writing that the employee is enrolled, or immediately will enroll in, other comprehensive health coverage not sponsored by the employer.

25. 3/13/21 UPDATED: Can we stop payroll deductions for employees enrolled in a dependent care FSA account (DCAP) if the employee or spouse now work from home and have the ability to take care of their dependents?

Provided your cafeteria plan document permits the change, changing to an in-home child care provider would allow the employee to reduce or stop the DCAP election. In addition, IRS Notice 2020-29 provides that, for mid-year elections made during the calendar year 2020, a cafeteria plan may permit employees to enroll in a DCAP, end enrollment, or increase or decrease existing DCAP elections on a prospective basis, if these are a permissible election changes adopted by an employer for the 2020 calendar year.

For plan years ending in 2021, IRS Notice 2021-15 clarifies that mid-year election changes can be made on a prospective basis to health FSAs, DCAPs, and employer-sponsored health coverage without regard to whether a permissible change in status occurred.

With respect to DCAPs, these changes can be made so long as the change does not exceed any applicable dollar amount limitations during a plan year ending in 2021. Employers can permit employees to revoke elections, make one or more elections, or increase or decrease existing elections for plan years ending in 2021. Prospective

election changes may include an initial election to enroll in a DCAP for the year, for example, to gain use of the temporary carryover or extended grace period for incurring claims if the employee initially declined to enroll in the DCAP for the year.

26. 5/20/20 UPDATED: Are we able to consider coronavirus or school closures a qualifying event that would allow dependent care FSA (DCAP) participants to change their 2020 election amount?

Maybe. Changing the hours of child care needed is a valid election change event that would allow an employee to change her DCAP election, including changing to an in-home child care provider. So long as the change is consistent with the event (e.g., increasing the election if paid child care is needed or reducing the election if child care is no longer needed), the participant may be permitted to change their election. In addition, IRS Notice 2020-29 provides that, for mid-year elections made during the calendar year 2020, a cafeteria plan may permit employees to enroll in a DCAP, end enrollment, or increase or decrease existing DCAP elections on a prospective basis, if these are a permissible election changes adopted by an employer for the 2020 calendar year. Before any changes are made, you should review your cafeteria plan document to make sure the plan allows for such mid-year election changes.

27. Employees earn incentives on a quarterly basis for activities completed as part of our organization's wellness program. Are we permitted to waive program requirements for one or more quarters due to COVID-19?

Yes. Neither HIPAA's nondiscrimination regulations nor the regulations for employee health programs under the ADA and GINA prohibit an employer from waiving the requirements to receive an incentive under a wellness program. In fact, the HIPAA nondiscrimination regulations contemplate a waiver of the program's requirements in lieu of completion of a reasonable alternative standard in certain circumstances. Waiver of the program's requirements should be applied on a uniform and consistent basis for all similarly situated program participants.

28. 3/13/21 UPDATED: If we change our plan to cover COVID-19 testing and/or treatment without cost-sharing, are we required to provide employees an opportunity to enroll in the plan mid-year?

Possibly. The Section 125 cafeteria plan regulations permit mid-year election changes due to the addition or significant improvement of a benefit package option. If a benefit package option is significantly improved mid-year, and the employer's written cafeteria plan document allows, the employer may permit election changes that are consistent with that improvement within the time frame for making requests specified in the

cafeteria plan document (usually 30 or 31 days).

As a result of the FFCRA, group health plans and health insurers are required to cover, without cost-sharing, testing for COVID-19, as well as office visits, telehealth, urgent care visits, or emergency room visit costs associated with the administration of testing. If your plan did not cover these expenses without cost-sharing before, the addition of this new benefit could be considered a significant improvement of the benefit package option, which would permit you to allow a mid-year enrollment on that basis. In addition, IRS Notice 2020-29 provides that, for mid-year elections made during the calendar year 2020, a cafeteria plan may permit employees to make any of the following election changes on a prospective basis:

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

Employers may permit some or all of these changes in their cafeteria plans. For example, employers may permit employees to drop health coverage if they have other coverage, but not enroll. In Notice 2020-29, the IRS comments that in order to prevent adverse selection under their health plans, employers may limit elections to those that would result in increased coverage. Or an employer may adopt all of the health plan changes and the DCAP changes, but not permit changes in health FSA elections. Employers that choose to permit any of these changes must formally amend their cafeteria plan document no later than December 31, 2021. In addition, employers that make a change will need to notify all cafeteria plan participants. These changes apply only to mid-year elections made in 2020.

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

IRS Notice 2021-15 provides additional relief with respect to mid-year elections for employer-sponsored health coverage. For plan years ending in 2021, an employer may permit an eligible employee to:

1. Make a new election on a prospective basis, if the employee initially declined to elect employer-sponsored health coverage.

2. Revoke an existing election and make a new election to enroll in different health coverage sponsored by the same employer on a prospective basis.

3. Revoke an existing election on a prospective basis, provided that the employee attests in writing that the employee is enrolled, or immediately will enroll, in other health coverage not sponsored by the employer.

In adopting this relief, the IRS referenced its earlier relief in Notice 2020-29. To accept an employee's revocation of an existing election for employer-sponsored health coverage when the employee does not make a new election to enroll in different health coverage, the employer must receive from the employee an attestation in writing that the employee is enrolled, or immediately will enroll in, other comprehensive health coverage not sponsored by the employer.

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

Review the terms of your Section 125 cafeteria plan to determine if your plan permits election changes due to a significant improvement of a benefit package option. Alternatively, consider whether your organization wishes to adopt the more generous permissible election changes available under IRS guidance.

29. 3/13/21 UPDATED: Can we decrease employer contributions for benefits due to a business interruption or slow down caused by COVID-19?

Yes. However, employers considering a decrease in employer contributions must consider the implications of this approach under the ACA's Employer Shared Responsibility provisions and their Section 125 cafeteria plan. Applicable large employers subject to the ACA's Employer Shared Responsibility provisions must continue to make offers of minimum essential coverage that both provide minimum value and are affordable to full-time employees. Decreasing the employer contribution could expose an employer to penalty risk if the offer of coverage becomes unaffordable. Additionally, decreasing an employer's contribution to the cost of coverage may result in a significant increase in cost for employees. The Internal Revenue Code recognizes a significant increase in the cost of coverage as an event that would allow an employee to make an election change consistent with that significant increase, provided this election change is allowed in the employer's Section 125 cafeteria plan document.

In addition, IRS Notice 2020-29 provides that, for mid-year elections made during the calendar year 2020, a cafeteria plan may permit employees to make any of the following election changes on a prospective basis:

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

Employers may permit some or all of these changes in their cafeteria plans. For example, employers may permit employees to drop health coverage if they have other coverage, but not enroll. In Notice 2020-29, the IRS comments that in order to prevent adverse selection under their health plans, employers may limit elections to those that would result in increased coverage. Or an employer may adopt all of the health plan

changes and the DCAP changes, but not permit changes in health FSA elections. Employers that choose to permit any of these changes must formally amend their cafeteria plan document no later than December 31, 2021. In addition, employers that make a change will need to notify all cafeteria plan participants. These changes apply only to mid-year elections made in 2020.

IRS Notice 2021-15 provides additional relief with respect to mid-year elections for employer-sponsored health coverage. For plan years ending in 2021, an employer may permit an eligible employee to:

1. Make a new election on a prospective basis, if the employee initially declined to elect employer-sponsored health coverage.

2. Revoke an existing election and make a new election to enroll in different health coverage sponsored by the same employer on a prospective basis.

3. Revoke an existing election on a prospective basis, provided that the employee attests in writing that the employee is enrolled, or immediately will enroll, in other health coverage not sponsored by the employer.

In adopting this relief, the IRS referenced its earlier relief in Notice 2020-29. To accept an employee's revocation of an existing election for employer-sponsored health coverage when the employee does not make a new election to enroll in different health coverage, the employer must receive from the employee an attestation in writing that the employee is enrolled, or immediately will enroll in, other comprehensive health coverage not sponsored by the employer.

New elections must be effective on a prospective basis. Employees may not be permitted to make retroactive elections. However, it appears that the relief provided in this Notice is available retroactively to cafeteria plans that had already permitted election changes this year as long as the changes that were permitted are consistent with the requirements of this Notice. It would be prudent for employers that want to relax election rules for health plan coverage under their cafeteria plans to confirm that their insurers (or stop loss insurers) are willing to permit new elections. Without insurer agreement, an employer that permits an employee who declined health coverage to enroll or to change plan options based on IRS guidance, may find itself unintentionally self-insuring the coverage if the insurer is not willing to amend its contract.

Review of your Section 125 cafeteria plan document is recommended to determine if such election changes may be allowed. Alternatively, consider whether your

organization wishes to adopt the more generous permissible election changes available under IRS guidance.

30. 3/13/21 UPDATED: We heard that the IRS is allowing employers to relax cafeteria plan election rules this year. Do we have to adopt those relaxed rules?

No. The changes are permitted, but not required. IRS Notice 2020-29 provides that, for mid-year elections made during the calendar year 2020, a cafeteria plan may permit employees to make any of the following election changes on a prospective basis:

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

Employers may permit some or all of these changes in their cafeteria plans. For example, employers may permit employees to drop health coverage if they have other coverage, but not enroll. In Notice 2020-29, the IRS comments that in order to prevent adverse selection under their health plans, employers may limit elections to those that would result in increased coverage. Or an employer may adopt all of the health plan changes and the DCAP changes, but not permit changes in health FSA elections. Employers that choose to permit any of these changes must formally amend their cafeteria plan document no later than December 31, 2021. In addition, employers that make a change will need to notify all cafeteria plan participants. These changes apply only to mid-year elections made in 2020.

IRS Notice 2021-15 provides additional relief with respect to mid-year elections for employer-sponsored health coverage. For plan years ending in 2021, an employer may permit an eligible employee to:

1. Make a new election on a prospective basis, if the employee initially declined to elect employer-sponsored health coverage.

2. Revoke an existing election and make a new election to enroll in different health coverage sponsored by the same employer on a prospective basis.

3. Revoke an existing election on a prospective basis, provided that the employee attests in writing that the employee is enrolled, or immediately will enroll, in other health coverage not sponsored by the employer.

In adopting this relief, the IRS referenced its earlier relief in Notice 2020-29. To accept an employee's revocation of an existing election for employer-sponsored health coverage when the employee does not make a new election to enroll in different health coverage, the employer must receive from the employee an attestation in writing that the employee is enrolled, or immediately will enroll in, other comprehensive health coverage not sponsored by the employer.

31. 3/13/21 UPDATED: If we adopt some or all of the more relaxed cafeteria plan election changes permitted by IRS Notice 2020-29 or IRS Notice 2021-15, do we have to amend our plan documents?

Yes. An employer that decides to amend one or more of its Section 125 cafeteria plans to provide for mid-year election changes for employer-sponsored health coverage, health FSAs, or DCAPs in a manner consistent with Notice 2020-29 and/or Notice 2021-15 must adopt a plan amendment. In addition, an employer that decides to amend its health FSA to provide for an increase in the carryover of unused amounts to the following year in a manner consistent with Notice 2020-33 or Notice 2021-15 (discussed below), for the 2020 plan year or plan years thereafter, must adopt a plan amendment.

An amendment for the 2020 plan year must be adopted on or before December 31, 2021, and may be effective retroactively to January 1, 2020, provided that the Section 125 cafeteria plan operates in accordance with Notice 2020-29 or Notice 2020-33 (discussed below) or both, as applicable, and the employer informs all employees eligible to participate in the Section 125 cafeteria plan of the changes to the plan. Any amendment adopted pursuant to Notice 2020-29 must apply only to mid-year elections made during calendar year 2020.

32. 3/3/21 UPDATED: If we allow employees to drop coverage under IRS Notice 2020-29 or IRS Notice 2021-15, is any special documentation required?

Yes. If your organization allows employees to drop coverage during calendar years 2020 or 2021, they most provide you with an attestation. IRS Notices 2020-29 and 2021-15 contain the following sample:

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

33. 5/20/20 UPDATED: Has the IRS issued any guidance relaxing the use-it-or-lose-it rules for health FSAs and DCAPs as a result of COVID-19?

Yes. Under the use-or-lose rule, cafeteria plan contributions, including health FSA and DCAP contributions, that are not used during the applicable coverage period for which they are made cannot be carried over for use in subsequent plan years and must be forfeited unless an exception applies (e.g., a grace period or a health FSA carryover). In Notice 2020-29, the IRS relaxes the rules to permit an employer to amend its cafeteria plan to add (or extend) its grace period in order to reimburse expenses incurred through December 31, 2020. The extension is available for any plan year or grace period that ends in 2020. For example, if an employer has a calendar year plan with a grace period that ends on March 15, 2020, the employer may amend the cafeteria plan to allow unused amounts remaining in an employee's health FSA as of March 15, 2020 to be used to reimburse the employee for health expenses incurred through December 31, 2020. This extension of time for incurring claims is available to cafeteria plans that have a grace period.

The extension is also available to plans that have a carryover provision even though other IRS rules prohibit both a grace period and carryover provision in the same health FSA.

In addition, IRS Notice 2020-23 postpones certain "Specific Time-Sensitive Actions" occurring between April 1, 2020, and July 15, 2020, which cross-references IRS Revenue Procedure 2018-58. Based upon that cross-reference, the deadline is extended for health FSA or DCAP forfeitures that would occur during that period. For organizations seeking to understand how that may impact their health FSA funds, we recommend that you discuss with your tax advisors.

If an employer sponsors a health FSA that does not currently have a carryover or a grace period or falls within IRS Notice 2020-23, you may amend your plan to implement either a grace period or a carryover (up to the applicable annual limit) prior to the end of the current plan year. Employers are also permitted to adopt a grace period for their DCAPs if they do not already have one.

For more information on these options and others that employers may consider to reduce the risk of health FSA and DCAP forfeitures, please consult with your benefits consultant or legal counsel.

34. 5/20/20 ADDED: How do the extended grace periods for health FSAs and DCAPs work under IRS Notice 2020-29?

The IRS provided several examples of how the extended periods would work. Those examples are set forth below. The examples use a plan with a July 1 through June 30 plan year that has a $500 carryover provision.

> Example 1. Employer provides a health FSA under a Section 125 cafeteria plan that allows a $500 carryover for the 2019 plan year (July 1, 2019 to June 30, 2020). Pursuant to this notice and Notice 2020-33, Employer amends the plan to adopt a $550 (indexed) carryover beginning with the 2020 plan year, and also amends the plan to adopt the temporary extended period for incurring claims with respect to the 2019 plan year, allowing for claims incurred prior to January 1, 2021, to be paid with respect to amounts from the 2019 plan year.
>
> Employee A has a remaining balance in his health FSA for the 2019 plan year of $2,000 on June 30, 2020, because a scheduled non-emergency procedure was postponed. For the 2020 plan year beginning July 1, 2020, Employee A elects to contribute $2,000 to his health FSA. Employee A is able to reschedule the procedure before December 31, 2020 and, between July 1, 2020 and December

31, 2020, incurs $1,900 in medical care expenses. The health FSA may reimburse Employee A $1,900 from the $2,000 remaining in his health FSA at the end of the 2019 plan year, leaving $100 unused from the 2019 plan year. Under the plan terms that provide for a carryover, Employee A is allowed to use the remaining $100 in his health FSA until June 30, 2021, to reimburse claims incurred during the 2020 plan year. Employee A may be reimbursed for up to $2,100 ($2,000 contributed to the health FSA for the 2020 plan year plus $100 carryover from the 2019 plan year) for medical care expenses incurred between January 1, 2021 and June 30, 2021. In addition, Employee A may carry over to the 2021 plan year beginning July 1, 2021 up to $550 of any remaining portion of that

$2,100 after claims are processed for the 2020 plan year that began July 1, 2020. A grace period is not available for the plan year ending June 30, 2021.

Example 2. Same facts as Example 1, except that Employee B has a remaining balance in his health FSA for the 2019 plan year of $1,250 on June 30, 2020. For the 2020 plan year beginning July 1, 2020, Employee B elects to contribute $1,200 to his health FSA. Between July 1, 2020 and December 31, 2020, Employee B incurs $600 in medical care expenses. The health FSA may reimburse Employee B $600 from the

$1,250 remaining in his health FSA at the end of the 2019 plan year, leaving $650 unused from the 2019 plan year. Under the plan terms, Employee B is allowed to use

$500 of the $650 unused amount from the 2019 plan year to reimburse claims incurred during the 2020 plan year, and the remaining $150 will be forfeited. Employee B may be reimbursed for up to $1,700 ($1,200 contributed to the health FSA for the 2020 plan year plus $500 carryover from the 2019 plan year) for medical care expenses incurred between January 1, 2021 and June 30, 2021. In addition, Employee B may carry over to the 2021 plan year beginning July 1, 2021 up to $550 of any remaining unused portion of that $1,700 after claims are processed for the 2020 plan year that began July 1, 2020. A grace period is not available for the plan year ending June 30, 2021.

Employers are permitted, but not required, to add this extension to their health FSAs and/or DCAPs. In addition, employers may choose to include an extension of time that ends earlier than December 30, 2020. However, adding the extension will reduce the potential for forfeitures under the plan.

Employers should be aware that an extension of time for a health FSA will impact an employee's ability to contribute to a Health Savings Account (HSA). Under the rules for HSAs, an individual who is covered by a health plan that is not a qualified High Deductible Health Plan (HDHP) is not eligible to contribute to an HSA. An individual who has unused amounts remaining at the end of a plan year or grace period ending in 2020 and who is given an extended period of time to incur expenses under a health FSA (that is not a HSA-compatible FSA) will not be eligible to contribute to an HSA during the extended period.

35. 3/13/21 ADDED: How do the extended grace periods for health FSAs and DCAPs work under IRS Notice 2021-15?

In IRS Notice 2021-15, the IRS provided the following examples (with an assumption that the applicable carryover limit continues to be $550 for all relevant periods):

> **Example 1.** Employer provides a health FSA under a calendar year § 125 cafeteria plan that allows a $550 carryover from one plan year to the next. Pursuant to § 214 of the Act, Employer amends the plan to adopt a 12-month temporary extended period for incurring claims with respect to the 2020 plan year, allowing for claims incurred on or after January 1, 2021, but prior to January 1, 2022, to be paid with amounts remaining from the 2020 plan year.
>
> As of December 31, 2020, Employee A has a remaining balance of $2,000 in a health FSA for the 2020 plan year. For the 2021 plan year, Employee A elects to contribute $2,000 to a health FSA. Between January 1, 2021 and December 31, 2021, Employee A incurs $3,300 in medical care expenses. The health FSA may reimburse Employee A $3,300, leaving $700 in the health FSA as of December 31, 2021.
>
> Pursuant to § 214 of the Act, Employer amends the plan to adopt the temporary extended period for incurring claims with respect to the 2021 plan year, allowing for claims incurred on or after January 1, 2022, but prior to January 1, 2023, to be paid with amounts remaining at the end of the 2021 plan year. For the 2022 plan year, Employee A elects to contribute $1,500 to a health FSA. Between January 1, 2022, and December 31, 2022, Employee A incurs $1,200 in medical care expenses. The health FSA may reimburse Employee A $1,200, leaving $1,000 in the health FSA as of December 31, 2022. Under the plan terms that provide for a $550 carryover from the 2022 plan year to the 2023 plan year, Employee A is allowed to use $550 of the remaining $1,000 in the health FSA during the 2023 plan year to reimburse expenses incurred on or after January 1,

2023, and before January 1, 2024. The $450 remaining 15 as of December 31, 2022, is forfeited. A 2½ month grace period is not available for the plan year ending December 31, 2023, because the plan provides for a carryover.

Example 2. Employer provides a health FSA under a non-calendar year (July 1 to June 30) § 125 cafeteria plan that allows a $550 carryover from one plan year to the next. Pursuant to § 214 of the Act, Employer amends the plan to adopt a 12-month temporary extended period for incurring claims with respect to the 2020 plan year, allowing claims incurred on or after July 1, 2021, but prior to July 1, 2022, to be paid with amounts from the 2020 plan year (which ends on June 30, 2021). For the 2020 plan year, Employee B elects to contribute $1,800 to a health FSA. As of June 30, 2021, Employee B has a remaining balance in the health FSA for the 2020 plan year of $1,800.

For the 2021 plan year, Employee B elects to contribute $1,000 to a health FSA. Between July 1, 2021, and June 30, 2022, Employee B incurs $2,000 in medical care expenses. The health FSA may reimburse Employee B $2,000, leaving $800 in the health FSA as of June 30, 2022. Under the plan terms that provide for a carryover, Employee B is allowed to use $550 of the remaining $800 in the health FSA during the 2022 plan year to reimburse expenses incurred on or after July 1, 2022, but prior to July 1, 2023. The $250 remaining as of June 30, 2022, is forfeited. A 2½ month grace period is not available for the plan year ending June 30, 2022, because the plan provides for a carryover.

Example 3. Employer provides a dependent care assistance program under a calendar year § 125 cafeteria plan. Pursuant to § 214 of the Act, Employer amends the plan to adopt a 12-month temporary extended period for incurring claims with respect to the 2020 plan year, allowing for claims incurred on or after January 1, 2021, but prior to January 1, 2022, to be paid with amounts remaining from the 2020 plan year.

As of December 31, 2020, Employee C has a remaining balance of $4,000 in a dependent care assistance program for the 2020 plan year. For the 2021 plan year, Employee C elects to contribute $3,000 to a dependent care assistance program. Between January 1, 2021, and December 31, 2021, Employee C incurs $6,000 in dependent care expenses. The dependent care assistance program may reimburse Employee C $6,000, leaving $1,000 in the dependent care assistance program as of December 31, 2021.

Pursuant to § 214 of the Act, Employer amends the plan to adopt a 12-month temporary extended period for incurring claims with respect to the 2021 plan year, allowing for claims incurred on or after January 1, 2022, but prior to January 1, 2023, to be paid with amounts remaining at the end of the 2021 plan year. For the 2022 plan year, Employee C elects to contribute $2,000 to a dependent care assistance program. Between January 1, 2022, and December 31, 2022, Employee C incurs $2,800 in dependent care expenses. The dependent care assistance program may reimburse Employee C $2,800, leaving $200 in the dependent care assistance program as of December 31, 2022. A carryover is not available for a dependent care assistance program from the 2022 plan year to the 2023 plan year. Employer adopts a 2½ month 16 grace period for the 2022 plan year, during which the $200 remaining as of December 31, 2022, may be applied to reimburse dependent care expenses incurred during the grace period.

36. 3/13/21 UPDATED: Is it true that there's a higher limit for health FSA carryover amounts for 2020? What about 2021?

Yes. IRS Notice 2020-33 permits plans to increase in the dollar amount of a carryover for a health FSA. For 2019, the maximum dollar amount for a carryover for a health FSA was $500. Under Notice 2020-33, the $500 maximum is increasing to $550 for plan years beginning in 2020. For 2021, a $550 carryover is also permitted. (But see below for additional carryover relief.) An employer that already has a $500 carryover provision will need to review its cafeteria plan document to determine if an amendment will be needed. If the cafeteria plan document lists the $500 amount (or lesser dollar amount), and the employer wants to use the $550 amount, an amendment will be required. The amendment must be adopted on or before the last day of the plan year from which amounts may be carried over. This change is permissive, not required.

On December 27, 2020, President Trump signed the Consolidated Appropriations Act, 2021 (the CAA) into law. The CAA includes several provisions impacting both health flexible spending accounts and dependent care spending accounts that will significantly impact employers and employees. See *Flexible Spending Account and Health Election Options for 2020/2021* for more information regarding available relief options.

37. 3/13/21 UPDATED: If we adopt an extended period to apply unused amounts under our health FSA or DCAP, do we have to amend out plan documents?

Yes. An employer that decides to amend one or more of its Section 125 cafeteria plans to provide for an extended period to apply unused amounts remaining in a health FSA

or a dependent care assistance program to pay or reimburse medical care expenses or dependent care expenses in a manner consistent with the Notice must adopt a plan amendment. In addition, an employer that decides to amend its health FSA to provide for an increase in the carryover of unused amounts to the following year in a manner consistent with Notice 2020-33 (discussed below), for the 2020 plan year or plan years thereafter, must adopt a plan amendment.

An amendment for the 2020 plan year must be adopted on or before December 31, 2021, and may be effective retroactively to January 1, 2020, provided that the Section 125 cafeteria plan operates in accordance with Notice 2020-29 or Notice 2020-33 or both, as applicable, and the employer informs all employees eligible to participate in the Section 125 cafeteria plan of the changes to the plan. Any amendment adopted pursuant to Notice 2020-29 must apply only to an extended period to apply unused health FSA amounts or DCAP amounts for the payment or reimbursement of medical care expenses or dependent care expenses incurred through December 31, 2020.

An employer who decides to implement the relief provided under Section 214 of the Consolidated Appropriations Act/IRS Notice 2021-15 for one or more of its Section 125 cafeteria plans (including plans that do not currently have a grace period or permit a carryover) must adopt a plan amendment to do so. The amendment may be retroactive, if (1) the amendment is adopted not later than the last day of the first calendar year beginning after the end of the plan year in which the amendment is effective, and (2) the plan or arrangement is operated consistent with the terms of the amendment during the period beginning on the effective date of the amendment and ending on the date the amendment is adopted. For example, if an employer sponsors a calendar year Section125 cafeteria plan with a health FSA that provides for a $550 carryover (from 2020 to 2021) and amends the plan to carry over the entire unused amount remaining in employees' health FSAs as of December 31, 2020, to the 2021 plan year, the amendment must be adopted by December 31, 2021. An amendment for the 2020 plan year of a non-calendar year plan, however, must be adopted by December 31, 2022, because the last day of the first calendar year beginning after the end of the 2020 plan year that ends in 2021 is the last day of 2022.

38. 5/20/20 ADDED: If our plan extends the time for employees to obtain reimbursements from their health FSAs, will employees still be eligible to contribute to their HSAs?

Employers should be aware that an extension of time for a health FSA will impact an employee's ability to contribute to a Health Savings Account (HSA). Under the rules for HSAs, an individual who is covered by a health plan that is not a qualified High

Deductible Health Plan (HDHP) is not eligible to contribute to an HSA. An individual who has unused amounts remaining at the end of a plan year or grace period ending in 2020 and who is given an extended period of time to incur expenses under a health FSA (that is not a HSA-compatible FSA) will not be eligible to contribute to an HSA during the extended period.

39. 4/21/20 ADDED: Can our health FSA or HRA reimburse for over-the-counter (OTC) drugs without a prescription?

Yes. After passage of the CARES Act, patients may use funds from HSAs, FSAs, or HRAs to cover OTC drugs without a prescription (thus repealing a prohibition under the Patient Protection and Affordable Care Act (ACA)). These changes are effective for amounts paid and expenses incurred in 2020 and apply indefinitely. Changes to cover OTC drugs without prescriptions under account-based plans (e.g., health FSAs) will likely trigger a need for plan amendments, and for employers subject to ERISA, summaries of material modification (SMMs).

40. 4/21/20 ADDED: Can our health FSA reimburse for menstrual products?

After passage of the CARES Act, patients may use funds in HSAs, health reimbursement arrangements (HRAs), and health flexible spending accounts (FSAs) to purchase over-the-counter (OTC) menstrual care products. These changes are effective for amounts paid and expenses incurred in 2020 and apply indefinitely. Changes to cover menstrual care products under account-based plans (e.g., health FSAs) will likely trigger a need for plan amendments, and for employers subject to ERISA, summaries of material modification (SMMs).

41. 4/21/20 ADDED: Can a limited purpose health FSA be used to pay for over-the-counter drugs and menstrual products?

Limited-purpose health FSAs should be limited to dental and vision expenses only, or possibly to also include preventive services. At this time, we are not aware of any guidance that places menstrual products into any of those categories. As a result, they would not be reimbursable under a limited purpose health FSA.

42. 4/21/20 ADDED: Do employees have more time to contribute money to their HSAs or Archer MSAs for 2019?

Yes. Contributions may be made to an HSA or Archer MSA, for a particular year, at any time during the year or by the due date for filing your tax return for that year. Because the due date for filing 2019 Federal income tax returns is now July 15, 2020, under this

relief, individuals may make contributions to their HSAs or Archer MSAs for 2019 at any time up to July 15, 2020.

43. **4/21/20 ADDED: Our annual enrollment period was supposed to begin May 1 for our plan year beginning on June 1, but we're not ready because of COVID-19. Can we delay our annual enrollment period?**

For cafeteria plan years beginning April 1, May 1, June 1 or July 1, employers may provide employees until July 15 to make new elections, even absent a permissible cafeteria plan change-in-status event. IRS Notice 2020-23 allows for the delay, but is unclear whether new elections must be prospective only or can apply retroactively to the beginning of the applicable plan year. Hopefully, additional guidance will be provided.

Handling Employee Illness in the Workplace

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

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

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

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

45. **What guidelines should employers follow regarding asking employees to stay home due to COVID-19?**

The CDC has published guidelines on when sick employees should be encouraged to stay home, separating sick employees, and general planning considerations to reduce transmission among staff.

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

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

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

47. 3/13/21 UPDATED: If an employee tests positive for COVID-19, is that employee eligible for Family and Medical Leave Act (FMLA) leave?

Maybe. FMLA leave includes leave for an eligible employee's own serious health condition that makes the employee unable to perform the functions of his or her job. A "serious health condition" means an illness, injury, impairment, or physical or mental condition that involves inpatient care or continuing treatment by a health care provider. Continuing treatment from a healthcare provider means that the individual receives either: (1) treatment two or more times from the health care provider, from a nurse or physician's assistant under direct supervision of a health care provider, or from a provider of health care services (e.g., physical therapist) under orders of, or on referral by, a health care provider; or (2) treatment by a health care provider on at least one occasion that results in a regimen of continuing treatment under the supervision of the health care provider. This would exist, for example, if the employee visits the doctor, receives a positive test result for COVID-19, and is prescribed medication for treatment of COVID-19. (Currently, no medication is available for the direct treatment of COVID-19, but the individual may receive a prescription to treat a condition related to his or her diagnosis.)

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

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

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

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

In addition, the FFCRA expanded FMLA to provide for a Public Health Emergency Leave until December 31, 2020 when an employee is unable to work (or telework) due to a need for leave to care for the son or daughter under 18 years of age of such employee if the school or place of care has been closed, or the child care provider of such son or daughter is unavailable, due to a public health emergency. The FFCRA applies to employers with fewer than 500 employees. Note, however, that employers may voluntarily continue to provide FFCRA leave and, if eligible, may continue to obtain payroll tax credits for leave provided through September 30, 2021.

48. We received a request from an employee with an underlying medical condition to work from a different location to reduce potential exposure to COVID-19. Does the ADA require us to provide this employee with a reasonable accommodation by temporarily reassigning them to another location?

In general, the ADA requires employers to provide reasonable accommodations to both prospective and current employees with disabilities to allow them to perform the essential functions of a job. Reassigning an employee to an alternate work location is one type of reasonable accommodation that an employer could provide. If the employee's medical condition is not considered a disability that is recognized under the ADA, the employer would not be required to accommodate the employee's request to

work from an alternative location. However, the ADA also does not prohibit or interfere with an employer's ability to follow the recommendations of the Centers for Disease Control (CDC) or state or local public health authorities in an effort to protect the general health of its employees. If an employee who has an underlying medical condition that is not considered a disability requests to work from an alternate location to reduce their risk of exposure, consult with legal counsel prior to denying the request.

Additional information from the Equal Employment Opportunity Commission about reasonable accommodations and COVID-19 is available: https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws.

Benefits Coverage During Layoffs, Shutdowns, or Leaves of Absence

49. What is the difference between a furlough and a layoff?

Furloughs are defined as temporary periods, in which an employer requires an employee to take unpaid time off work. The general idea behind a furlough is to retain workers but reduce labor costs by reducing the number of hours they work. Furloughs can include having an employee work fewer hours, giving employees a full week or weeks off, or designating a "furlough day" once a month when employees stay home and are not paid for that day. Furloughs allow workers to return to their jobs. An employee on furlough is still an active worker with the organization and can return to his or her position at the end of the furlough period. Also, in some instances, an employee may continue to accrue certain benefits, such as paid vacation, pension, and retirement benefits (but this will depend upon each individual organization's policy).

Laid off employees are not viewed as active with the organization. A layoff essentially terminates the employment relationship. A layoff often occurs because the business encounters financial hardship or an employee's job is no longer necessary. Unlike with furloughs, the impacted employee is terminated from payroll and usually can collect unemployment benefits. If a laid off employee is rehired, he or she may have to go through the same hiring process as new employees. Laid off workers generally do not accrue benefits such as paid vacation, pension, or retirement benefits.

50. We are planning to furlough a portion of our workforce on a rotating basis (25% of the workforce at a time) for one to four months. We want to continue

benefits during this period, but not pay wages for those individuals on furlough. What do we need to consider relating to benefits?

First, you should check your plan documents and applicable insurance policies for layoff provisions that allow for extended benefits. If your documents and any applicable policies (including stop loss for self-insured benefits) contain provisions to extend benefits during layoffs, determine what period of time the extension covers (e.g., three months). If your plan documents and applicable policies do not provide for an extension, or the extension will not be long enough in duration, then check with your carrier or stop-loss carrier to see if an extension provision can be added or extended. If you can amend your plan(s) to add or extend your layoff provision, you will need to do an amendment to you plan document(s), and issue an SMM (or SMMs) to the plan participants explaining the change.

You should also determine how to handle employee premiums for those individuals who are on furlough. You can either pay the employees' portions of their contributions during the furlough, require employees to send in checks for their contributions, or cover the employees' cost while on furlough and then require the employees to make catch-up contributions upon returning to work. One thing to note is if you allow catch-up contributions upon returning to work, those can be made on a pre-tax basis under your Section 125 cafeteria plan. The downside is that if an employee doesn't return, you may have difficulty getting repaid. The downside of the pay-as-you-go method is employees will have to pay by check (post-tax), and it will be an additional administrative burden to track all those payments.

Also see our article on Layoffs and Furloughs for more information and our article on Employees Who Cannot Cover Salary Reduction Elections.

51. If our employees are not "actively at work" during a temporary layoff or furlough, does that result in their loss of benefit coverage?

Plan terms govern plan eligibility. If the plan has an "actively at work" requirement or even a general full-time status requirement, the carrier or stop-loss carrier may take the position that employees lose their eligibility for coverage during a work stoppage. Alternatively, it is possible that your plan has a provision that permits continued eligibility in the event of a temporary layoff. In either case, the determination is governed by plan terms. Further, in the absence of such a provision currently, it is possible that the carrier or stop-loss carrier would agree to continue coverage during a COVID-19-related

temporary work stoppage. Whatever approach and interpretation is decided upon should be confirmed with the carrier.

With respect to health coverage in particular, there may be employees who are considered full-time under the ACA employer shared responsibility rules. For example, if the employer uses the "look-back" measurement method, then employees who remain employed during a stability period (notwithstanding a temporary period of low or no hours) would still be considered full-time employees for purposes of the ACA. If that is the case, then removing coverage for such individuals during a temporary period of absence would not be optimal and could result in penalties under the Employer Shared Responsibility rules. To protect against that possibility, the employer may be able to arrange continued coverage with the carrier for this temporary period of absence (rather than the alternative – which would be to offer COBRA coverage due to the qualifying event of a reduction in hours). Furthermore, if your plan has adopted ACA full-time employee status using the look-back method as one basis for plan eligibility, then termination of coverage for those employees may result in a failure to follow your plan terms.

Finally, if you (with your carrier's permission) are able to continue coverage during a temporary layoff, then you should communicate with employees on the methodology for employees to pay their regularly-scheduled employee premium contributions as well. You are not under an obligation to provide "free" coverage if you are able to secure continued coverage for employees with your carrier.

Further information on this topic can be found in our article on Layoffs, Furloughs, and Reduction in Hours.

52. Can we or do we have to credit employees with "hours of service" for purposes of the Patient Protection and Affordable Care Act (ACA) if they are off work during the COVID-19 pandemic, for purposes of their current look-back measurement period?

At this time, the IRS has not yet released rules on how to treat COVID-19-related absences for purposes of counting hours under the look-back measurement period under Employer Shared Responsibility rules. But the following general guidance applies. First, note that any absence under the FMLA (which would include extended FMLA leave under the FFCRA) would be treated as having "hours of service" during that period – generally, at the same average hour amount that the employee had at other periods during the year. Second, other periods of time in which the employee is not working and not paid or entitled to pay are not required to be treated as "hours of

service" by the employer for purposes of the look back measurement period. However, third, employers are not prohibited from being more generous than what the counting hours rules require – and we suspect that in some cases employers may still wish to credit their employees with hours of service during COVID-19-related absences in much the same way that they are required to do so under the FMLA today (in order to prevent normally full-time employees from being technically treated as "non-full-time" under employer shared responsibility rules).

53. Can we continue active employee medical benefits for individuals we put on temporary layoff or furlough?

Plan eligibility language will govern whether you can continue coverage for active employees on temporary layoff or furlough. However, as an employer, you have a lot of flexibility in how you define eligibility, and you can be more generous than what the law requires. If you want to continue active employee benefits for those on a temporary layoff or furlough, you will want to make sure that your carrier or stop loss carrier has agreed to this before making any changes. In addition, you will need to amend plan documents and issue a summary of material modification (SMM) reflecting the change in eligibility.

54. Can we pay the employee's portion of the premium for those who are on a temporary layoff or furlough?

Yes, an employer can pay the employee's portion of the premium while the employee is on a temporary layoff or furlough. However, you should consult with your tax advisor about any potential tax implications.

55. Do employer-initiated quarantines or temporary shutdowns entitle workers to unemployment benefits?

Yes, workers are generally entitled to unemployment insurance if they are furloughed when a business temporarily shuts down, if all other applicable unemployment requirements are met (including the fact that the employee is ready, willing, and able to work). Unemployment compensation laws vary by state, though, and some states may provide for a waiting period before employees will be eligible for benefits. Further, some states have recently amended their unemployment compensation requirements in response to COVID-19.

56. We have employees who are not working right now but have *not* been laid off. We're not collecting their portion of their premiums because there is no

pay from which to collect it. What are our options for collecting back premiums?

You can either pay the employees' portions of their contributions during the furlough, require employees to send in checks for their contributions, or cover the employees' cost while on furlough and then require the employees to make catch-up contributions upon returning to work. Note: If you allow catch-up contributions upon returning to work, those can be made on a pre-tax basis under your Section 125 cafeteria plan. The downside is that if an employee doesn't return, you may have difficulty getting repaid. The downside of the pay-as-you-go method is employees will have to pay by check (post-tax), and it will be an additional administrative burden to track all those payments.

Also see our article on Layoffs and Furloughs for more information.

57. What can we do regarding part-time employees if there is no work available for them?

You should discuss these issues with your employment counsel, but the following general guidelines and general information may be helpful:

First and foremost, be aware that the CDC has published guidelines on when sick employees should be encouraged to stay home, separating sick employees, and general planning considerations to reduce virus transmission among staff.

Second, if you have any specific policies regarding scheduling, part-time expectations, and sick/PTO leave, you should follow those policies if they continue to be valid in this environment or if your employment counsel believes they are binding and cannot be altered (for example, while part-time employees often do not have PTO, if they do, then they may have the right to use their PTO time while they are off).

Absent some sort of restrictions in a collective bargaining agreement or employment agreement, an employer is generally free to schedule its employees as it chooses, to meet business needs. Further, employers do not need to pay non-exempt employees for time not worked.

Note that some workers may be entitled to unemployment insurance (UI) if they are furloughed when a business temporarily shuts down and all other unemployment requirements are met. Further, UI issues are being reviewed by Congress, which may relax requirements to get UI, and some states are modifying their UI laws in response to COVID-19.

You should discuss the issues above with labor and employment counsel.

58. 3/13/21 UPDATED: Can employees on furlough change benefit elections?

If a furlough causes an employee to lose eligibility for a benefit under the plan, then it is a change in election event allowing that individual to change his or her salary reduction agreement election. If the furlough does not impact eligibility, then there is no change in election event unless the employer has adopted a permissible change in status under such circumstances under IRS Notice 2014-55. Under IRS Notice 2014-55, an employee may change his or her cafeteria plan election to reflect termination of major medical plan coverage if:

(1) The employee has been in an employment status under which the employee was reasonably expected to average at least 30 hours of service per week and there is a change in that employee's status so that the employee will reasonably be expected to average less than 30 hours of service per week after the change, even if that reduction does not result in the employee ceasing to be eligible under the group health plan; and

(2) The revocation of the election of coverage under the group health plan corresponds to the intended enrollment of the employee, and any related individuals who cease coverage due to the revocation, in another plan that provides minimum essential coverage with the new coverage effective no later than the first day of the second month following the month that includes the date the original coverage is revoked.

It may be unlikely that the employee enrolls in other coverage during a furlough, but if an employer has adopted all permissible Section 125 permissible changes in status or has specifically adopted this change in status, then the employee may be entitled to make a cafeteria plan election change.

Alternatively, see the IRS relief described in FAQ 30.

If an employer wants employees to be able to drop health flexible spending account (health FSA) coverage during a furlough, the plan's eligibility provisions must state that coverage under the health FSA ends when an employee is no longer actively working.

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

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

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

60. If an employee is called up for National Guard duty because of COVID-19, do USERRA Requirements Apply?

If an employee is called to active duty with the National Guard pursuant to orders issued under **federal** law, it qualifies as "service in the uniformed services," and the requirements under the Uniform Service Employment and Reemployment Rights Act (USERRA) will apply. However, service pursuant to a state order does not count as "service in the uniformed services" under USERRA.

Note: USERRA applies to all types of employers – private, government, and church – regardless of size.

61. If an employee is called up for National Guard duty because of COVID-19, are we required to continue health and welfare benefits?

USERRA requires continuation of health coverage during (federally ordered) National Guard service with provisions that are similar to COBRA, but are not identical. The law also requires that health coverage be reinstated (if not continued) when the employee returns with no new waiting periods or additional restrictions. It applies to all health coverage, not just medical.

The law does not require other types of coverage such as life and disability insurance to be continued during service, but does require that those coverages be reinstated upon the employee's return with no new waiting period or additional restrictions. Because National Guard duty in response to COVID-19 is likely to be of limited duration, most employers will want to continue coverage during the employee's period of service.

62. In states that have military leave laws similar to the federal USERRA law, do we need to comply with the federal law, state law, or both?

USERRA is intended to be a floor of protection. State laws will also apply and may provide greater rights to employees called up for National Guard Duty. Employers with employees in states that have state military leave laws will need to comply with both the USERRA and the applicable state military leave law(s).

Families First Coronavirus Response Act

63. 3/13/21 UPDATED: I heard that the FFCRA adds a new kind of leave to the FMLA. What does that mean?

The FFCRA temporarily amends the FMLA to provide employees of employers with fewer than 500 employees and government employers who have been on the job for at least 30 days with the right take up to 12 weeks of job-protected leave for Public Health Emergency Leave through December 31, 2020. To qualify for Public Health Emergency Leave, an employee must be unable to work or telework due to a need to care for the son or daughter under 18 years of age because the child's school or place of care has been closed, or the child care provider of such son or daughter is unavailable, due to a public health emergency. Note that additional requirements apply. See FAQs below.

NOTE: On August 3, 2020, the U.S. District Court for the Southern District of New York invalidated the following four provisions of the final rule implementing the paid leave provisions of the Families First Coronavirus Relief Act (FFCRA): (1) the requirement that an employer must have work available for an employee in order for the employee to qualify for leave; (2) the broad definition of "health care provider" for the purpose of the exemption of certain employees from eligibility for leave; (3) the discretion given to employers to allow or disallow employees to take intermittent leave; and (4) the requirement for employees to submit documentation of the need to take FFCRA leave prior to the start of that leave. In response, the DOL issued updated regulations on September 11, 2020 that (1) reaffirms that FFCRA leave may be taken only if the employee has work from which to take leave; (2) reaffirms that, where intermittent FFCRA leave is permitted by the regulations, an employee must obtain his or her employer's approval to take FFCRA leave; (3) revises and narrows the definition of "health care provider" for purposes of the exemption of certain employees from eligibility for leave; and (4) clarifies that the information the employee must give to the employer to support the need for his or her leave should be provided to the employer as soon as practicable.

64. 3/13/21 UPDATED: Are employees entitled to paid leave due to COVID-19?

Before December 31, 2020, under the FFCRA, employers with fewer than 500 employees and government employers were required to provide employees who are unable to work or telework with two weeks of paid sick leave, paid at the employee's regular rate, due to one of the following reasons:

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

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

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

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

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

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

Employers may voluntarily extend FFCRA leave during 2021, and through September 30, 2021, eligible employers may continue to receive payroll tax credits for leave. Employers may also extend FFCRA leave to individuals taking time off in connections with the receipt of COVID-19 vaccinations.

Under the FFCRA, an employer's obligations were limited to paid leave of $511 per day ($5,110 in the aggregate) where leave was taken for reasons (1), (2), and (3) above (i.e., an employee's own illness or quarantine), and $200 per day ($2,000 in the aggregate) where leave is taken for reasons (4), (5), or (6) (i.e., care for others or school closures).

Full-time employees were entitled to two weeks (80 hours) of leave and part-time employees were entitled to the typical number of hours that they work in a typical two-

week period. The FFCRA allowed employers to exclude employees who are health care providers or emergency responders from this coverage.

The FFCRA's paid leave provisions were effective on April 1, 2020, and applied to leave taken between April 1, 2020, and December 31, 2020. Emergency Paid Sick Leave expired on December 31, 2020 and any unused paid leave granted by the FFCRA does not carry over into 2021 unless an employer voluntarily extends coverage into 2021. However, the employee may be limited to remaining eligibility from leave entitlement originally granted in 2020.

NOTE: Under the DOL's Temporary Rule issued on April 1, 2020, an employee subject to these orders may not take paid sick leave where the employer does not have work for the employee.

NOTE: On August 3, 2020, the U.S. District Court for the Southern District of New York invalidated the following four provisions of the final rule implementing the paid leave provisions of the Families First Coronavirus Relief Act (FFCRA): (1) the requirement that an employer must have work available for an employee in order for the employee to qualify for leave; (2) the broad definition of "health care provider" for the purpose of the exemption of certain employees from eligibility for leave; (3) the discretion given to employers to allow or disallow employees to take intermittent leave; and (4) the requirement for employees to submit documentation of the need to take FFCRA leave prior to the start of that leave. In response, the DOL issued updated regulations on September 11, 2020 that: (1) reaffirms that FFCRA leave may be taken only if the employee has work from which to take leave; (2) reaffirms that, where intermittent FFCRA leave is permitted by the regulations, an employee must obtain his or her employer's approval to take FFCRA leave; (3) revises and narrows the definition of "health care provider" for purposes of the exemption of certain employees from eligibility for leave; and (4) clarifies that the information the employee must give to the employer to support the need for his or her leave should be provided to the employer as soon as practicable.

65. 4/1/20 UPDATED: Which employers are subject to the FFCRA?

The FFCRA applies to: (1) employers with fewer than 500 employees and (2) government employers, regardless of size.

Under a DOL Temporary Rule, to determine who counts as an employee for this purpose, an employer should include full-time and part-time employees, employees on leave, temporary employees who are jointly employed by the employer and another employer, and day laborers supplied by a temporary placement agency. Independent

contractors that provide services for an employer do not count towards the 500-employee threshold. Nor do employees count who have been laid off or furloughed and have not subsequently been reemployed. Furthermore, employees must be employed within the United States. For example, if an employer employs 1,000 employees in North America, but only 250 are employed in a U.S. State, the District of Columbia, or a territory or possession of the United States, that employer will be considered to have 250 employees and is thus subject to the FFCRA.

66. Our organization has more than 50, but fewer than 500 employees. However, fewer than 50 employees work at each worksite, and all worksites are more than 75 miles apart. Was our organization required to provide Public Health Emergency Leave and Emergency Paid Sick Leave under the FFCRA?

Yes. For purposes of the 500 employee threshold under the FFCRA's Public Health Emergency Leave and Emergency Paid Sick Leave provisions, all employees within the United States are counted, even if they are located at a worksite with fewer than 50 employees more than 75 miles away from another worksite.

67. Are global employees counted when determining the 500 employee thresholds under the FFCRA?

No. Employees working exclusively outside the United States are not counted for purposes of the 500 employee threshold for either Public Health Emergency Leave or Emergency Paid Sick Leave under the FFCRA. If an employer has fewer than 500 employees within the United States, but more than 500 employees globally, the employer would be subject to both Public Health Emergency Leave and Emergency Paid Sick Leave under the FFCRA. For example, if an employer employs 1,000 employees in North America, but only 250 are employed in a U.S. State, the District of Columbia, or a territory or possession of the United States, that employer will be considered to have 250 employees and is thus subject to the FFCRA.

68. 4/1/20 UPDATED: Should we include part-time and seasonal employees in determining whether we are an employer with fewer than 500 employees for purposes of the FFCRA?

Under a DOL Temporary Rule, to determine who counts as an employee for this purpose, an employer should include full-time and part-time employees, employees on leave, temporary employees who are jointly employed by the employer and another employer, and day laborers supplied by a temporary placement agency. Independent contractors that provide services for an employer do not count towards the 500-employee threshold. Nor do employees count who have been laid off or furloughed and

have not subsequently been reemployed. Furthermore, employees must be employed within the United States. For example, if an employer employs 1,000 employees in North America, but only 250 are employed in a U.S. State, the District of Columbia, or a territory or possession of the United States, that employer will be considered to have 250 employees and is thus subject to the FFCRA.

NOTE: The employee count should be made at the time the employee would take leave. For example, if an employer has 450 employees on April 20, 2020, and an employee is unable to work starting on that date because a health care provider has advised that employee to self-quarantine because of concerns related to COVID-19, the employer must provide paid sick leave to that employee. If, however, the employer hires 75 new employees between April 21, 2020, and August 3, 2020, such that the employer employs 525 employees as of August 3, 2020, the employer would not be required to provide paid sick leave to a different employee who is unable to work for the same reason beginning on August 3, 2020.

69. **4/13/20 ADDED: We currently employ more than 500 total employees. However, with layoffs under consideration, we may have fewer than 500 employees in the near future. Could we become subject to the paid leave provisions of FFCRA in the future if our employee count falls below 500?**

Existing Department of Labor guidance appears to indicate that a private employer who currently employs 500 or more employees, but employs fewer than 500 employees prior to December 31, 2020 could become subject to the FFCRA's paid leave provisions due to the reduction in size. The DOL FAQs and Temporary Rule both indicate that all private employers that employ fewer than 500 employees *at the time an employee would take leave* must comply with the paid leave provisions.

Based on this provision, it appears as though the count is determined at the time an employee would take leave. This could mean that the employer could be required to provide paid leave under the FFCRA if the employer has fewer than 500 employees at the time an employee would take leave.

If you currently employ 500 or more employees but may employ fewer than 500 employees due to reductions in force prior to December 31, 2020, consult with legal counsel before denying an employee's leave if there are fewer than 500 employees at the time the leave request is received.

70. 4/1/20 UPDATED: Are nonprofits exempt from either of the leave requirements under the FFCRA?

No, the FFCRA applies to employers with fewer than 500 employees and all governmental employers. There may be some exemptions for small employers (under 25 for certain job protections and under 50 for the child care leave part.

On March 31, 2020, the IRS issued an FAQ confirming that tax-exempt employers may receive the credit. Specifically, the IRS stated that: The FFCRA entitles Eligible Employers that pay qualified sick leave wages and qualified family leave wages to refundable tax credits. Qualified sick leave wages and qualified family leave wages are those wages for paid sick leave and paid family and medical leave that are required to be paid under the FFCRA. Tax-exempt organizations that are required to provide such paid sick leave or expanded paid family and medical leave may claim the tax credits.

71. 9/16/20 UPDATED: Do the Emergency Paid Sick Leave and Public Health Emergency Leave provisions apply to an employer that is temporarily closing its doors?

It seems like the new law would apply if the employer is not terminating employees in connection with the temporary shut-down, and it has under 500 employees. However, the employer might not have any employees who qualify for the paid leave. Generally, in order to receive the paid leave, an individual must be unable to work due to a COVID-19-related reason (quarantined, sick, caring for a child, etc.). In the event that an employer stops work temporarily, the individual is not working due to shut down of company, not because one of the reasons for leave under the new law.

NOTE: Under the DOL's Temporary Rule issued on April 1, 2020, an employee subject to these orders may not take paid sick leave where the employer does not have work for the employee.

NOTE: On August 3, 2020, the U.S. District Court for the Southern District of New York invalidated the following four provisions of the final rule implementing the paid leave provisions of the Families First Coronavirus Relief Act (FFCRA): (1) the requirement that an employer must have work available for an employee in order for the employee to qualify for leave; (2) the broad definition of "health care provider" for the purpose of the exemption of certain employees from eligibility for leave; (3) the discretion given to employers to allow or disallow employees to take intermittent leave; and (4) the requirement for employees to submit documentation of the need to take FFCRA leave prior to the start of that leave. In response, the DOL issued updated regulations on September 11, 2020 that: (1) reaffirms that FFCRA leave may be taken only if the

employee has work from which to take leave; (2) reaffirms that, where intermittent FFCRA leave is permitted by the regulations, an employee must obtain his or her employer's approval to take FFCRA leave; (3) revises and narrows the definition of "health care provider" for purposes of the exemption of certain employees from eligibility for leave; and (4) clarifies that the information the employee must give to the employer to support the need for his or her leave should be provided to the employer as soon as practicable.

72. 9/16/20 UPDATED: Are all employees of healthcare providers excluded from eligibility for paid leave under the FFCRA?

As the temporary rule was originally drafted, the definition of healthcare provider was broader than only those who provide health care. However, on August 3, 2020, the U.S. District Court for the Southern District of New York invalidated certain provisions of the final rule implementing the paid leave provisions of the Families First Coronavirus Relief Act (FFCRA) including the broad definition of "health care provider" for the purpose of the exemption of certain employees from eligibility for leave. In response, the DOL issued updated regulations on September 11, 2020 that revises the definition of "health care provider" for this purpose. It narrows the definition to include only employees who are health care providers under the Family Medical Leave Act (FMLA) and those providing diagnostic services, preventive services, treatment services, or other services that are integrated with and necessary to the provision of patient care and, if not provided, would adversely impact patient care.

73. 9/16/20 UPDATED: I heard that health care providers cannot qualify for Public Health Emergency Leave or Emergency Paid Sick Leave under the FFCRA. Who are health care providers for purposes of the FFCRA?

Under the FFCRA, for purposes of defining who may be excluded by an employer from both Public Health Emergency Leave and Emergency Paid Sick Leave, the DOL adopted a definition of a health care provider that broadly encompasses "anyone employed at" a wide range of facilities that provide health care.

However, on August 3, 2020, the U.S. District Court for the Southern District of New York invalidated certain provisions of the final rule implementing the paid leave provisions of the Families First Coronavirus Relief Act (FFCRA) including the broad definition of "health care provider" for the purpose of the exemption of certain employees from eligibility for leave. In response, the DOL issued updated regulations on September 11, 2020 that revises the definition of "health care provider" for this purpose. It narrows the definition to include only employees who are health care providers under

the Family Medical Leave Act (FMLA) and those providing diagnostic services, preventive services, treatment services, or other services that are integrated with and necessary to the provision of patient care and, if not provided, would adversely impact patient care.

74. 3/30/20 UPDATED: I heard that emergency responders cannot qualify for Public Health Emergency Leave or Emergency Paid Sick Leave under the FFCRA. Who are emergency responders for purposes of the FFCRA?

The DOL released an FAQ defining “emergency responders” for purposes of the exclusion. From that DOL FAQ:

For the purposes of employees who may be excluded from paid sick leave or expanded family and medical leave by their employer under the FFCRA, an emergency responder is an employee who is necessary for the provision of transport, care, health care, comfort, and nutrition of such patients, or whose services are otherwise needed to limit the spread of COVID-19. This includes but is not limited to military or national guard, law enforcement officers, correctional institution personnel, fire fighters, emergency medical services personnel, physicians, nurses, public health personnel, emergency medical technicians, paramedics, emergency management personnel, 911 operators, public works personnel, and persons with skills or training in operating specialized equipment or other skills needed to provide aid in a declared emergency as well as individuals who work for such facilities employing these individuals and whose work is necessary to maintain the operation of the facility. This also includes any individual that the highest official of a state or territory, including the District of Columbia, determines is an emergency responder necessary for that state’s or territory’s or the District of Columbia’s response to COVID-19.

To minimize the spread of the virus associated with COVID-19, the Department encourages employers to be judicious when using this definition to exempt emergency responders from the provisions of the FFCRA.

75. 4/1/20 UPDATED: Does an order from a state or local government that businesses must close count as a quarantine or isolation order under the FFCRA?

While we originally believed that a shelter-in-place or stay-at-home order would not support leave under these circumstances, the DOL issued temporary guidance, which included the following definition:

> For the purposes of [Emergency Paid Sick Leave], a quarantine or isolation order includes quarantine, isolation, containment, shelter-in-place, or stay-at-home orders issued by any Federal, State, or local government authority that cause the Employee to be unable to work even though his or her Employer has work that the Employee could perform but for the order. This also includes when a Federal, State, or local government authority has advised categories of citizens (e.g., of certain age ranges or of certain medical conditions) to shelter in place, stay at home, isolate, or quarantine, causing those categories of Employees to be unable to work even though their Employers have work for them.

So, a shelter-in-place or a stay-at-home order does qualify as a quarantine or isolation order.

76. 6/30/20 ADDED: May an employee take leave under the FFCRA to be home with a child whose summer camp, summer enrichment program, or other summer program is closed due to COVID-19?

In Field Assistance Bulletin 2020-4, the DOL explained that FFCRA leave may be taken if the employee is unable to work or telework due to a need to care for his or her child whose place of care is closed due to COVID-19 related reasons. A "place of care" is a physical location in which care is provided for the employee's child while the employee works, including summer camps and summer enrichment programs. In requesting leave, the employee must provide the employer with information in support of the need for leave either orally or in writing, including:

- an explanation of the reason for leave;
- a statement that the employee is unable to work because of that reason;
- the name of the child;
- the name of the specific summer camp or program that would have been the place of care of the child if it had not closed due to COVID-19; and
- a statement that no other suitable person is available to care for the child.

The requirement to name a specific summer camp or program may be satisfied if, for example, before the summer camp or program closed, the child was enrolled in the summer camp or program, submitted an application for enrollment, or submitted a deposit, or if the child attended the camp or program in prior summers and was eligible to attend again . There may be other circumstances that show an employee's child's enrollment or planned enrollment in a camp or program, but a parent's mere interest in a camp or program generally is not sufficient.

77. **8/18/20 ADDED: My child's school or place of care has moved to online instruction or to another model in which children are expected or required to complete assignments at home. Is it "closed" for purposes of FFCRA leave?**

Yes. If the physical location where your child received instruction or care is now closed, the school or place of care is "closed" for purposes of paid sick leave and expanded family and medical leave. This is true even if some or all instruction is being provided online or whether, through another format such as "distance learning," your child is still expected or required to complete assignments.

78. **8/18/20 ADDED: My child's school has decided not to have students going to school in person but will be offering instruction online instead. Am I eligible for FFCRA leave?**

Yes. The DOL has made clear that if the physical location of the school is closed, even though instruction will be provided online or otherwise through distance learning, the school is closed for purposes of FFCRA leave. However, you will qualify for leave under the FFCRA only if you can certify that no other suitable person will be caring for the child.

79. **8/18/20 ADDED: My child's school is offering the choice between in person learning at school or online learning at home. Am I eligible for FFCRA leave?**

No. If the school is open for in-person learning and keeping children home to learn remotely is a parent's choice, the school is not closed, and thus you do not qualify for FFCRA leave. Choosing the remote learning option is not a qualifying reason for child care leave under the FFCRA.

80. **8/18/20 ADDED: Suppose school is open for in-person learning, but only for a limited number of students. If a parent wants to send his child to school, but the school has reached the maximum number of students, is the parent eligible for FFCRA leave?**

Probably. Having a child who is unable to attend in person because a school has reached its maximum number of students would seem to equate to the school being closed because it is essentially closed for the students who are denied in-person learning due to the school having reached its maximum capacity. An employee seeking FFCRA leave in these circumstances should provide documentation to support the reason for the leave. For example, the employee could provide a letter from the school indicating that the parent applied, but was denied.

81. 9/16/20 UPDATED: Some schools are providing a hybrid approach where learning occurs partially in person and partially online. For example, a student might attend school in person on Monday and Wednesday and do remote learning on Tuesday, Thursday, and Friday. Would an employee be eligible for FFCRA leave for the days her child is home and learning remotely?

In the DOL's updated guidance issued on September 11, 2020, employer approval would not apply to employees who take FFCRA leave in full-day increments to care for their children whose schools are operating on an alternate day (or other hybrid-attendance) basis because such leave would not be intermittent leave. In this case, the employee may be able to take FFCRA leave on Tuesday, Thursday, and Friday provided that leave is needed to care for the child and no other suitable person is available to do so.

82. 9/16/20 UPDATED: Can leave under the FFCRA be taken intermittently?

Under DOL guidance issued on March 26, 2020, unless an employee is teleworking, paid sick leave for qualifying reasons must be taken in full-day increments. It cannot be taken intermittently if the leave is taken because:

- An individual is subject to a Federal, State, or local quarantine or isolation order related to COVID-19;
- An individual has been advised by a health care provider to self-quarantine due to concerns related to COVID-19;
- An individual is experiencing symptoms of COVID-19 and seeking a medical diagnosis;
- An individual is caring for an individual who either is subject to a quarantine or isolation order related to COVID-19 or has been advised by a health care provider to self-quarantine due to concerns related to COVID-19; or
- An individual is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services.

NOTE: On August 3, 2020, the U.S. District Court for the Southern District of New York invalidated the following four provisions of the final rule implementing the paid leave provisions of the Families First Coronavirus Relief Act (FFCRA): (1) the requirement that an employer must have work available for an employee in order for the employee to qualify for leave; (2) the broad definition of "health care provider" for the purpose of the exemption of certain employees from eligibility for leave; (3) the discretion given to employers to allow or disallow employees to take intermittent leave; and (4) the requirement for employees to submit documentation of the need to take FFCRA leave

prior to the start of that leave. In response, the DOL issued updated regulations on September 11, 2020 that (1) reaffirms that FFCRA leave may be taken only if the employee has work from which to take leave; (2) reaffirms that, where intermittent FFCRA leave is permitted by the regulations, an employee must obtain his or her employer's approval to take FFCRA leave; (3) revises the definition of "health care provider" for purposes of the exemption of certain employees from eligibility for leave; and (4) clarifies that the information the employee must give to the employer to support the need for his or her leave should be provided to the employer as soon as practicable.

83. Can an employee request sick leave under the FFCRA, and then also use his accrued PTO, vacation, or sick time, in any order?

Yes. The FFCRA provides the following prohibition, which we interpret as stating that the sick leave provided by the FFCRA is in addition to other leave the employee has: "An employer may not require an employee to use other paid leave provided by the employer to the employee before the employee uses the paid sick time." And further, the FFCRA states that the rights provided by it do not diminish the rights provided by "existing employer policy."

84. 4/1/20 UPDATED: How do the paid leave provisions under the Emergency Paid Sick Leave and the Public Health Emergency Leave provisions of the FFCRA interact? Must an employee choose one or the other, or are employees eligible to receive pay under both?

Although the first two weeks of Public Health Emergency Leave are unpaid, an employee may substitute Emergency Paid Sick Leave or accrued PTO, vacation, or sick time, in any order. Emergency Paid Sick Leave provided by the FFCRA is in addition to other leave the employee has. The FFCRA states: "An employer may not require an employee to use other paid leave provided by the employer to the employee before the employee uses the paid sick time." And further, the FFCRA states that the rights provided by it do not diminish the rights provided by "existing employer policy." So, an employee qualifying for both Emergency Paid Sick Leave and Public Health Emergency Leave (i.e., the employee is taking leave to care for a son or daughter whose school or place of care has been closed, or the child care provider is unavailable, due to COVID-19 precautions) may take the first two weeks of leave in the form of Emergency Paid Sick Leave at a rate of no less than two-thirds of the employee's usual rate of pay with a cap of $200 per day or $2,000 total, or an employee may choose to substitute accrued vacation leave, personal leave, or other medical leave during this period, but an employer may not require an employee to do so. An employee may also take unpaid leave for the first two weeks. After two weeks of leave, employers must continue paid

Public Health Emergency Leave at a rate of no less than two-thirds of the employee's usual rate of pay. The FFCRA limits the amount of required Public Health Emergency Leave to no more than $200 per day and $10,000 in total. The FFCRA's paid leave provisions were effective on April 1, 2020, and apply to leave taken between April 1, 2020, and December 31, 2020.

85. What pay is included in an employee's "regular rate of pay" for purposes of extended paid FMLA or paid sick leave under the FFCRA?

The FFCRA says that employers must use the "regular rate of pay" as defined by the Fair Labor Standards Act. That definition is quite broad, and it includes both regular pay, and additional forms of compensation specified by regulations. The DOL has provided additional guidance on the regular rate of pay in the following resource: https://www.dol.gov/agencies/whd/fact-sheets/56a-regular-rate.

86. 4/1/20 UPDATED: Is paid leave under the FFCRA included in the taxable income of employees?

Yes. Covered sick and family leave payments under the FFCRA are taxable wages for income and employment tax purposes, except that such wages are exempt from Employer Social Security taxes. Such payments are subject to Medicare taxes, but the tax credit is increased by the amount of employer Medicare taxes (i.e., 1.45%) paid on such wages.

An IRS FAQ confirms that qualified sick leave wages and qualified family leave wages are taxable to employees and that the FFCRA does not include an exception for qualified leave wages from income.

87. 4/1/20 ADDED: Are qualified Public Health Emergency Leave or qualified Emergency Paid Sick Leave wages excluded from an employee's income as "qualified disaster relief payments"?

Under IRS guidance, no. Section 139 of the Internal Revenue Code (Code) excludes from a taxpayer's gross income certain payments to individuals to reimburse or pay for expenses related to a qualified disaster ("qualified disaster relief payments"). Although the COVID-19 outbreak is a "qualified disaster" for purposes of section 139 the Code (see below), qualified leave wages are not excludible qualified disaster relief payments, because qualified leave wages are intended to replace wages or compensation that an individual would otherwise earn, rather than to serve as payments to offset any particular expenses that an individual would incur due to COVID-19.

Section 139(c)(2) of the Code provides that for purposes of section 139 of the Code, the term "qualified disaster" includes a federally declared disaster, as defined by 165(i)(5)(A) of the Code. The COVID-19 pandemic is a "federally declared disaster," as defined by section 165(i)(5)(A) of the Code. On March 13, 2020, the President of the United States issued a Proclamation declaring a national emergency concerning the Novel Coronavirus Disease (COVID-19) outbreak, stating that the ongoing COVID-19 pandemic warrants an emergency determination under section 501(b) of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121 – 5207. A "qualified disaster relief payment" is defined by section 139(b) of the Code to include any amount paid to or for the benefit of an individual to reimburse or pay reasonable and necessary personal, family, living, or funeral expenses incurred as a result of a qualified disaster. Qualified disaster relief payments do not include income replacements such as sick leave or other paid time off paid by an employer.

88. 3/30/20 UPDATED: Does Public Health Emergency leave under the FFCRA count against an employee's 12 weeks FMLA leave time per year?

Yes. The Emergency Family and Medical Leave Expansion Act portion of the FFCRA expands the qualifying reasons an employee could take leave under FMLA (i.e., Public Health Emergency Leave), but does not provide additional weeks of leave. If an employee has already used FMLA leave during the relevant 12-month period before the FFCRA expanded FMLA, he or she would only be able to take whatever was left of the maximum 12 weeks of leave should a qualifying COVID-19 reason arise.

89. 4/1/20 ADDED: Are we required to continue employer-sponsored group health coverage for an employee on Public Health Emergency Leave or Emergency Paid Sick Leave?

Yes. An employee who takes Public Health Emergency Leave or Emergency Paid Sick Leave is entitled to continued coverage under the employer's group health plan on the same terms as if the employee did not take leave. The employee's share of premiums must be paid by the method normally used during any paid leave; in many cases, this will be through a payroll deduction. For unpaid leave or where pay provided under Public Health Emergency Leave or Emergency Paid Sick Leave is insufficient to cover employee's premiums, employers may use the methods available for unpaid FMLA leave as follows:

> The employer has a number of options for obtaining payment from the employee. The employer may require that payment be made to the employer or to the insurance carrier, but no additional charge may be added to the employee's

premium payment for administrative expenses. The employer may require employees to pay their share of premium payments in any of the following ways:

(1) Payment would be due at the same time as it would be made if by payroll deduction;

(2) Payment would be due on the same schedule as payments are made under COBRA;

(3) Payment would be prepaid pursuant to a cafeteria plan at the employee's option;

(4) The employer's existing rules for payment by employees on leave without pay would be followed, provided that such rules do not require prepayment (*i.e.,* prior to the commencement of the leave) of the premiums that will become due during a period of unpaid FMLA leave or payment of higher premiums than if the employee had continued to work instead of taking leave; or,

(5) Another system voluntarily agreed to between the employer and the employee, which may include prepayment of premiums (e.g., through increased payroll deductions when the need for the FMLA leave is foreseeable).

NOTE: An employer must provide advance, written notice of the terms and conditions under which payment must be made.

90. 3/13/21 UPDATED: I understand that employers can get tax credits for providing paid sick leave under FFCRA. How will that work?

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

However, after March 31, 2021, there will be changes to the way the credits are calculated, such as an increase in the maximum amount of wages used to calculate the credit, an increase in the maximum number of sick days an employer can count for the credit, and inclusion of a new category of leave – time off for COVID vaccinations. The credits will apply against an employer's Medicare hospital insurance (HI) instead of the employer's Social Security Old Age, Survivor's, and Disability Insurance (OASDI) taxes after March 31, 2021.

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

If the credit exceeds the employer's total tax liability under section 3111(a) for all employees for any calendar quarter, the excess credit is refundable to the employer. To prevent a double benefit, no deduction is allowed for the amount of the credit. In addition, no credit is allowed with respect to wages for which a credit is allowed under Code section 45S. Employers may also elect to not have the credit apply.

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

However, after March 31, 2021, there will be changes to the way the credits are calculated, such as an increase in the maximum amount of wages used to calculate the credit, an increase in the maximum number of sick days an employer can count for the credit, and inclusion of a new category of leave – time off for COVID vaccinations. The credits will apply against an employer's Medicare hospital insurance (HI) instead of the employer's Social Security Old Age, Survivor's, and Disability Insurance (OASDI) taxes after March 31, 2021.

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

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

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

The tax credits for emergency paid sick leave and emergency paid family leave are available for qualified leave wages with respect to the period of April 1, 2020 through September 30, 2021. (See IRS FAQ 48.)

NOTE: An employee does not qualify for paid sick leave if the employer does not have work for the employee.

91. How will the new tax credits under the FFCRA work?

In IRS Notice 2020-57, the IRS provides guidance on the operation of these two new refundable tax credits. Key points from this guidance:

- Employers are to receive 100% reimbursement for paid leave required by the FFCRA.
- An immediate dollar-for-dollar tax offset against payroll taxes will be provided with a refund available if the offset is not sufficient to cover the cost.
- Health insurance costs are also included in the credit.
- Self-employed individuals will receive an equivalent credit.

In general, employers are required to withhold federal income taxes and the employee's portion of Social Security and Medicare taxes from employees' paychecks. Employers are required to deposit the funds withheld, along with the employer's share of the Social Security and Medicare taxes, with the IRS on a quarterly basis when filing Form 941. If the amount of payroll tax money that the employer is able to retain is not sufficient to cover the cost of qualified leave under the FFCRA, the employer will be able to file a request for an accelerated payment from the IRS. The IRS expects to process requests for these accelerated payments in two weeks or less.

Notice 2020-57 includes two examples:

Example #1

If an eligible employer paid $5,000 in sick leave and is otherwise required to deposit $8,000 in payroll taxes, including taxes withheld from all its employees, the employer could use up to $5,000 of the $8,000 of taxes it was going to

deposit for making qualified leave payments. The employer would only be required under the law to deposit the remaining $3,000 on its next regular deposit date.

Example #2

If an eligible employer paid $10,000 in sick leave and was required to deposit $8,000 in taxes, the employer could use the entire $8,000 of taxes in order to make qualified leave payments and file a request for an accelerated credit for the remaining $2,000.

Equivalent leave credit amounts are available to self-employed individuals under similar circumstances. Credits for self-employed individuals may be claimed on their income tax return and will reduce estimated tax payments.

The COVID-related Tax Relief Act of 2020 extends the tax credits available to Eligible Employers for paid sick and family leave provided under the EPSLA or Expanded FMLA through March 31, 2021. The American Rescue Plan Act of 2021 (ARPA) further extends those credits to September 30, 2021. As of March 13, 2021, the IRS has not issued additional guidance to reflect the further extension under ARPA.

92. Can you explain a little more about how tax withholdings and tax credits work under the FFCRA?

The IRS has released the following summary, which will be followed by additional regulations from the IRS in the future: When employers pay their employees, they are required to withhold from their employees' paychecks federal income taxes and the employees' share of Social Security and Medicare taxes. The employers then are required to deposit these federal taxes, along with their share of Social Security and Medicare taxes, with the IRS and file quarterly payroll tax returns (Form 941 series) with the IRS.

Eligible employers who pay qualifying sick or child care leave will be able to retain an amount of the payroll taxes equal to the amount of qualifying sick and child care leave that they paid, rather than deposit them with the IRS. The payroll taxes that are available for retention include withheld federal income taxes, the employee share of Social Security and Medicare taxes, and the employer share of Social Security and Medicare taxes with respect to all employees. If there are not sufficient payroll taxes to cover the cost of qualified sick and child care leave paid, employers will be able file a request for an accelerated payment from the IRS. The IRS expects to process these

requests in two weeks or less. Employers should coordinate further with their tax advisors and their payroll providers.

The COVID-related Tax Relief Act of 2020 extends the tax credits available to Eligible Employers for paid sick and family leave provided under the EPSLA or Expanded FMLA through March 31, 2021. The American Rescue Plan Act of 2021 (ARPA) further extends those credits to September 30, 2021. As of March 13, 2021, the IRS has not issued additional guidance to reflect the further extension under ARPA.

93. 4/1/20 ADDED: Has the IRS issued any guidance on for employers on the taxation and deductibility of tax credits for Public Health Emergency Leave and Emergency Paid Sick Leave?

Yes. On March 31, 2020, the IRS issued a series of FAQs on COVID-19-Related Tax Credits for Required Paid Leave Provided by Small and Midsize Businesses, which are periodically updated. The COVID-related Tax Relief Act of 2020 extends the tax credits available to Eligible Employers for paid sick and family leave provided under the EPSLA or Expanded FMLA through March 31, 2021. The American Rescue Plan Act of 2021 (ARPA) further extends those credits to September 30, 2021. As of March 13, 2021, the IRS has not issued additional guidance to reflect the further extension under ARPA.

94. If an employer that has 500 or more employees voluntarily complies with the new paid leave laws, will they be eligible to receive the tax credits?

No. Only employers with under 500 employees are required to provide leave, and the tax credit extends only to those required to provide the leave – except that governmental employers cannot claim tax credits.

95. 4/15/21 UPDATED: Is a governmental employer that does not pay into the Social Security system eligible to receive the tax credits?

Under the FFCRA, state and local governments were not entitled to tax credits for paid Public Health Emergency Leave or Emergency Paid Sick Leave. The FFCRA specifically states that the tax credits *"shall not apply to the Government of the United States, the government of any State or political subdivision thereof, or any agency or instrumentality of any of the foregoing."* However, this statutory language specifically excluding state and local governments from claiming the tax credit for paid EPSL and EFML was not included in ARPA (which allows employers to voluntarily extend Public Health Emergency Leave or Emergency Paid Sick Leave). Thus, it appears that state and local governments offering such leave now may be eligible for the tax credit as applied under ARPA.

96. 3/30/20 UPDATED: If providing Public Health Emergency or Emergency Paid Sick leave at my business with fewer than 50 employees would jeopardize the viability of my business as a going concern, how do I take advantage of the small business exemption?

According to the DOL, to elect this small business exemption, you should document why your business with fewer than 50 employees meets the criteria set forth by the Department, which will be addressed in more detail in forthcoming regulations.

You should not send any materials to the DOL when seeking a small business exemption for paid sick leave and expanded family and medical leave.

97. 3/27/20 ADDED: When did the DOL begin enforcing the FFCRA?

Although the FFCRA took effect on April 1, 2020, the DOL issued enforcement guidance stating that it would observe a temporary non-enforcement period of the provisions of the FFCRA from March 18 through April 17, 2020. During the non-enforcement period, DOL asserted that it would not bring enforcement action against any public or private employer for violations of the FFCRA if the employer made a reasonable, good faith effort to comply with its provisions. The DOL indicated that a reasonable, good faith effort exists if the employer remedies the violation, including making all employees whole as soon as practicable, the employer did not act in a "willful" manner, and the employer provides the DOL with a written commitment that the employer will comply with the provisions of the FFCRA going forward.

98. 6/30/20 ADDED: Where can I find the FAQs Part 43 with information about the FFCRA and the CARES Act?

The FFCRA and the CARES Act Implementation FAQs Part 43 are available via this link: https://www.dol.gov/sites/dolgov/files/ebsa/about-ebsa/our-activities/resource-center/faqs/aca-part-43.pdf

Below is the text of the FAQs from Part 43.

99. 6/30/20 ADDED: Are self-insured group health plans required to comply with the requirements of section 6001 of the FFCRA?

Yes. In FAQs Part 42, Q1, the Departments addressed which types of group health plans and health insurance coverage are subject to the requirements of section 6001 of the FFCRA. The statute and FAQs make clear that the requirements apply to both insured and self-insured group health plans.*

The Departments will enforce the applicable provisions of the FFCRA (and the related provisions of the CARES Act), in conjunction with states, where applicable. If you are covered by a private-sector, employer-sponsored group health plan and have concerns about your plan's compliance with these requirements, you may contact DOL at www.askebsa.dol.gov or by calling toll free at 1-866-444-3272. If you are covered by a non-federal public-sector employer-sponsored plan (such as a state or local government employee plan) and have concerns about your plan's compliance with these requirements, you may contact HHS at 1-877-267-2323 extension 6-1565 or at phig@cms.hhs.gov. If you have insured coverage, you may contact your State Department of Insurance (For contact information, visit https://content.naic.org/state_web_map.htm).

* Section 6001 does not apply to a plan or coverage in relation to its provision of excepted benefits or to group health plans that do not cover at least two employees who are current employees (such as plans in which only retirees participate). It does, however, apply to health insurance coverage offered in connection with a group health plan maintained by a small employer, as defined in section 2791(e)(4) of the PHS Act, which term includes employers with as few as one common law employee.

100. 6/30/20 ADDED: How can a plan or issuer determine which COVID-19 tests are required to be covered under section 6001(a)(1) of the FFCRA?

Section 6001(a) of the FFCRA requires plans and issuers to provide coverage for an in vitro diagnostic test defined in section 809.3(a) of title 21, Code of Federal Regulations (or its successor regulations) for the detection of SARS-CoV-2 or the diagnosis of COVID-19, and the administration of such a test, that—

A. Is approved, cleared, or authorized under section 510(k), 513, 515, or 564 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. §§ 360(k), 360c, 360e, 360bbb–3);

B. The developer has requested, or intends to request, emergency use authorization under section 564 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. § 360bbb–3), unless and until the emergency use authorization request under such section 564 has been denied or the developer of such test does not submit a request under such section within a reasonable timeframe;

C. Is developed in and authorized by a State that has notified the Secretary of HHS of its intention to review tests intended to diagnose COVID–19; or

D. Other tests that the Secretary of HHS determines appropriate in guidance.

For purposes of A above, all in vitro diagnostic tests for COVID-19 that have received an emergency use authorization (EUA) under section 564 of the Federal Food, Drug,

and Cosmetic Act are listed on the EUA page of the Food and Drug Administration (FDA) website, available at https://www.fda.gov/medical-devices/emergency-situations-medical-devices/emergency-useauthorizations#covid19ivd. At this time, the FDA has not cleared or approved an in vitro diagnostic test for COVID-19 under the other regulatory pathways outlined in A above.

For purposes of B above, also available on the FDA website is a list of clinical laboratories and commercial manufacturers that have notified FDA that they have validated their own COVID-19 test and are offering the test as outlined in FDA guidance.** The following scenarios are outlined in FDA guidance:

- Commercial manufacturers that develop COVID-19 diagnostic tests and serological tests should notify FDA prior to distribution that their test has been validated. Among other things, they should also be preparing a request for an EUA, and should submit a request for an EUA to FDA within a reasonable period of time thereafter, as described in FDA guidance.
- Laboratories certified under the Clinical Laboratory Improvement Amendments (CLIA) to perform high-complexity testing that develop a diagnostic test for COVID-19 should notify FDA prior to using the test for specimen testing that their test has been validated. Among other things, they should also be preparing an EUA request, and should submit an EUA request within a reasonable period of time thereafter, as described in FDA guidance. (This policy does not apply to tests being offered by such laboratories as referenced in C above.)
- Laboratories certified under CLIA to perform high-complexity testing that develop serology tests should, among other things, notify FDA prior to using the test for specimen testing that their test has been validated. FDA does not expect such laboratories to submit an EUA request, although they are encouraged to do so. (This policy does not apply to tests being offered by such laboratories as referenced in C above.)

FDA will post the names of entities that provide such notification on FDA's website at https://www.fda.gov/medical-devices/emergency-situations-medical-devices/faqs-diagnostictesting-sars-cov-2#offeringtests. If an expected EUA request is not submitted within a reasonable time after notifying the FDA, or if significant problems are identified with a test that cannot be or have not been addressed in a timely manner, FDA intends to remove the manufacturer/laboratory and test from the list, and may take additional actions as appropriate.

Accordingly, for purposes of B above, if a clinical laboratory or commercial manufacturer is listed on FDA's website as having provided notification under the FDA guidance, it

can reasonably be assumed that the laboratory or manufacturer has requested or intends to request an EUA, except for laboratory-developed serology tests (as an EUA request is not currently expected in that case). Therefore, plans and issuers must cover in vitro diagnostic tests for COVID-19 that are included on this list. In addition, a plan or issuer may take reasonable steps to verify that a test offered by a developer meets the statutory criteria outlined in B. For example, a plan or issuer may request that a laboratory or commercial manufacturer provide documentation, such as a copy of the EUA request or pre-EUA submitted to FDA, to demonstrate that it has requested or intends to request an EUA. These requests will not be considered to violate FFCRA section 6001's prohibition on medical management requirements as long as they are reasonable and necessary to verify that a COVID-19 test meets the statutory criteria.

For purposes of C above, states and territories may authorize laboratories within that state or territory to develop and perform a test for COVID-19, as outlined in FDA guidance. States and territories that have notified FDA that they choose to use this flexibility are listed at https://www.fda.gov/medical-devices/emergency-situations-medical-devices/faqs-diagnostictesting-sars-cov-2#offeringtests.

For purposes of D above, no other tests have been specified in guidance by the Secretary of HHS at this time.

** U.S. Food and Drug Administration, Center for Devices and Radiological Health, Policy for Coronavirus Disease2019 Tests During the Public Health Emergency (Revised): Immediately in Effect Guidance for Clinical Laboratories, Commercial Manufacturers, and Food and Drug Administration Staff (updated May 11, 2020), available at https://www.fda.gov/media/135659/download.

101. 6/30/20 ADDED: In FAQs Part 42, the Departments clarified that coverage for certain items and services must be provided consistent with the requirements of section 6001 of the FFCRA "when medically appropriate for the individual, as determined by the individual's attending health care provider." How should plans and issuers determine if a provider is the attending health care provider?

Given the critical importance of expanding the availability of COVID-19 testing through safe and accurate tests to combat the COVID-19 pandemic, the Departments clarify that a health care provider need not be "directly" responsible for providing care to the patient to be considered an attending provider, as long as the provider makes an individualized clinical assessment to 6 determine whether the test is medically appropriate for the individual in accordance with current accepted standards of medical practice. Therefore, an attending provider for purposes of section 6001 of the FFCRA is an individual who is

licensed (or otherwise authorized) under applicable law, who is acting within the scope of the provider's license (or authorization), and who is responsible for providing care to the patient. As stated in FAQs Part 42, a plan, issuer, hospital, or managed care organization is not an attending provider.***

*** This guidance supersedes the definition of an "attending provider" in FAQs Part 42, footnote 16, which stated that "[a]n attending provider means an individual who is licensed under applicable state law, who is acting within the scope of the provider's license, and who is directly responsible for providing care to a patient."

102. 6/30/20 ADDED: Are plans and issuers required to cover COVID-19 tests intended for at-home testing under section 6001 of the FFCRA?

Yes. COVID-19 tests intended for at-home testing**** (including tests where the individual performs self-collection of a specimen at home) must be covered, when the test is ordered by an attending health care provider who has determined that the test is medically appropriate for the individual based on current accepted standards of medical practice and the test otherwise meets the statutory criteria in section 6001(a)(1) of the FFCRA. Consistent with section 6001 of the FFCRA, this coverage must be provided without imposing any cost-sharing requirements, prior authorization, or other medical management requirements.

**** On April 20, 2020, the FDA authorized the first COVID-19 test for home collection of specimens to be sent to a laboratory for processing and test reporting. See U.S. Food and Drug Administration, Letter to Brian Krueger, Ph.D., Laboratory Corporation of America, Granting EUA Amendments (Apr. 20, 2020), available at https://www.fda.gov/media/136148/download. However, as of [June 23, 2020], the FDA has not authorized any COVID-19 test to be completely used and processed at home.

103. 6/30/20 ADDED: Is COVID-19 testing for surveillance or employment purposes required to be covered under section 6001 of the FFCRA?

No. Section 6001 of the FFCRA requires coverage of items and services only for diagnostic purposes as outlined in this guidance. Clinical decisions about testing are made by the individual's attending health care provider and may include testing of individuals with signs or symptoms compatible with COVID-19, as well as asymptomatic individuals with known or suspected recent exposure to SARS-CoV-2, that is determined to be medically appropriate by the individual's health care provider, consulting CDC guidelines as appropriate.* However, testing conducted to screen for general workplace health and safety (such as employee "return to work" programs), for public health surveillance for SARS-CoV-2, or for any other purpose not primarily intended for individualized diagnosis or treatment of COVID-19 or another health condition is beyond the scope of section 6001 of the FFCRA.

* See Centers for Disease Control and Prevention, Overview of Testing for SARS-CoV-2 (June 13, 2020), available at https://www.cdc.gov/coronavirus/2019-nCoV/hcp/clinical-criteria.html.

104. 6/30/20 ADDED: If an individual receives multiple diagnostic tests for COVID-19, are plans and issuers required to cover each test, as well as other applicable items and services?

Yes. The coverage required under section 6001 of the FFCRA for items and services described in section 6001(a) of the FFCRA is not limited with respect to the number of diagnostic tests for an individual, provided that the tests are diagnostic and medically appropriate for the individual, as determined by an attending health care provider in accordance with current accepted standards of medical practice.** Although plans and issuers may not impose prior authorization or other medical management requirements to deny coverage for individuals who are tested multiple times, providers are urged to consult guidance issued by the CDC, as well as state, tribal, territorial, and local health departments or professional societies, when determining whether diagnostic testing is appropriate for a particular individual.***

** Since the Departments are not aware of any professional society recommendations for confirmatory or repeat testing on the same sample, the Departments expect plans and issuers to be billed once per sample.

*** See Centers for Disease Control and Prevention, Overview of Testing for SARS-CoV-2 (June 13, 2020), available at https://www.cdc.gov/coronavirus/2019-nCoV/hcp/clinical-criteria.html.

105. 6/30/20 ADDED: If a facility fee is charged for a visit that results in an order for or administration of a COVID-19 diagnostic test, must the plan or issuer also cover the facility fee without imposing cost-sharing requirements?

Yes, to the extent the facility fee relates to the furnishing or administration of a COVID-19 test or to the evaluation of an individual to determine the individual's need for testing.

Section 6001(a)(2) of the FFCRA requires plans and issuers to provide coverage for items and services furnished to an individual during health care provider office visits (including in-person visits and telehealth visits), urgent care center visits, and emergency room visits that result in an order for or administration of an in vitro diagnostic product, but only to the extent that the items and services relate to the furnishing or administration of the product or to the evaluation of the individual for purposes of determining the need of the individual for that product. A facility fee is a fee for the use of facilities or equipment an individual's provider does not own or that are owned by a hospital. Therefore, to the extent a facility fee is assessed in relation to items or services required to be covered under section 6001, the plan or issuer must provide coverage for the facility fee.**** Consistent with section 6001 of the FFCRA, this coverage must be provided without imposing any cost-sharing requirements, prior authorization, or other medical management requirements.

For example, if an individual is treated in the emergency room and the attending provider orders a number of services to determine whether a COVID-19 diagnostic test is appropriate, such as diagnostic test panels for influenza A and B and respiratory syncytial virus, as well as a chest x-ray, and ultimately orders a COVID-19 test, the plan or issuer must cover those related items and services without cost sharing, prior authorization, or other medical management requirements, including any physician fee charged to read the x-ray and any facility fee assessed in relation to those items and services.

**** Section 6001 of the FFCRA does not preempt state laws that prohibit providers from billing facility fees, or require coverage of facility fees for in-network providers, if the plan and issuer and the provider have entered into a contractual arrangement under which the plan or issuer does not pay facility fees for any service furnished by the in network provider.

106. 6/30/20 ADDED: Do the reimbursement requirements of section 3202(a) of the CARES Act apply to any items and services other than diagnostic testing for COVID-19?

No. Section 3202(a) of the CARES Act describes the amount a plan or issuer must reimburse a provider for COVID-19 testing, but does not address the reimbursement rate for any other items and services.

107. 6/30/20 ADDED: Does section 3202 of the CARES Act protect participants, beneficiaries, and enrollees from balance billing for a COVID-19 diagnostic test?

The Departments read the requirement to provide coverage without cost sharing in section 6001 of the FFCRA, together with section 3202(a) of the CARES Act establishing a process for setting reimbursement rates, as intended to protect participants, beneficiaries, and enrollees from being balance billed for an applicable COVID-19 test. Section 3202(a) contemplates that a provider of COVID-19 testing will be reimbursed either a negotiated rate or an amount that equals the cash price for such service that is listed by the provider on a public website. In either case, the amount the plan or issuer reimburses the provider constitutes payment in full for the test, with no cost sharing to the individual or other balance due. Therefore, the statute generally precludes balance billing for COVID-19 testing. However, section 3202(a) of the CARES Act does not preclude balance billing for items and services not subject to section 3202(a), although balance billing may be prohibited by applicable state law and other applicable contractual agreements.*

* See e.g., the terms and conditions for certain payments for provider relief (Provider Relief Fund) under Division B of Public Law 116-136 (providing that, as a condition of accepting a payment from the Provider Relief Fund for all care

for a presumptive or actual case of COVID-19, a recipient certifies that it will not seek to collect from the patient out-of-pocket expenses that are greater than what the patient would have otherwise been required to pay if the care had been provided by an in-network provider). See Department of Health and Human Services, Provider Relief Fund Payments Terms and Conditions, available at https://www.hhs.gov/sites/default/files/relief-fundpayment-terms-and-conditions.pdf.

108. 6/30/20 ADDED: How do the requirements of section 3202(a)(2) of the CARES Act interact with state balance billing laws regarding reimbursement for items and services furnished by out-of-network providers or providers that do not have a negotiated rate with a plan or issuer for COVID-19 tests?

Section 3202(a)(2) of the CARES Act provides that, if a plan or issuer does not have a negotiated rate with a provider of COVID-19 diagnostic testing, the plan or issuer shall reimburse the provider in an amount that equals the cash price for such service as listed by the provider on a public internet website, or the plan or issuer may negotiate a rate with the provider that is lower than the cash price. Plans and issuers that do not already have a negotiated rate with a provider may nevertheless seek to negotiate to determine a rate, and state laws governing reimbursements may apply. For example, many states have balance billing laws that establish dispute resolution processes for issuers and providers to determine reimbursement rates for certain items and services. Such dispute resolution processes would continue to apply in these states to the issuers and providers that do not already have a negotiated rate. Additionally, to the extent that a state law does not prevent the application of the requirements of section 3202(a) of the CARES Act, the state law is not preempted and continues to apply.

109. 6/30/20 ADDED: How should plans and issuers determine a reimbursement rate for providers of COVID-19 testing if they do not have a negotiated rate with the provider and the provider has not made available on a public internet website the cash price of a COVID-19 diagnostic test, as required by section 3202(b) of the CARES Act?

The requirement imposed by section 3202(a) of the CARES Act to reimburse the provider an amount that equals the cash price of a COVID-19 test is contingent upon the provider making public the cash price for the test, as required by section 3202(b) of the CARES Act. If the provider has not complied with this requirement, and the plan or issuer does not have a negotiated rate with the provider, the plan or issuer may seek to negotiate a rate with the provider for the test. However, section 3202(a) is silent with respect to the amount to be reimbursed for COVID-19 testing in circumstances where the provider has not made public the cash price for a test and the plan or issuer and the provider cannot agree upon a rate that the provider will accept as payment in full for the test. The Departments note that section 3202(b) of the CARES Act grants the Secretary

of HHS authority to impose civil monetary penalties on any provider of a diagnostic test for COVID-19 that does not comply with the requirement to publicly post the cash price for the COVID-19 diagnostic test on the provider's website and has not completed a corrective action plan, in an amount not to exceed $300 per day that the violation is ongoing.* If the method for determining reimbursement for out-of-network services (or services for which there is no negotiated rate) is governed by applicable state law, then state law continues to apply as described in FAQ 108 above.

* See also Centers for Medicare & Medicaid Services, Price Transparency: Requirements for Providers to Make Public Cash Prices for COVID-19 Diagnostic Testing (May 12, 2020), available at https://www.cms.gov/files/document/covid-ffs-price-transparency-faqs.pdf.

110. 6/30/20 ADDED: If an individual receives a COVID-19 test in an emergency department of a hospital that is out-of-network, how do the requirements of section 3202(a) of the CARES Act interact with PHS Act section 2719A?

Under PHS Act section 2719A and its implementing regulations, non-grandfathered group health plans and health insurance issuers offering non-grandfathered group or individual health insurance coverage cannot impose cost sharing (expressed as a copayment amount or coinsurance rate) on out-of-network emergency services in a greater amount than what is imposed for in-network emergency services. Additionally, the Departments' regulations provide that a plan or issuer satisfies the cost-sharing limitations in the statute if it provides benefits for out-of-network emergency services in an amount at least equal to the greatest of the following three amounts (adjusted for in-network cost-sharing requirements): (1) the median amount negotiated with in-network providers for the emergency service; (2) the amount for the emergency service calculated using the same method the plan generally uses to determine payments for out-of-network services (such as the usual, customary, and reasonable amount); or (3) the amount that would be paid under Medicare for the emergency service (collectively, minimum payment standards).** The minimum payment standards do not prohibit a group health plan or health insurance issuer from paying an amount for an emergency service that is greater than the amounts specified in the regulations.

Because the Departments interpret the provisions of section 3202 of the CARES Act as specifying a rate that generally protects participants, beneficiaries, and enrollees from balance billing for a COVID-19 test (see FAQ 107 above), the requirement to pay the greatest of three amounts under the regulations implementing section 2719A of the PHS Act is superseded by the requirements of section 3202(a) of the CARES Act with regard to COVID-19 diagnostic tests that are out-of-network emergency services. For these services, the plan or issuer must reimburse an out-of-network provider of COVID-19 testing an amount that equals the cash price for such service that is listed by the

provider on a public website, or the plan or issuer may negotiate a rate that is lower than the cash price.

For all other out-of-network emergency services, which are not subject to the requirements of section 3202(a) (see FAQ 106 above), the minimum payment standards under section 2719A of the PHS Act continue to apply.

** 26 CFR 54.9815-2719A(b)(3); 29 CFR 2590.715-2719A(b)(3); 45 CFR 147.138(b)(3).

111. 6/30/20 ADDED: (Notice Requirements) In FAQs Part 42, the Departments announced temporary enforcement relief that allows plans and issuers to make changes to coverage to increase benefits, or reduce or eliminate cost sharing, for the diagnosis and treatment of COVID-19 or for telehealth and other remote care services more quickly than they would otherwise be able to under current law. *** May a plan or issuer also revoke these changes upon the expiration of the public health emergency related to COVID-19 without satisfying advance notice requirements?

Section 2715(d)(4) of the PHS Act and final rules issued by the Departments regarding the Summary of Benefits and Coverage (SBC) provide that if a plan or issuer makes a material modification (as defined under section 102 of the Employee Retirement Income Security Act (ERISA)) in any of the terms of the plan or coverage that would affect the content of the SBC, that is not reflected in the most recently provided SBC, and that occurs other than in connection with a renewal or reissuance of coverage, the plan or issuer must provide notice of the modification not later than 60 days prior to the date on which the modification will become effective. In FAQs Part 42, Q9 and Q14, the Departments announced temporary enforcement relief that generally applies with respect to changes made to increase benefits, or reduce or eliminate cost-sharing requirements, for the diagnosis and/or treatment of COVID-19 and telehealth or other remote care services during the public health emergency or national emergency declaration period related to COVID-19.

If a plan or issuer reverses these changes once the COVID-19 public health emergency or national emergency declaration is no longer in effect, the Departments will consider a plan or issuer to have satisfied its obligation to provide advance notice of a material modification under section 2715(d)(4) of the PHS Act and its implementing regulations with respect to a participant, beneficiary, or enrollee if the plan or issuer had previously notified the participant, beneficiary, or enrollee of the general duration of the additional benefits coverage or reduced cost sharing (such as, that the increased coverage applies only during the COVID-19 public health emergency) or notifies the participant, beneficiary, or enrollee of the general duration of the additional benefits coverage or

reduced cost sharing within a reasonable timeframe in advance of the reversal of the changes.****

*** With respect to any change that adds benefits, or reduces or eliminates cost-sharing requirements, for the diagnosis and treatment of COVID-19 or telehealth and other remote care services, the Departments will not enforce requirements that generally require plans and issuers to provide 60 days' advance notice of a material modification to the terms of the plan or coverage. However, under the enforcement relief policy, a plan or issuer must provide notice of the changes as soon as reasonably practicable. This non-enforcement relief applies with respect to changes made during the period in which a public health emergency declaration under section 319 of the PHS Act related to COVID-19 or a national emergency declaration under the National Emergencies Act related to COVID-19 is in effect. See FAQs Part 42, Q9 and Q14, (Apr. 11, 2020), available at https://www.dol.gov/sites/dolgov/files/ebsa/about-ebsa/our-activities/resource-center/faqs/aca-part-42.pdf and https://www.cms.gov/files/document/FFCRA-Part-42-FAQs.pdf.

**** The DOL has issued guidance providing additional time to furnish notices, disclosures, and other documents required by provisions of Title I of ERISA that would be required to be furnished between March 1, 2020, and 60 days after the announced end of the COVID-19 National Emergency or such other date announced by DOL in a future notice, if the plan and responsible fiduciary act in good faith and furnish the notice, disclosure, or document as soon as administratively practicable under the circumstances. See EBSA Disaster Relief Notice 2020-01 (Apr. 28, 2020), available at https://www.dol.gov/agencies/ebsa/employers-and-advisers/plan-administration-andcompliance/disaster-relief/ebsa-disaster-relief-notice-2020-01.

112. 6/30/20 ADDED: (Telehealth and Other Remote Care Services) In light of the COVID-19 pandemic, may a large employer offer coverage only for telehealth and other remote care services to employees who are not eligible for any other group health plan offered by the employer?

Yes. In general, a plan, fund, or program established or maintained by an employer (or employee organization) that provides medical care (including telehealth or other remote cares services) to employees or their dependents is a group health plan subject to federal requirements applicable to group health plans. Nonetheless, in light of the critical need to minimize the risk of exposure to and community spread of SARS-CoV-2, for the duration of any plan year beginning before the end of the public health emergency related to COVID-19, the Departments are providing relief for a group health plan (and health insurance coverage offered in connection with a group health plan) that solely provides benefits for telehealth or other remote care services from the group market reforms under part 7 of ERISA, title XXVII of the PHS Act, and chapter 100 of the Internal Revenue Code (the Code), except as specified below. This relief is limited to telehealth and other remote care service arrangements that are sponsored by a large employer (as defined under section 2791(e)(2) of the PHS Act) and that are offered only to employees (or their dependents) who are not eligible for coverage under any other group health plan offered by that employer.

Under this temporary relief, the Departments will continue to apply otherwise applicable federal non-discrimination standards. The specified market reforms that these

arrangements must continue to satisfy are the following provisions of the PHS Act (and corresponding provisions of ERISA and the Code):

- Section 2704 (relating to prohibition of pre-existing condition exclusions or other discrimination based on health status);
- Section 2705 (relating to prohibition of discrimination against individual participants and beneficiaries based on health status);
- Section 2712 (relating to prohibition of rescissions); and
- Section 2726 (relating to parity in mental health or substance use disorder benefits).

HHS encourages states to take a similar approach and will not consider a state to have failed to substantially enforce applicable PHS Act requirements if it takes such an approach.

113. **6/30/20 ADDED: (Grandfathered Health Plans) If a grandfathered group health plan or issuer of grandfathered group or individual health insurance coverage adds benefits, or reduces or eliminates cost-sharing requirements, for the diagnosis and treatment of COVID-19 or for telehealth and other remote care services during the public health or national emergency period related to COVID-19, will the plan or coverage lose its grandfather status solely because it later reverses these changes upon the expiration of the COVID-19 emergency period?**

No. In general, for purposes of determining whether changes to the terms of a plan or coverage would cause a loss of grandfather status under regulations issued by the Departments, the revised terms are compared to the terms that were in effect as of March 23, 2010. To the extent that a plan or issuer added benefits or reduced or eliminated cost sharing pursuant to the Departments' safe harbor outlined in FAQs Part 42, Q9 and Q14, only for the period in which a public health emergency or national emergency related to COVID-19 is in effect, the plan or coverage would not lose its grandfather status solely because these changes are later reversed (which could involve an elimination of all or substantially all benefits to diagnose or treat a particular condition or increases in cost-sharing requirements) and the terms of the plan or coverage that were in effect prior to the applicable emergency period are restored.

114. **6/30/20 ADDED: (Mental Health Parity and Addiction Equity Act) When performing the "substantially all" and "predominant" tests for financial requirements and quantitative treatment limitations under the MHPAEA**

regulations, may plans and issuers disregard benefits for items and services required to be covered without cost sharing under section 6001 of the FFCRA?

Yes. The coverage requirements of section 6001 of the FFCRA went into effect immediately upon enactment of the FFCRA and apply with respect to items and services furnished only while the public health emergency related to COVID-19 is in effect. In consideration of the temporary nature of these requirements, and given that plans and issuers were not able to anticipate these requirements when designing their plans and coverage, the Departments will temporarily exercise enforcement discretion under which the Departments will not take enforcement action against any plan or issuer that disregards benefits for the items and services that are covered without cost sharing under section 6001 of the FFCRA for purposes of the "substantially all" and "predominant" tests for financial requirements and quantitative treatment limitations.

HHS encourages states to adopt a similar approach with respect to health insurance issuers offering coverage in the group and individual markets. Under this temporary exercise of enforcement discretion, HHS also will not consider a state to have failed to substantially enforce MHPAEA and its implementing regulations insofar as the state adopts such an approach for plan years with respect to which section 6001 applies.

The Departments remain committed to enforcement of MHPAEA and will take action as appropriate to the extent violations occur that are not within this limited exercise of enforcement discretion.

115. **6/30/20 ADDED: (Wellness Programs) May a plan or issuer waive a standard for obtaining a reward (including any reasonable alternative standard) under a health-contingent wellness program if participants or beneficiaries are facing difficulty in meeting the standard as a result of circumstances related to COVID-19?**

Yes. Plans and issuers are permitted to waive a standard (including a reasonable alternative standard) for obtaining a reward under a health-contingent wellness program. However, to the extent the plan or issuer waives a wellness program standard as a result of the COVID-19 public health emergency, the waiver must be offered to all similarly situated individuals, as described in the implementing regulations.*

* 26 CFR 54.9802-1(d); 29 CFR 2590.702(d); 46 CFR 146.121(d).

Gallagher

Insurance | Risk Management | Consulting

FAQs about Families First Coronavirus Response Act and Coronavirus Aid, Relief, and Economic Security Act Implementation Part 44

On February 26, 2021, the Departments of Labor, Health and Human Services, and the Treasury issued FAQs to provide additional guidance on the coverage of COVID-19 testing and related health care.

116. 3/13/21 ADDED: Under the FFCRA, can plans and issuers use medical screening criteria to deny (or impose cost sharing on) a claim for COVID-19 diagnostic testing for an asymptomatic person who has no known or suspected exposure to COVID-19?

No. The FFCRA prohibits plans and issuers from imposing medical management, including specific medical screening criteria, on coverage of COVID-19 diagnostic testing. Plans and issuers cannot require the presence of symptoms or a recent known or suspected exposure, or otherwise impose medical screening criteria on coverage of tests.

When an individual seeks and receives a COVID-19 diagnostic test from a licensed or authorized health care provider, or when a licensed or authorized health care provider refers an individual for a COVID-19 diagnostic test, plans and issuers generally must assume that the receipt of the test reflects an "individualized clinical assessment" and the test should be covered without cost sharing, prior authorization, or other medical management requirements.

This FAQ clarifies the Departments' guidance in FAQs Part 43, Q5,5 with respect to the testing of asymptomatic individuals with no known or suspected exposure to COVID-19. This FAQ does not modify previous guidance addressing coverage of testing for groups of asymptomatic employees or individuals with no known or suspected recent exposure to COVID-19, such as for public health surveillance or employment purposes (see Q2 below). State and local public health authorities retain the authority to direct providers to limit eligibility for testing based on clinical risk or other criteria to manage testing supplies and access to testing. Responsibility for implementing such state or local limits on testing falls on attending health care providers, not on plans and issuers. Plans and issuers may not use such criteria to deny (or impose cost sharing on) a claim for COVID-19 diagnostic testing.

117. 3/13/21 ADDED: May plans and issuers distinguish between COVID-19 diagnostic testing of asymptomatic people that must be covered, and testing

for general workplace health and safety, for public health surveillance, or for other purposes not primarily intended for individualized diagnosis or treatment of COVID-19?

Yes. Plans and issuers must provide coverage without imposing any cost-sharing requirements (including deductibles, copayments, and coinsurance), prior authorization, or other medical management requirements for COVID-19 diagnostic testing of asymptomatic individuals when the purpose of the testing is for individualized diagnosis or treatment of COVID-19. However, plans and issuers are not required to provide coverage of testing such as for public health surveillance or employment purposes. But there is also no prohibition or limitation on plans and issuers providing coverage for such tests. Plans and issuers are encouraged to ensure communications about the circumstances in which testing is covered are clear. To the extent not inconsistent with the FFCRA's prohibition on medical management, plans and issuers may continue to employ programs designed to detect and address fraud and abuse.

118. **3/13/21 ADDED: Under the FFCRA, are plans and issuers required to cover COVID-19 diagnostic tests provided through state- or locality-administered testing sites?**

Yes. As stated in FAQs Part 43, Q3, any health care provider acting within the scope of their license or authorization can make an individualized clinical assessment regarding COVID-19 diagnostic testing. If an individual seeks and receives a COVID-19 diagnostic test from a licensed or authorized provider, including from a state- or locality-administered site, a "drivethrough" site, and/or a site that does not require appointments, plans and issuers generally must assume that the receipt of the test reflects an "individualized clinical assessment."

119. **3/13/21 ADDED: Do point-of-care tests for COVID-19 have to be covered without cost sharing under the FFCRA?**

Yes. The FFCRA and the CARES Act make no distinction between point-of-care and other tests; all COVID-19 diagnostic tests that meet one of the criteria outlined in section 6001 of the FFCRA, as amended by section 3201 of the CARES Act, must be covered without cost sharing, prior authorization, or medical management (including for asymptomatic individuals with no known or suspected exposure to COVID-19).

120. 3/13/21 ADDED: What items and services are plans and issuers required to cover associated with COVID-19 diagnostic testing? What steps should plans and issuers take to help ensure compliance with these requirements?

As the Departments previously explained, "[s]ection 6001(a)(2) of the FFCRA requires plans and issuers to provide coverage for items and services furnished to an individual during health care provider office visits (including in-person visits and telehealth visits), urgent care center visits, and emergency room visits that result in an order for or administration of an in vitro diagnostic product, but only to the extent that the items and services relate to the furnishing or administration of the product or to the evaluation of the individual for purposes of determining the need of the individual for that product."

Plans and issuers should maintain their claims processing and other information technology systems in ways that protect participants, beneficiaries, and enrollees from inappropriate cost sharing and should document any steps that they are taking to do so. The Departments invite feedback from stakeholders on additional steps that plans and issuers should take to protect their participants, beneficiaries, and enrollees from inappropriate cost sharing and ensure compliance with the law. The Departments will take enforcement action, where appropriate, to ensure consumers receive the protections they are entitled to under the FFCRA and CARES Act.

121. 3/13/21 ADDED: What should plans and issuers do if they identify providers of COVID-19 diagnostic testing who are not complying with requirements under section 3202(b) of the CARES Act related to cash price posting or who are otherwise acting in bad faith?

Although it is the Departments' understanding that most providers have been pricing COVID-19 tests at reasonable levels, generally consistent with reimbursement rates set by the Medicare program, the Departments are aware that some providers have not done so and are using the public health emergency as an opportunity to impose extraordinarily high charges. One way plans and issuers can respond to such practices is by giving participants, beneficiaries, and enrollees information about providers who have negotiated rates for COVID-19 testing with the plan or issuer, or about other providers who adhere to best practice standards, and encouraging participants, beneficiaries, and enrollees to rely on these providers. Plans and issuers that identify providers that are violating the cash price posting requirements should report violations to COVID19CashPrice@cms.hhs.gov. The Departments welcome feedback from stakeholders on how best to monitor abusive practices and on ways to encourage consumers to get tested by providers that are not overcharging for their services or otherwise violating the law.

122. 3/13/21 ADDED: Do plans and issuers have to cover all COVID-19 vaccines with a recommendation in effect from ACIP (and associated administration)?

Yes. Plans and issuers must provide coverage without cost sharing for all COVID-19 vaccines that have received a recommendation that makes them a qualifying coronavirus preventive service with respect to the individual involved, and their administration. Plans and issuers are not permitted to exclude coverage for (or impose cost sharing on) any qualifying coronavirus preventive services. 10 Q8. When must plans and issuers begin providing coverage for qualifying coronavirus preventive services? Plans and issuers must cover qualifying coronavirus preventive services without cost sharing starting no later than 15 business days (not including weekends or holidays) after the date the USPSTF or ACIP makes an applicable recommendation regarding a qualifying coronavirus preventive service. A recommendation from ACIP is considered in effect after it has been adopted by the Director of the CDC. Thus, the requirement to cover the Pfizer BioNTech COVID-19 vaccine became effective January 5, 2021, and the requirement to cover the Moderna COVID-19 vaccine became effective January 12, 2021.

123. 3/13/21 ADDED: Do plans and issuers have to cover the vaccine administration fee when the plan or issuer is not billed for the vaccine?

Yes. As the Departments previously explained in the preamble to the Additional Policy and Regulatory Revisions in Response to the COVID-19 Public Health Emergency interim final rule with request for comments, plans and issuers subject to section 2713 of the PHS Act must cover without cost sharing an immunization that is a qualifying coronavirus preventive service and its administration, regardless of how the administration is billed, and regardless of whether a COVID-19 vaccine or any other immunization requires the administration of multiple doses in order to be considered a complete vaccination. This includes covering without cost sharing the administration of a required preventive immunization in instances where a third party, such as the Federal Government, pays for the preventive immunization.

124. 3/13/21 ADDED: The CDC and ACIP have made recommendations regarding the categories of individuals to prioritize for vaccination during the initial phases of the COVID-19 vaccination program while vaccine supply is limited. May a plan or issuer deny coverage of recommended COVID-19 vaccines

because a participant, beneficiary, or enrollee is not in a category recommended for early vaccination?

No. While certain individuals may be prioritized by states and local jurisdictions for early vaccination, ACIP does not currently recommend against vaccination of individuals in other prioritization categories. Plans and issuers must provide coverage without cost sharing of COVID-19 immunizations in accordance with the vaccine-specific recommendations of ACIP that have been adopted by the Director of the CDC, regardless of priority. Those ACIP recommendations currently recommend vaccination of all individuals in the specified age groups noted in the introduction to this section.

Plans and issuers may communicate with participants, beneficiaries, or enrollees about which individuals will be vaccinated first when supply is limited. However, a plan or issuer should not communicate that coverage is limited only to individuals who are recommended for early vaccination based on state and local plans for allocation of initial doses of the COVID-19 vaccine or the CDC and ACIP recommendations regarding which categories of individuals to prioritize for vaccination.

Furthermore, a decision by an individual's provider (including a provider integrated with a health plan) to decline to give the vaccine to someone because he or she is not within a prioritization category is not an adverse benefit determination made by a group health plan or health insurance issuer. Therefore, the provider's decision is not subject to the internal claims and appeals and external review requirements under section 2719 of the PHS Act (incorporated into the Employee Retirement Income Security Act (ERISA) by section 715 of ERISA and the Internal Revenue Code (the Code) by section 9815 of the Code).

125. **3/13/21 ADDED: Will the Departments take enforcement action when a plan or issuer covers qualifying coronavirus preventive services prior to satisfying the SBC notice of modification requirements?**

No. The Departments acknowledge that it would not be possible for plans and issuers to comply with the advance notice of modification requirements regarding qualifying coronavirus preventive services, as those services must be covered on the expedited timeframe specified by statute. Accordingly, the Departments will not take enforcement action against any plan or issuer that does not provide at least 60 days' advance notice of a material modification regarding the addition of coverage for qualifying coronavirus preventive services. However, plans and issuers must provide any required notice of the changes as soon as reasonably practicable. In addition, HHS encourages states to take

a similar approach and will not consider a state to have failed to substantially enforce section 2715(d)(4) of the PHS Act if it takes such an approach.

126. 3/13/21 ADDED: May an employer offer benefits for COVID-19 vaccines (and their administration) under an EAP that constitutes an excepted benefit?

Yes. The Departments' final regulations provide that for the purpose of determining whether an EAP provides benefits that are significant in the nature of medical care, the amount, scope, and duration of covered services are taken into account. An EAP will not be considered to provide benefits that are significant in the nature of medical care solely because it offers benefits for COVID-19 vaccines and their administration (including when offered in combination with benefits for diagnosis and testing for COVID-19). However, there must be no cost sharing under the EAP for benefits under the EAP to constitute excepted benefits and the EAP must also comply with other applicable requirements.

127. 3/13/21 ADDED: May an employer offer benefits for COVID-19 vaccines (and their administration) at an on-site medical clinic that constitutes an excepted benefit?

Yes. Coverage of on-site medical clinics is an excepted benefit in all circumstances.

128. 3/13/21 ADDED: How should health care providers seek reimbursement when delivering COVID-19- related services to the uninsured?

Congress provided and HHS administers two sources of federal funding to reimburse providers for providing services related to COVID-19 to uninsured patients. The FFCRA Relief Fund and the Paycheck Protection Program and Health Care Enhancement Act (PPPHCEA) collectively appropriated $2 billion to reimburse providers for COVID-19 testing for uninsured individuals. Additionally, the CARES Act established a Provider Relief Fund (PRF) and appropriated $100 billion to the fund. The PPPHCEA and the Coronavirus Response and Relief Supplemental Appropriations Act (CRRSA) collectively appropriated an additional $78 billion in relief funds for a total of $178 billion. A portion of the PRF is available to reimburse providers for COVID19 testing and testing-related visits for uninsured individuals, treatment for uninsured individuals with a COVID-19 diagnosis, and COVID-19 vaccination administration fees via the Health Resources and Services Administration (HRSA) COVID-19 Claims Reimbursement to Health Care Providers and Facilities for Testing, Treatment, and Vaccine Administration for the Uninsured program (referred to as the HRSA COVID-19 Uninsured Program). Providers are not required to ascertain a patient's immigration status in order to receive reimbursement from the fund.

HHS expects that providers will seek reimbursement from these funding sources for providing this care to the uninsured, thus helping to ensure that cost does not act as a barrier to needed services during the COVID-19 pandemic. HHS expects that providers will act in a manner consistent with state law and will not inappropriately leverage their greater knowledge of or familiarity with applicable reimbursement policy or withhold relevant information from consumers. Providers who receive reimbursement from the HRSA COVID-19 Uninsured Program cannot seek reimbursement, including balance billing, for such vaccination, care, or treatment from the individual or any other source.

Providers can familiarize themselves with this process at https://www.hrsa.gov/coviduninsuredclaim, and learn more and file claims at https://coviduninsuredclaim.linkhealth.com/. The Departments also seek input from stakeholders on potential strategies for directing uninsured people to providers who rely on reimbursement from the PRF and agree not to charge such patients for COVID-19 related services. Information regarding providers who have received claims reimbursement for COVID-19 testing of uninsured individuals and/or treatment for uninsured individuals with a COVID-19 diagnosis is available at https://data.cdc.gov/Administrative/Claims-Reimbursement-to-Health-CareProviders-and-/rksx-33p3.

IRS Guidance on Tax Credits

On March 31, 2020, the IRS issued FAQs on COVID-19 tax credit related issues for paid Public Health Emergency Leave and Emergency Paid Sick Leave. Below, we highlight some important FAQs from that release and subsequent updates.

129. 4/1/20 ADDED: What documentation must an Eligible Employer retain to substantiate eligibility to claim the tax credits for FFCRA required leave?

Eligible Employers claiming the credits for qualified leave wages (and allocable qualified health plan expenses and the Eligible Employer's share of Medicare taxes), must retain records and documentation related to and supporting each employee's leave to substantiate the claim for the credits, and retain the Forms 941, Employer's Quarterly Federal Tax Return, and 7200, Advance of Employer Credits Due To COVID-19, and any other applicable filings made to the IRS requesting the credit.

For more information, see "How Should an Employer Substantiate Eligibility for Tax Credits for Qualified Leave Wages?"

130. 3/13/21 UPDATED: How do eligible employers claim credits?

Eligible Employers will report their total qualified leave wages (and allocable qualified health plan expenses and the Eligible Employer's share of Medicare tax on the qualified leave wages) for each quarter on their federal employment tax return, usually Form 941, Employer's Quarterly Federal Tax Return. Form 941 is used to report income tax and social security and Medicare taxes withheld by most Eligible Employers from employee wages, as well as the Eligible Employer's own share of social security and Medicare taxes.

In anticipation of receiving the credits, Eligible Employers can fund qualified leave wages (and allocable qualified health plan expenses and the Eligible Employer's share of Medicare tax on the qualified leave wages) by accessing federal employment taxes related to wages paid between April 1, 2020, and September 30, 2021, including withheld taxes, that would otherwise be required to be deposited with the IRS. This means that in anticipation of claiming the credits on the Form 941, Eligible Employers can retain the federal employment taxes that they otherwise would have deposited, including federal income tax withheld from employees, the employees' share of social security and Medicare taxes, and the Eligible Employer's share of social security and Medicare taxes with respect to all employees. The Form 941 will provide instructions about how to reflect the reduced liabilities for the quarter related to the deposit schedule.

For more information, see "How to Claim the Credits."

131. 12/7/20 UPDATED: As an employer subject to the FFCRA and responsible for providing Public Health Emergency Leave, I understand that we must provide "qualified family leave wages." What are "qualified family leave wages"?

The Family and Medical Leave Act (FMLA) generally entitles eligible employees of covered employers to unpaid, job-protected leave for specified family and medical reasons. The FFCRA amended the FMLA (the IRS FAQs refer this portion of the FFCRA as "the Expanded FMLA") to require an Eligible Employer to provide qualified family leave wages when an employee is unable to work or telework due to a need for leave to care for a child of the employee if the child's school or place of care has been closed, or because the child care provider of the child is unavailable, for reasons related to COVID-19.

Qualified family leave wages are wages (as defined in section 3121(a) of the Internal Revenue Code (the "Code") for social security and Medicare tax purposes) or

compensation (as defined in section 3231(e) of the Code) that Eligible Employers must pay eligible employees for periods of leave during which they are unable to work or telework due to a need for leave to care for a child of such employee if the child's school or place of care has been closed (including the closure of a summer camp, summer enrichment program, or other summer program), or because the child care provider of the child is unavailable, for reasons related to COVID-19. The first ten days for which an employee takes leave for this reason may be unpaid. However, during that 10-day period, an employee may be entitled to receive qualified sick leave wages as provided under the ESPLA or may receive other forms of paid leave, such as accrued sick leave, annual leave, or other paid time off under the Eligible Employer's policy. After an employee takes leave for ten days, the Eligible Employer must provide the employee with qualified family leave wages for up to ten weeks. For more information, see the Department of Labor's Families First Coronavirus Response Act: Questions and Answers and the IRS FAQs on tax credits.

132. 4/1/20 ADDED: How do we, as Eligible Employers, determine the amount of "allocable qualified health plan expenses" when claiming a tax credit for paid leave under the FFCRA?

"Qualified health plan expenses" are amounts paid or incurred by the Eligible Employer to provide and maintain a group health plan (as defined in section 5000(b)(1) of the Internal Revenue Code (the "Code")), but only to the extent that those amounts are excluded from the gross income of employees by reason of section 106(a) of the Code.

Generally, the tax credits for qualified sick leave wages and qualified family leave wages are increased by the qualified health plan expenses allocable to each type of qualified leave wages. Qualified health plan expenses are properly allocated to the qualified sick or family leave wages if the allocation is made on a pro rata basis among covered employees (for example, the average premium for all employees covered by a policy) and pro rata on the basis of periods of coverage (relative to the time periods of leave to which such wages relate). For more information, visit the IRS webpage on tax credits for paid leave under the FFCRA.

133. 12/7/20 ADDED: Does the amount of qualified health plan expenses include both the portion of the cost paid by the Eligible Employer and the portion of the cost paid by the employee?

The amount of qualified health plan expenses taken into account in determining the credits generally includes both the portion of the cost paid by the Eligible Employer and the portion of the cost paid by the employee with pre-tax salary reduction

contributions. However, the qualified health plan expenses should not include amounts that the employee paid for with after-tax contributions.

134. **12/7/20 ADDED: For an Eligible Employer that sponsors more than one plan for its employees (for example, both a group health plan and a health flexible spending arrangement (health FSA)), or more than one plan covering different employees, how are the qualified health plan expenses for each employee determined?**

The qualified health plan expenses are determined separately for each plan. Therefore, for each plan, those expenses are allocated to the employees who participate in that plan. In the case of an employee who participates in more than one plan, the allocated expenses of each plan in which the employee participates are aggregated for that employee.

135. **12/7/20 ADDED: For an Eligible Employer that sponsors a fully-insured group health plan, how are the qualified health plan expenses of that plan allocated to the qualified sick or family leave wages on a pro rata basis? (updated November 25, 2020)**

An Eligible Employer who sponsors a fully-insured group health plan may use any reasonable method to determine and allocate the plan expenses, including (1) the COBRA applicable premium for the employee typically available from the insurer, (2) one average premium rate for all employees, or (3) a substantially similar method that takes into account the average premium rate determined separately for employees with self-only and other than self-only coverage.

If an Eligible Employer chooses to use one average premium rate for all employees, the allocable amount for each day an employee covered by the insured group health plan is entitled to qualified leave wages could be determined using the following steps:

1. The Eligible Employer's overall annual premium for the employees covered by the policy is divided by the number of employees covered by the policy to determine the average annual premium per employee.

2. The average annual premium per employee is divided by the average number of work days during the year by all covered employees (treating days of paid leave as a work day and a work day as including any day on which work is performed) to determine the average daily premium per employee. For example, a full-year employee working five days per week may be treated as working 52 weeks x 5 days or 260 days. Calculations for part-time and seasonal employees who

participate in the plan should be adjusted as appropriate. Eligible Employers may use any reasonable method for calculating part-time employee work days.

3. The resulting premium should be adjusted to reflect any portion that employees contribute after-tax.
4. The resulting amount is the amount allocated to each day of qualified sick or family leave wages.

Example: An Eligible Employer sponsors an insured group health plan that covers 400 employees, some with self-only coverage and some with family coverage. Each employee is expected to have 260 work days a year. (Five days a week for 52 weeks.) The employees contribute a portion of their premium by pre-tax salary reduction, with different amounts for self-only and family. The total annual premium for the 400 employees is $5.2 million. (This includes both the amount paid by the Eligible Employer and the amounts paid by employees through salary reduction.)

For an Eligible Employer using one average premium rate for all employees, the average annual premium rate is $5.2 million divided by 400, or $13,000. For each employee expected to have 260 work days a year, this results in a daily average premium rate equal to $13,000 divided by 260, or $50. That $50 is the amount of qualified health expenses allocated to each day of paid sick or family leave per employee.

136. 12/7/20 ADDED: For an Eligible Employer who sponsors a self-insured group health plan, how are the qualified health plan expenses of that plan allocated to the qualified leave wages on a pro rata basis?

An Eligible Employer who sponsors a self-insured group health plan may use any reasonable method to determine and allocate the qualified health plan expenses, including (1) the COBRA applicable premium for the employee typically available from the administrator, or (2) any reasonable actuarial method to determine the estimated annual expenses of the plan.

If the Eligible Employer uses a reasonable actuarial method to determine the estimated annual expenses of the plan, then rules similar to the rules for insured plans are used to determine the amount of expenses allocated to an employee. That is, the estimated annual expense is divided by the number of employees covered by the plan, and that amount is divided by the average number of work days during the year by the employees (treating days of paid leave as work days and any day on which an

employee performs any work as work days). The resulting amount is the amount allocated to each day of qualified sick or family leave wages.

137. **12/7/20 ADDED: For an Eligible Employer who sponsors a health savings account (HSA), or Archer Medical Saving Account (Archer MSA) and a high deductible health plan (HDHP), are contributions to the HSA or Archer MSA included in the qualified health plan expenses?**

The amount of qualified health plan expenses does not include Eligible Employer contributions to HSAs or Archer MSAs. Eligible Employers who sponsor an HDHP should calculate the amount of qualified health plan expenses in the same manner as an insured group health plan, or a self-insured plan, as applicable.

138. **12/7/20 ADDED: For an Eligible Employer who sponsors a health reimbursement arrangement (HRA), a health flexible spending arrangement (health FSA), or a qualified small employer health reimbursement arrangement (QSEHRA), are contributions to the HRA, health FSA, or QSEHRA included in the qualified health plan expenses?**

The amount of qualified health plan expenses may include contributions to an HRA (including an individual coverage HRA), or a health FSA, but does not include contributions to a QSEHRA. To allocate contributions to an HRA or a health FSA, Eligible Employers should use the amount of contributions made on behalf of the particular employee.

139. **4/1/20 ADDED: What information should an Eligible Employer receive from an employee and maintain to substantiate eligibility for the sick leave of paid family leave credits?**

An Eligible Employer will substantiate eligibility for the sick leave or family leave credits if the employer receives a written request for such leave from the employee in which the employee provides:

1. The employee's name;

2. The date or dates for which leave is requested;

3. A statement of the COVID-19 related reason the employee is requesting leave and written support for such reason; and

4. A statement that the employee is unable to work, including by means of telework, for such reason.

In the case of a leave request based on a quarantine order or self-quarantine advice, the statement from the employee should include the name of the governmental entity ordering quarantine or the name of the health care professional advising self-quarantine, and, if the person subject to quarantine or advised to self-quarantine is not the employee, that person's name and relation to the employee.

In the case of a leave request based on a school closing or child care provider unavailability, the statement from the employee should include the name and age of the child (or children) to be cared for, the name of the school that has closed or place of care that is unavailable, and a representation that no other person will be providing care for the child during the period for which the employee is receiving family medical leave and, with respect to the employee's inability to work or telework because of a need to provide care for a child older than fourteen during daylight hours, a statement that special circumstances exist requiring the employee to provide care.

140. 4/1/20 ADDED: What additional records should an Eligible Employer maintain to substantiate eligibility for the sick leave or family leave credit?

An Eligible Employer will substantiate eligibility for the sick leave or family leave credits if, in addition to the information set forth in FAQ 139 ("**What information should an Eligible Employer receive from an employee and maintain to substantiate eligibility for the sick leave or family leave credits?**"), the employer creates and maintains records that include the following information:

1. Documentation to show how the employer determined the amount of qualified sick and family leave wages paid to employees that are eligible for the credit, including records of work, telework and qualified sick leave and qualified family leave.

2. Documentation to show how the employer determined the amount of qualified health plan expenses that the employer allocated to wages. See IRS FAQ ("Determining the Amount of Allocable Qualified Health Plan Expenses") for methods to compute this allocation.

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

4. Copies of the completed Forms 941, Employer's Quarterly Federal Tax Return, that the employer submitted to the IRS (or, for employers that use third party payers to meet their employment tax obligations, records of information provided to the third party payer regarding the employer's entitlement to the credit claimed on Form 941).

141. 4/1/20 ADDED: How long should an Eligible Employer maintain records to substantiate eligibility for the sick leave or family leave credit?

An Eligible Employer should keep all records of employment taxes for at least 4 years after the date the tax becomes due or is paid, whichever comes later. These should be available for IRS review.

DOL, HHS, and IRS FAQs about the FFCRA and CARES Act

On April 11, 2020, the Departments of Labor, Health and Human Services (HHS), and Treasury collectively issued FAQs on the FFCRA and CARES Act. The FAQs in this section are summaries of those FAQs.

142. 5/20/20 UPDATED: Which types of health plans and health insurance coverage are subject to the requirements to cover diagnostic testing related to COVID-19 without cost sharing?

The requirement to cover diagnostic testing related to COVID-19 without cost sharing applies to group health plans and health insurance carriers as those terms are used under the Patient Protection and Affordable Care Act, including grandfathered plans. The requirement also applies to individual health insurance except for short-term, limited duration insurance and excepted benefits.

IRS Notice 2020-29 clarifies that the panel of diagnostic testing for influenza A and B, norovirus and other coronaviruses, and respiratory syncytial virus (RSV) and any items or services required to be covered with no costing sharing are part of the testing and treatment for COVID-19.

143. 3/13/21 UPDATED: When are plans and insurers required to comply with the requirement to cover diagnostic testing related to COVID-19 without cost sharing?

Plans and insurers must comply with the requirement to cover diagnostic testing related to COVID-19 without cost sharing as of March 18, 2020, and must continue until the public health emergency related to COVID-19 ends. In other words, the requirement applies to any applicable items and services what were furnished on or after March 18, 2020.

144. 5/20/20 UPDATED: What items and services are plans and insurers required to cover under the FFCRA and the CARES Act?

(1) An in vitro diagnostic test as defined in section 809.3 of title 21, Code of Federal Regulations, (or its successor regulations) for the detection of SARS-CoV-2 or the diagnosis of COVID-19, and the administration of such a test, that—

A. Is approved, cleared, or authorized under section 510(k), 513, 515, or 564 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. §§ 360(k), 360c, 360e, 360bbb3);

B. The developer has requested, or intends to request, emergency use authorization under section 564 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 360bbb–3), unless and until the emergency use authorization request under such section 564 has been denied or the developer of such test does not submit a request under such section within a reasonable timeframe;

C. Is developed in and authorized by a State that has notified the Secretary of HHS of its intention to review tests intended to diagnose COVID–19; or

D. Other tests that the Secretary of HHS determines appropriate in guidance.

(2) Items and services furnished to an individual during healthcare provider office visits (which includes in-person visits and telehealth visits), urgent care center visits, and emergency room visits that result in an order for or administration of an in vitro diagnostic product described in paragraph (1), but only to the extent the items and services relate to the furnishing or administration of the product or to the evaluation of the individual for purposes of determining the need of the individual for such product.

IRS Notice 2020-29 clarifies that the panel of diagnostic testing for influenza A and B, norovirus and other coronaviruses, and respiratory syncytial virus (RSV) and any items or services required to be covered with no costing sharing are part of the testing and treatment for COVID-19.

145. 4/13/20 ADDED: Are serological tests included in the definition of "in vitro diagnostic tests" for COVID-19 under the FFCRA and the CARES Act?

Yes. Serological tests for COVID-19 are used to detect antibodies against the SARS-CoV-2 virus, and are intended for use in the diagnosis of the disease or condition of having current or past infection with SARS-CoV-2, the virus which causes COVID-19. The Food and Drug Administration (FDA) currently believes such tests should not be used as the sole basis for diagnosis. FDA has advised the Departments that serological

tests for COVID-19 meet the definition of an in vitro diagnostic product for the detection of SARS-CoV-2 or the diagnosis of COVID-19. Therefore, plans and issuers must provide coverage for a serological test for COVID-19 that otherwise meets the requirements of the FFCRA and the CARES Act.

146. 4/13/20 ADDED: What types of items and services must be covered in under the FFCRA and the CARES Act conjunction with the requirement to cover items and services during a visit that relates to the furnishing or administration of COVID-19 testing or that relates to the evaluation of a person for the purposes of determining if a diagnosis is needed?

Plans and issuers must cover items and services furnished to an individual during visits that result in an order for, or administration of, a COVID-19 diagnostic test, but only to the extent that the items or services relate to the furnishing or administration of the test or to the evaluation of such individual for purposes of determining the need of the individual for the product, as determined by the individual's attending healthcare provider. The Centers for Disease Control and Prevention (CDC) advises that clinicians should use their judgment to determine if a patient has signs and symptoms compatible with COVID-19 and whether the patient should be tested. In addition, the CDC strongly encourages clinicians to test for other causes of respiratory illness. Therefore, for example, if the individual's attending provider determines that other tests (e.g., influenza tests, blood tests, etc.) should be performed during a visit (which term here includes in-person visits and telehealth visits) to determine the need of such individual for COVID-19 diagnostic testing, and the visit results in an order for, or administration of, COVID-19 diagnostic testing, the plan or issuer must provide coverage for the related tests under the FFCRA. This coverage must be provided without cost sharing, when medically appropriate for the individual, as determined by the individual's attending healthcare provider in accordance with accepted standards of current medical practice. This coverage must also be provided without imposing prior authorization or other medical management requirements.

147. 4/13/20 ADDED: May a plan or insurer require cost-sharing, prior authorization, or medical management requirements for diagnostic services related to COVID-19?

No. Diagnostic services related to COVID-19 must be provided without cost-sharing, prior authorization, or medical management when medical appropriate for an individual as determined by the individual's attending healthcare provider under accepted standards of current medical practice.

148. **4/13/20 ADDED: If a provider has not agreed to accept a negotiated rate for diagnostic items and services related to COVID-19 as required by the FFCRA and the CARES Act, is a plan or insurer required to provide coverage for those items and services?**

Yes. The CARES Act requires a plan or issuer providing coverage of items and services to reimburse the provider of COVID-19 diagnostic testing as follows:

1. If the plan or issuer has a negotiated rate with such provider in effect before the COVID-19 public health emergency, that negotiated rate shall apply throughout the period of such declaration.

2. If the plan or issuer does not have a negotiated rate with such provider, the plan or issuer shall reimburse the provider in an amount that equals the cash price for such service as listed by the provider on a public internet website, or the plan or issuer may negotiate a rate with the provider for less than such cash price.

The CARES Act also requires providers of diagnostic tests for COVID-19 to make public the cash price of a COVID-19 diagnostic test on the provider's public internet website. The Secretary of HHS may impose civil monetary penalties on any provider that does not comply with this requirement and has not completed a corrective action plan, in an amount not to exceed $300 per day that the violation is ongoing.

149. **4/13/20 ADDED: The FFCRA requires plans and providers to provide benefits for certain items and services that are furnished during healthcare provider office visits, including in-person and telehealth visits, as well as visits to urgent care centers and emergency room. What is a "visit" for these purposes?**

The term "visit" is interpreted broadly to include traditional and non-traditional care settings in which a COVID-19 test is ordered or administered, including drive-through screening and testing sites where licensed healthcare providers administer COVID-19 diagnostic testing.

150. **4/13/20 ADDED: Can we amend our plan to add benefits, or reduce or eliminate cost sharing, for the diagnosis and treatment of COVID-19 prior to**

providing 60-days advance notice of an update to our Summary of Benefits and Coverage (SBC)?

Yes. The Departments of Labor and HHS will not take enforcement action against any plan or insurer that modifies its coverage to provide greater coverage related to the diagnosis or treatment of COVID-19 without providing at least 60 days advance notice. Plans and insurers are required to make the changes as soon as reasonably practicable. States are encouraged to take a similar approach to enforcement.

This nonenforcement relief is available for the advance SBC notice requirements while the national emergency related to COVID-19 is in effect. However, to the extent that a plan or insurer maintains any changes beyond the emergency period, plans and insurers must comply with all other applicable requirements to update plan documents or terms of coverage.

151. **4/13/20 ADDED: May states impose additional requirements on health insurance issuers to respond to the COVID-19 public health emergency?**

Yes. Nothing in the FFCRA prevents a state from imposing additional standards or requirements on health insurance issuers with respect to the diagnosis or treatment of COVID-19, to the extent that such standards or requirements do not prevent the application of a federal requirement.

152. **4/13/20 ADDED: If our EAP provides benefits for diagnosis and testing of COVID-19, will that EAP cease to be an excepted benefit?**

Under DOL, HHS, and IRS final regulations, EAPs are excepted if they satisfy all of the following requirements:

> (A) The EAP does not provide significant benefits in the nature of medical care. For this purpose, the amount, scope and duration of covered services are taken into account.
>
> (B) The benefits under the EAP are not coordinated with benefits under another group health plan:
>
> > (1) Participants in the other group health plan must not be required to use and exhaust benefits under the EAP (making the EAP a gatekeeper) before an individual is eligible for benefits under the other group health plan; and

(2) Participant eligibility for benefits under the EAP must not be dependent on participation in another group health plan.

(C) No employee premiums or contributions are required as a condition of participation in the EAP.

(D) There is no cost sharing under the EAP.

Under this definition, the primary consideration is whether providing for testing and diagnosis would constitutes significant medical care. For the purpose of determining whether an EAP provides benefits that are significant in the nature of medical care, the amount, scope, and duration of covered services are taken into account. The DOL, HHS, and IRS have clarified that an EAP will not be considered to provide benefits that are significant in the nature of medical care solely because it offers benefits for diagnosis and testing for COVID-19 while a public health emergency declaration or a national emergency declaration related to COVID-19 is in effect.

153. 4/13/20 ADDED: May an employer offer benefits for diagnosis and testing for COVID-19 at an on-site medical clinic that constitute an excepted benefit?

Yes. Coverage of on-site medical clinics is an excepted benefit in all circumstances.

154. 5/20/20 UPDATED: How can plans and issuers use telehealth and other remote care services to mitigate the impact of the COVID-19 public health emergency?

The widespread availability and use of telehealth and other remote care services are vital to combat the COVID-19 public health emergency. By using these services, patients are able to seek treatment from a healthcare professional in their home, without having to go to a medical office or hospital, helping minimize the risk of exposure to and community spread of COVID-19. The DOL, HHS, and IRS recognize that many plans and issuers are currently offering benefits for telehealth and/or other remote care services in some form. Many states have encouraged issuers to cover robust telehealth and other remote care services without cost sharing, and many plans and issuers have taken steps to promote the use of these services by providing expanded access to them without cost sharing.

The DOL, HHS, and IRS strongly encourage all plans and issuers to promote the use of telehealth and other remote care services, including by notifying consumers of their availability, by ensuring access to a robust suite of telehealth and other remote care services, including mental health and substance use disorder services, and by covering telehealth and other remote care services without cost sharing or other medical

management requirements. The CARES Act amends the laws applicable to high deductible health plans (HDHPs) and Health Savings Accounts (HSAs) to provide flexibility with respect to telehealth and other remote care services. Specifically the CARES Act provides a temporary safe harbor for providing coverage for telehealth and other remote care services. The CARES Act allows HSA-eligible HDHPs to cover telehealth and other remote care services without a deductible or with a deductible below the minimum annual deductible otherwise required by HSA-compatible HDHPs. In addition, telehealth and other remote care services are included as categories of coverage that are disregarded for purposes of determining whether an individual who has other health plan coverage in addition to an HDHP is an eligible individual who may make tax-favored contributions to his or her HSA. Thus, an otherwise eligible individual with coverage under an HDHP may also receive coverage for telehealth and other remote care services outside the HDHP and before satisfying the deductible of the HDHP and still contribute to an HSA. Although originally limited in application with regard to timing, IRS Notice 2020-29 clarifies that this treatment of telehealth and other remote health services applies with respect to services provided on or after January 1, 2020 and is available for plan years that begin on or before December 31, 2021.

155. **4/13/20 ADDED: In light of the public health emergency posed by COVID-19, will the Departments allow plans and issuers to add benefits, or reduce or eliminate cost sharing, for telehealth and other remote care services prior to satisfying any applicable notice of modification requirements and without regard to restrictions on mid-year changes to provide coverage for telehealth services?**

Yes. The Departments will apply the same non-enforcement policies described in FAQ 150 to situations where a plan or issuer adds benefits, or reduces or eliminates cost sharing, for telehealth and other remote care services. These non-enforcement policies will apply with respect to changes made for the period during which a public health emergency declaration related to COVID-19 or a national emergency declaration related to COVID-19 is in effect.

Plans and issuers must provide notice of the changes as soon as reasonably practicable. Although enforcement relief is being provided for the advance notice requirements for Summaries of Benefits and Coverage (SBCs), to the extent a plan or issuer maintains any such changes beyond the emergency period, plans and issuers must comply with all other applicable requirements to update plan documents or terms of coverage. The Departments would continue to take enforcement action against any health insurance issuer or plan that attempts to limit or eliminate other benefits, or to

increase cost-sharing, to offset the costs of increasing the generosity of benefits related to the diagnosis and/or treatment of COVID19.

ACA Employer Mandate Issues

156. If we reduce an employee's pay, what impact does the reduction have on the affordability of coverage if we are an applicable large employer?

A reduction in an employee's rate of pay could result in an offer of unaffordable coverage. Applicable large employers subject to the ACA's Employer Shared Responsibility provisions must continue to make offers of minimum essential coverage that both provide minimum value and are affordable to full-time employees. Generally, employers utilize one of three regulatory safe harbors to protect themselves from penalty risk by ensuring coverage offered is affordable. If you use the Federal Poverty Line safe harbor, a reduction in an employee's pay will not impact the affordability of coverage. However, if you use the Form W-2 safe harbor, a reduction in the employee's pay may result in a reduction of the employee's taxable income at year end, which may cause the employer's offer of coverage to be unaffordable. Similarly, if you are using the Rate of Pay safe harbor and a non-hourly employee (e.g., a salaried employee) experiences a reduction in monthly compensation, the Rate of Pay safe harbor cannot be used. If an employee's hourly rate decreases mid-year, the lower pay rate must be used to calculate affordability for the months the lower rate is paid to the employee.

157. 5/5/20 ADDED: How do reductions in hours of service, furloughs, or layoffs impact employee status for purposes of the ACA?

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

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

employee who experiences a reduction of hours, continues to accrue hours of service that count toward an individual's status for purposes of the ACA. An employee who was laid off will not be considered to be employed for the period between layoff and rehire, and thus will not accrue hours of service.

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

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

158. 5/5/20 ADDED: Should an employee be treated as a new employee or continuing employee for purposes of health coverage after returning from furlough or layoff?

When eligibility for health insurance coverage is tied to ACA employment status, employers should be sure to determine their employees' ACA status before reinstating coverage. Many employees may have been in stability periods as full-time employees when laid off, for example, and, upon rehire, employers may be required to treat those employees as continuing employees (instead of as new employees) who are entitled to reinstatement of health coverage as soon as practicable.

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

Returning Employees to Work

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

Under both the ADA and FMLA, an employer generally may require an employee to provide a doctor's note, submit to a medical exam, or remain symptom-free for a specified amount of time before returning to work, if the employer has a reasonable belief that the employee's present medical condition would impair the employee's ability to perform essential job functions. EEOC guidance may permit you to take employees' temperatures during a pandemic as an exception to the regular rules prohibiting

workplace medical exams. However, the CDC discourages employers from requiring return-to-work notices from their doctors.

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

Employment Considerations

160. Can an employer restrict business travel?

Yes. An employer may restrict business travel. The CDC recommends that employers restrict *all non-essential travel* until such time as the high level of risk has been lowered. Employers should continue to review the CDC's website for up-to-date travel information and restrictions, as well as border closings and health notices for other countries impacting international travel. See also the Department of State's travel advisory website.

161. 3/13/21 UPDATED: What if employees share that they have recently traveled or plan to travel out of town for personal reasons?

An employer should advise employees to use caution with travel and to check the CDC website for the latest guidance and recommendations about the region to which the employee will be traveling. If the employee is sick or experiencing symptoms of respiratory illness, he or she should stay home. An employer that has a reasonable belief an employee has traveled and either has acquired or been exposed to COVID-19 may ask that the employee not return to work for 10 days (per CDC recommendations).

On September 8, 2020, the EEOC clarified that questions about where a person traveled would not be disability-related inquiries. If the CDC or state or local public officials recommend that people who visit specified locations remain at home for a certain period of time, an employer may ask whether employees are returning from these locations, even if the travel was personal.

162. 9/16/20 ADDED: What if an employee has family members who have been confirmed to have COVID-19?

The CDC advises that an employee who is well, but who has a family member who is sick with COVID-19 should notify his or her supervisor and refer to the CDC guidance on how to conduct a risk assessment of potential exposure. If the employee has been

exposed to the virus, the employer should send the employee home for a period of 14 days in an attempt to mitigate the spread of COVID-19 in the community.

The EEOC clarified on September 8, 2020 that the Genetic Information Nondiscrimination Act prohibits an employer from asking employees medical questions about family members. However, the employer may ask an employee about whether they have had contact with anyone diagnosed with COVID-19 or who may have symptoms associated with COVID-19.

163. If one of our employees is has been confirmed to have COVID-19 and is quarantined, what information can we share with our employees?

Employers should inform their employees of the possible exposure to COVID-19 in the workplace. They should not, however, disclose the identity of the quarantined employee to maintain confidentiality as required by the ADA.

164. 9/16/20 ADDED: What privacy concerns do we need to be aware of when we are asking for the health information of our employees in order to evaluate whether they need to be quarantined?

Employers may ask employees if they are experiencing COVID-19 symptoms such as fever, tiredness, cough, and shortness of breath. The employer may be required to handle the employee's response as confidential as that information may be protected under the confidentiality provisions of FMLA and/or the ADA.

If a manager or supervisor receives medical information involving COVID-19 (or any other medical information) while teleworking the manager/supervisor must follow the employer's confidentiality protocols to the extent feasible while working remotely. To the extent not feasible, the manager/supervisor must still safeguard the information to the greatest extend possible. For example, paper notepads, laptops, or other devices should not be left where others can access the information.

165. Which employees are eligible to take FMLA leave?

Generally, FMLA applies to employers with 50 or more employees within a 75-mile radius and requires covered employers to provide up to 12 weeks of unpaid leave to eligible employees. Eligible employees are those who have worked for their employer for at least 12 months and have at least 1,250 hours of service over the previous 12 months. An employee will be eligible for FMLA leave if the employee experiences one of the enumerated reasons for leave (e.g., birth and care for a newborn child, placement of an adopted or foster child, or due to the employee's own serious health condition or the

employee's need to care for a family member with a serious health condition). An employee on leave is entitled to health plan benefits under the same conditions as during active employment and job protection in the form of returning the employee to his or her original or equivalent position with equivalent pay, benefits, and other terms and conditions of employment. While FMLA leave is unpaid leave, employees may be eligible to elect to use paid time off or paid sick leave as a substitute for unpaid FMLA leave.

Special hours of service requirements apply to airline flight crew employees and to breaks in service to fulfill National Guard or Reserve military service obligations pursuant to the Uniformed Services Employment and Reemployment Rights Act (USERRA).

The FFCRA temporarily amends FMLA to provide employees of employers with fewer than 500 employees and government employers who have been on the job for at least 30 days with the right take up to 12 weeks of job-protected leave for Public Health Emergency Leave. Under a DOL Temporary Rule, an employee is considered to have been employed for at least thirty calendar days for purposes of Public Health Emergency Leave eligibility if the employer had the employee on its payroll for the thirty calendar days immediately prior to the day that the employee's leave would begin. For example, for an employee to be eligible to take leave under the Public Health Emergency Leave on April 1, 2020, the employee must have been on the employer's payroll as of March 2, 2020. The Temporary Rule also provides that an employee who is laid off or otherwise terminated by an employer on or after March 1, 2020, is nevertheless also considered to have been employed for at least thirty calendar days, provided the employer rehires or otherwise reemploys the employee on or before December 31, 2020, and the employee had been on the employer's payroll for thirty or more of the sixty calendar days prior to the date the employee was laid off or otherwise terminated. "For example, an employee who was originally hired by an employer on January 15, 2020, but laid off on March 14, 2020, would be eligible for Public Health Emergency leave and Emergency Paid Sick Leave, if the same employer rehired the employee on October 1, 2020."

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

as soon as practicable of a need for leave under this temporary provision when the need for leave is foreseeable. For more information, see our article.

166. Can an employee stay home under FMLA leave to avoid getting COVID-19?

FMLA leave does not extend to situations that do not involve a "serious health condition" as that term is defined by FMLA. In this regard, employers are not required to provide leave to those employees who stay home from work in an attempt to avoid contracting COVID-19.

167. Must an employer grant leave to an employee who is sick or who is caring for a family member that is sick?

DOL issued FAQs on March 11, 2020 related to pandemic influenza, which indicate that FMLA leave may apply to employees sick with influenza if complications arise. Specifically, an employee who is sick or who is caring for a sick family member may be entitled to FMLA leave where complications from the flu arise that create "a serious health condition" as defined by FMLA. The DOL guidance related to an influenza pandemic would apply to COVID-19, as well. Furthermore, the DOL urges workers who are ill with COVID-19 or have a family member who is ill to stay home to minimize the spread of the pandemic. DOL encourages employers to consider flexible leave policies to support these employees and other strategies to mitigate spread of COVID-19 in the community. The DOL FAQs recommend, however, that employers review their leave policies and consider providing flexibility to their employees and in a manner that does not discriminate based on race, color, sex, national origin, religion, age, disability, or veteran status.

Additionally, the FFCRA requires employers with fewer than 500 employees and government employers to provide employees who are unable to work or telework with two weeks of paid sick leave, paid at the employee's regular rate, due to one of the following reasons:

> (1) The employee is subject to a Federal, State, or local quarantine or isolation order related to COVID-19.
>
> (2) The employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19.
>
> (3) The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis.

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

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

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

Under the FFCRA, an employer's obligations are limited to paid leave of $511 per day ($5,110 in the aggregate) where leave is taken for reasons (1), (2), and (3) above (i.e., an employee's own illness or quarantine), and $200 per day ($2,000 in the aggregate) where leave is taken for reasons (4), (5), or (6) (i.e., care for others or school closures). Full-time employees are entitled to two weeks (80 hours) of leave and part-time employees are entitled to the typical number of hours that they work in a typical two week period. The FFCRA allows employers to exclude employees who are health care providers or emergency responders from this coverage. Under the FFCRA, Emergency Paid Sick Leave expires on December 31, 2020, and employers may voluntarily permit any unused paid leave granted by the FFCRA to carry over into 2021. The FFCRA's paid leave provisions are effective on April 1, 2020, and apply to leave taken between April 1, 2020, and December 31, 2020. Tax credits are available for eligible employers who voluntarily provide FFCRA leave between January 1, 2021 and September 30, 2021.

NOTE: Under the DOL's Temporary Rule issued on April 1, 2020, an employee subject to these orders may not take paid sick leave where the employer does not have work for the employee.

NOTE: In order to take time off for another individual under reason (4) above, the employee must have a genuine need to care for the individual. In addition, the person being cared for must be an immediate family member, roommate, or a similar person with whom the employee has a relationship that creates an expectation that the employee would care for the person if he or she self-quarantined or was quarantined.

NOTE: In order to take time off under reason (5) above, the employee is not eligible to take paid time off under FFCRA to care for a child if another suitable individual – such as a co-parent, co-guardian, or the usual child care provider – is available to provide the care the child needs.

168. 4/1/20 UPDATED: What legal responsibility do employers have to allow parents or care givers time off from work to care for children who have been dismissed from school?

As described in FAQ 167, the FFCRA requires employers with fewer than 500 employees to provide up to 12 weeks of job-protected leave related to caring for a child if the child's school is closed due to COVID-19 (with the first two weeks unpaid). Further, given the potential for significant illness under some pandemic scenarios, employers should review their leave policies to consider providing increased flexibility to their employees and their families.

169. Are employers required by law to provide paid sick leave to employees who are out of work because they have COVID-19, have been exposed to a family member with COVID-19, or are caring for a family member with COVID-19?

Maybe. The FFCRA requires employers with fewer than 500 employees to provide up to 80 hours of emergency paid "sick" leave to full-time employees for COVID-19-related issues. This includes, for example, when an employee is under quarantine due to COVID-19, is experiencing symptoms of COVID-19 and seeking a medical diagnosis, or is caring for an individual who is under quarantine due to COVID-19. See FAQ 71.

In addition to relief provided at the federal level, employers may have employees who are eligible for state or local paid sick, medical, or family leave. Below is a brief overview of Coronavirus-related impacts on state statutory disability and paid family leave:

- California Department of Industrial Relations issued FAQs affirming the use of leave under California paid sick leave law related to COVID-19. Additionally, the California Employment Development Department issued FAQs expanding benefits to those impacted by COVID-19.
- Colorado issued a temporary emergency rule requiring employers in certain industries (e.g., food services, child care, education, nursing home facilities) to pay up to four days of sick leave to employees being tested for COVID-19.
- New Jersey has information on its website regarding the state's Department of Labor and Workforce Development guidance for employees who may be eligible to take family leave insurance to care for a family member impacted by coronavirus. Additionally, the website contains information regarding eligibility for Temporary Disability Insurance for those employees who are unable to work due to having contracted or who were exposed to coronavirus.
- Rhode Island issued guidance waiving its regular requirements for certification and a seven-day time period an claimant must be out of work for COVID-19-related claims.

- Washington clarified scenarios related to COVID-19 to outline when an employee will qualify for paid family and medical leave under the state law.

Due to the rapidly changing nature of employee leave laws in the wake of the COVID-19 pandemic employers should monitor state leave laws in your respective states or consult with your Gallagher account team for additional information where needed.

170. What should we do if an employee requests to wear some type of mask as an accommodation?

The CDC recommends that surgical masks be used only by people who show symptoms of COVID-19 or by people treating individuals with COVID-19 and recommends handwashing as the best defense against the virus. However, an employer might consider allowing (but not necessarily encouraging) an employee to wear a mask if it will help them to feel safe. If, however, an employee is requesting to wear a mask because he or she shows symptoms or has been diagnosed with COVID-19, the CDC recommends that the employee be separated from other employees and be sent home immediately.

DOL FAQs on FMLA Leave and COVID-19

Below are some common questions and answers provided by the DOL to help guide employers as they deal with the COVID-19 pandemic.

171. Which employees are eligible to take FMLA leave?

Employees are eligible to take FMLA leave if they work for a covered employer and:

- have worked for their employer for at least 12 months;
- have at least 1,250 hours of service over the previous 12 months; and
- work at a location where at least 50 employees are employed by the employer within 75 miles.

Special hours of service requirements apply to airline flight crew employees and to breaks in service to fulfill National Guard or Reserve military service obligations pursuant to the Uniformed Services Employment and Reemployment Rights Act (USERRA). (See the U.S. Department of Labor Wage and Hour Division or call 1-866-487-9243 for additional information on FMLA.)

172. Must an employer grant leave to an employee who is sick or who is caring for a family member that is sick?

An employee who is sick or whose family members are sick may be entitled to leave under the FMLA under certain circumstances. The FMLA entitles eligible employees of covered employers to take up to 12 weeks of unpaid, job-protected leave in a designated 12-month leave year for specified family and medical reasons. This may include the flu where complications arise that create a “serious health condition” as defined by the FMLA. Employees on FMLA leave are entitled to the continuation of group health insurance coverage under the same conditions as coverage would have been provided if the employee had been continuously employed during the leave period.

Workers who are ill with COVID-19 or who have a family member with COVID-19 are urged to stay home to minimize the spread of the pandemic. Employers are encouraged to support these and other community mitigation strategies and should consider flexible leave policies for their employees.

173. Can an employee stay home under FMLA leave to avoid getting COVID-19?

The FMLA protects eligible employees who are incapacitated by a serious health condition, as may be the case with COVID-19 where complications arise, or who are needed to care for covered family members who are incapacitated by a serious health condition. Leave taken by an employee for the purpose of avoiding exposure to COVID-19 would not be protected under the FMLA. Employers should encourage employees who are ill with COVID-19 or are exposed to ill family members to stay home and should consider flexible leave policies for their employees in these circumstances.

174. May employers send employees home if they show symptoms of COVID-19? Can the employees be required to take sick leave? Do they have to be paid? May employers prevent employees from coming to work?

It is important to prepare a plan of action specific to your workplace, given that the COVID-19 outbreak could affect many employees. This plan or policy could permit you to send employees home, but the plan and the employment decisions must comply with the laws prohibiting discrimination in the workplace on the basis of race, sex, age (40 and over), color, religion, national origin, disability, or veteran status. It would also be prudent to notify employees (and if applicable, their bargaining unit representatives) about decisions made under this plan or policy at the earliest feasible time.

Your company policies on sick leave, and any applicable employment contracts or collective bargaining agreements would determine whether you should provide paid leave to employees who are not at work. If the leave qualifies as FMLA-protected leave, the statute allows the employee to elect or the employer to require the substitution of paid sick and paid vacation/personal leave in some circumstances. (See the U.S. Department of Labor Wage and Hour Division for additional information or call 1-866-487-9243 if you have any questions.)

Remember when making decisions to exclude employees from the workplace, you cannot discriminate on the basis of race, sex, age (40 and over), color, religion, national origin, disability, union membership or veteran status. However, you may exclude an employee with a disability from the workplace if you:

- obtain objective evidence that the employee poses a direct threat (i.e. significant risk of substantial harm); and
- determine that there is no available reasonable accommodation (that would not pose an undue hardship) to eliminate the direct threat.

(See the U.S. Equal Employment Opportunity Commission's Enforcement Guidance: Disability-Related Inquiries and Medical Examinations of Employees under the Americans with Disabilities Act for additional information.)

175. May an employer require an employee who is out sick with COVID-19 to provide a doctor's note, submit to a medical exam, or remain symptom-free for a specified amount of time before returning to work?

Yes. However, employers should consider that during a pandemic, healthcare resources may be overwhelmed and it may be difficult for employees to get appointments with doctors or other health care providers to verify they are well or no longer contagious.

During a pandemic health crisis, under the ADA, an employer would be allowed to require a doctor's note, a medical examination, or a time period during which the employee has been symptom free, before it allows the employee to return to work. Specifically, an employer may require the above actions of an employee where it has a reasonable belief – based on objective evidence – that the employee's present medical condition would:

- impair his ability to perform essential job functions (i.e., fundamental job duties) with or without reasonable accommodation, or,

- pose a direct threat (i.e., significant risk of substantial harm that cannot be reduced or eliminated by reasonable accommodation) to safety in the workplace.

In situations in which an employee's leave is covered by the FMLA, the employer may have a uniformly-applied policy or practice that requires all similarly-situated employees to obtain and present certification from the employee's health care provider that the employee is able to resume work. Employers are required to notify employees in advance if the employer will require a fitness-for-duty certification to return to work. If state or local law or the terms of a collective bargaining agreement govern an employee's return to work, those provisions shall be applied. Employers should be aware that fitness-for-duty certifications may be difficult to obtain during a pandemic.

176. May employers change their paid sick leave policy if a number of employees are out and they cannot afford to pay them all?

Federal equal employment opportunity laws do not prohibit employers from changing their paid sick leave policy if it is done in a manner that does not discriminate between employees because of race, sex, age (40 and over), color, religion, national origin, disability, or veteran status. However, employers must consult state and local laws.

In addition, you should consider that if your workforce is represented by a labor union and the collective bargaining agreement covers sick leave policies, you may be limited in either the manner in which you change the policy or the manner of the changes themselves because the collective bargaining agreement would be controlling. In a workplace without a collective bargaining agreement, employees may have a contractual right to any accrued sick leave, but not future leave.

Your sick leave policy also has to follow the requirements of the FMLA (if your employees are covered by the Act), and it needs to be consistent with federal workplace anti-discrimination laws, such as the ADA. (See the U.S. Department of Labor, Wage and Hour Division or call 1-866-487-9243 for additional information on FMLA. See the U.S. Equal Employment Opportunity Commission or call 1-800-669-4000 if you have questions on ADA.)

177. If an employer temporarily closes his or her place of business because of the COVID-19 pandemic and chooses to lay off some but not all employees, are there any federal laws that would govern this decision?

The federal laws prohibiting discrimination in the workplace on the basis of race, sex, age (40 and over), color, religion, national origin, or disability may apply. Other specific

Federal laws that prohibit discrimination on these or additional bases may also govern if an employer is a Federal contractor or a recipient of Federal financial assistance.

Additionally, the Worker Adjustment and Retraining Notification (WARN) Act helps ensure advance notice in cases of qualified plant closings and mass layoffs. For more information about the WARN Act see https://www.dol.gov/agencies/eta/layoffs/warn.

You may also not discriminate against an employee because the employee has requested or used qualifying FMLA leave. In addition, you may not discriminate against an employee because he or she is a past or present member of the United States uniformed service.

178. Some employees may not be able to come to work because they have to take care of sick family members. May an employer lay them off?

It depends. If an employee is covered and eligible under the FMLA and is needed to care for a spouse, daughter, son, or parent who has a serious health condition, then the employee is entitled to up to 12 weeks of job-protected, unpaid leave during any 12-month period. Some states may have similar family leave laws. In those situations, covered employers must comply with the federal or state provision that provides the greater benefit to their employees. (See the U.S. Department of Labor, Wage and Hour Division for additional information or call 1-866-487-9243 if you have questions.)

In lieu of laying off employees in this situation, the DOL is encouraging employers to consider other options such as telecommuting and to prepare a plan of action specific to your workplace.

179. What types of policy options do employers have for preventing abuse of leave?

Both the FMLA and the ADA affect the provision of leave.

Under the FMLA, employees seeking to use FMLA leave are required to provide 30-day advance notice of the need to take FMLA leave when the need is foreseeable and such notice is practicable. In addition, employers may require employees to provide:

- medical certification supporting the need for leave due to a serious health condition affecting the employee or a spouse, son, daughter or parent, including periodic re-certification;
- second or third medical opinions (at the employer's expense);

- periodic reports during FMLA leave regarding the employee's status and intent to return to work; and
- consistent with a uniformly-applied policy or practice for similarly-situated employees, a fitness for duty certification. (Employers should be aware that fitness-for-duty certifications may be difficult to obtain during a pandemic.) (See also: "May an employer require an employee who is out sick with pandemic influenza to provide a doctor's note, submit to a medical exam, or remain symptom-free for a specified amount of time before returning to work?")

The FMLA also allows the employee to elect or the employer to require the substitution of paid sick and paid vacation/personal leave in some circumstances. (See the U.S. Department of Labor Wage and Hour Division for additional information on the FMLA or call 1-866-487-9243 if you have questions.)

Under the ADA, qualified individuals with disabilities may be entitled to unscheduled leave, unpaid leave, or modifications to the employer sick leave policies as "reasonable accommodations." These are modifications or adjustments to jobs, work environments, or workplace polices that enable qualified employees with disabilities to perform the essential functions (i.e., fundamental duties) of their jobs and have equal opportunities to receive the benefits available to employees without disabilities. (See the U.S. Equal Employment Opportunity Commission's Enforcement Guidance: Reasonable Accommodation and Undue Hardship under the Americans with Disabilities Act for additional information.)

EEOC FAQs on the Americans with Disabilities Act, the Rehabilitation Act, and COVID-19

The EEOC has frequently updated its FAQs related to the ADA and COVID-19. Updated FAQs are included below; however, you should check the EEOC website for the most recent version because the EEOC often updates its website at this time. The dates in parentheses after each question represents the dates the EEOC added each question. The dates at the beginning of the question represent the dates Gallagher added the EEOC's FAQs to this document.

180. How much information may an employer request from an employee who calls in sick, in order to protect the rest of its workforce during the COVID-19 pandemic? *(3/17/20)*

During a pandemic, ADA-covered employers may ask such employees if they are experiencing symptoms of the pandemic virus. For COVID-19, these include symptoms

such as fever, chills, cough, shortness of breath, or sore throat. Employers must maintain all information about employee illness as a confidential medical record in compliance with the ADA.

181. 4/21/20 ADDED: When screening employees entering the workplace during this time, may an employer only ask employees about the COVID-19 symptoms EEOC has identified as examples, or may it ask about any symptoms identified by public health authorities as associated with COVID-19? *(4/9/20)*

As public health authorities and doctors learn more about COVID-19, they may expand the list of associated symptoms. Employers should rely on the CDC, other public health authorities, and reputable medical sources for guidance on emerging symptoms associated with the disease. 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. For example, additional symptoms beyond fever or cough may include new loss of smell or taste as well as gastrointestinal problems, such as nausea, diarrhea, and vomiting.

182. When may an ADA-covered employer take the body temperature of employees during the COVID-19 pandemic? *(3/17/20)*

Generally, measuring an employee's body temperature is a medical examination. Because the CDC and state/local health authorities have acknowledged community spread of COVID-19 and issued attendant precautions, employers may measure employees' body temperature. However, employers should be aware that some people with COVID-19 do not have a fever.

183. Does the ADA allow employers to require employees to stay home if they have symptoms of the COVID-19? *(3/17/20)*

Yes. The Centers for Disease Control (CDC) states that employees who become ill with symptoms of COVID-19 should leave the workplace. The ADA does not interfere with employers following this advice.

184. When employees return to work, does the ADA allow employers to require doctors' notes certifying their fitness for duty?*(3/17/20)*

Yes. Such inquiries are permitted under the ADA either because they would not be disability-related or, if the pandemic influenza were truly severe, they would be justified under the ADA standards for disability-related inquiries of employees. As a practical

matter, however, doctors and other health care professionals may be too busy during and immediately after a pandemic outbreak to provide fitness-for-duty documentation. Therefore, new approaches may be necessary, such as reliance on local clinics to provide a form, a stamp, or an e-mail to certify that an individual does not have the pandemic virus.

185. 9/16/20 ADDED: May an employer administer a COVID-19 test (a test to detect the presence of the COVID-19 virus)when evaluating an employee's initial or continued presence in the workplace? *(4/23/20; updated 9/8/20 to address stakeholder questions about updates to CDC guidance)*

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 screening 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 initially permitting them to enter the workplace and/or periodically to determine if their presence in the workplace poses a direct threat to others. The ADA does not interfere with employers following recommendations by the CDC or other public health authorities regarding whether, when, and for whom testing or other screening is appropriate. Testing administered by employers consistent with current CDC guidance will meet the ADA's "business necessity" standard.

Consistent with the ADA standard, employers should ensure that the tests are considered accurate and reliable. For example, employers may review information 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 CDC or other public health authorities. Because the CDC and FDA may revise their recommendations based on new information, it may be helpful to check these agency websites for updates. Employers may wish to consider the incidence of false-positives or false-negatives associated with a particular test. Note that a positive test result reveals that an individual most likely has a current infection and may be able to transmit the virus to others. A negative test result means that the individual did not have detectable COVID-19 at the time of testing.

A negative test does not mean the employee will not acquire the virus later. Based on guidance from medical and public health authorities, employers should still require–to the greatest extent possible–that employees observe infection control practices (such as social distancing, regular handwashing, and other measures) in the workplace to prevent transmission of COVID-19.

186. 9/16/20 ADDED: CDC said in its Interim Guidelines that antibody test results "should not be used to make decisions about returning persons to the

workplace." In light of this CDC guidance, under the ADA, may an employer require antibody testing before permitting employees to re-enter the workplace?

No. An antibody test constitutes a medical examination under the ADA. In light of CDC's Interim Guidelines that antibody test results "should not be used to make decisions about returning persons to the workplace," at this time, an antibody test does not meet the ADA's "job related and consistent with business necessity" standard for medical examinations or inquiries for current employees. Therefore, requiring antibody testing before allowing employees to re-enter the workplace is not allowed under the ADA. Please note that an antibody test is different from a test to determine if an individual has an active case of COVID-19 (i.e., a viral test). The EEOC has already stated that COVID-19 viral tests are permissible under the ADA.

The EEOC will continue to closely monitor CDC's recommendations, and could update this discussion in response to changes in CDC's recommendations.

187. **9/16/20 ADDED: May employers ask all employees physically entering the workplace if they have been diagnosed with or tested for COVID-19? (9/8/20; adapted from 3/27/20 Webinar Question 1)**

Yes. Employers may ask all employees who will be physically entering the workplace if they have COVID-19 or symptoms associated with COVID-19, and ask if they have been tested for COVID-19. Symptoms associated with COVID-19 include, for example, fever, chills, cough, and shortness of breath. The CDC has identified a current list of symptoms.

An employer may exclude those with COVID-19, or symptoms associated with COVID-19, from the workplace because, as EEOC has stated, their presence would pose a direct threat to the health or safety of others. However, for those employees who are teleworking and are not physically interacting with coworkers or others (for example, customers), the employer would generally not be permitted to ask these questions.

188. **9/16/20 ADDED: May a manager ask only one employee—as opposed to asking all employees—questions designed to determine if she has COVID-19, or require that this employee alone have her temperature taken or undergo other screening or testing? (*9/8/20; adapted from 3/27/20 Webinar Question 3)***

If an employer wishes to ask only a particular employee to answer such questions, or to have her temperature taken or undergo other screening or testing, the ADA requires the employer to have a reasonable belief based on objective evidence that this person

might have the disease. So, it is important for the employer to consider why it wishes to take these actions regarding this particular employee, such as a display of COVID-19 symptoms. In addition, the ADA does not interfere with employers following recommendations by the CDC or other public health authorities regarding whether, when, and for whom testing or other screening is appropriate.

189. **9/16/20 ADDED: May an employer ask an employee who is physically coming into the workplace whether they have family members who have COVID-19 or symptoms associated with COVID-19? *(9/8/20; adapted from 3/27/20 Webinar Question 4)***

No. The Genetic Information Nondiscrimination Act (GINA) prohibits employers from asking employees medical questions about family members. GINA, however, does not prohibit an employer from asking employees whether they have had contact with anyone diagnosed with COVID-19 or who may have symptoms associated with the disease. Moreover, from a public health perspective, only asking an employee about his contact with family members would unnecessarily limit the information obtained about an employee's potential exposure to COVID-19.

190. **9/16/20 ADDED: What may an employer do under the ADA if an employee refuses to permit the employer to take his temperature or refuses to answer questions about whether he has COVID-19, has symptoms associated with COVID-19, or has been tested for COVID-19? (9/8/20; adapted from 3/27/20 Webinar Question 2)**

Under the circumstances existing currently, the ADA allows an employer to bar an employee from physical presence in the workplace if he refuses to have his temperature taken or refuses to answer questions about whether he has COVID-19, has symptoms associated with COVID-19, or has been tested for COVID-19. To gain the cooperation of employees, however, employers may wish to ask the reasons for the employee's refusal. The employer may be able to provide information or reassurance that they are taking these steps to ensure the safety of everyone in the workplace, and that these steps are consistent with health screening recommendations from CDC. Sometimes, employees are reluctant to provide medical information because they fear an employer may widely spread such personal medical information throughout the workplace. The ADA prohibits such broad disclosures. Alternatively, if an employee requests reasonable accommodation with respect to screening, the usual accommodation process should be followed.

191. 9/16/20 ADDED: During the COVID-19 pandemic, may an employer request information from employees who work on-site, whether regularly or occasionally, who report feeling ill or who call in sick? *(9/8/20; adapted from Pandemic Preparedness Question 6)*

Due to the COVID-19 pandemic, at this time employers may ask employees who work on-site, whether regularly or occasionally, and report feeling ill or who call in sick, questions about their symptoms as part of workplace screening for COVID-19.

192. 9/16/20 ADDED: May an employer ask an employee why he or she has been absent from work? *(9/8/20; adapted from Pandemic Preparedness Question 15)*

Yes. Asking why an individual did not report to work is not a disability-related inquiry. An employer is always entitled to know why an employee has not reported for work.

193. 9/16/20 ADDED: When an employee returns from travel during a pandemic, must an employer wait until the employee develops COVID-19 symptoms to ask questions about where the person has traveled? *(9/8/20; adapted from Pandemic Preparedness Question 8)*

No. Questions about where a person traveled would not be disability-related inquiries. If the CDC or state or local public health officials recommend that people who visit specified locations remain at home for a certain period of time, an employer may ask whether employees are returning from these locations, even if the travel was personal.

194. 4/21/20 ADDED: May an employer store in existing medical files information it obtains related to COVID-19, including the results of taking an employee's temperature or the employee's self-identification as having this disease, or must the employer create a new medical file system solely for this information? *(4/9/20)*

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 includes an employee's statement that he has the disease or suspects he has the disease, or the employer's notes or other documentation from questioning an employee about symptoms.

195. **4/21/20 ADDED: If an employer requires all employees to have a daily temperature check before entering the workplace, may the employer maintain a log of the results?** ***(4/9/20)***

Yes. The employer needs to maintain the confidentiality of this information.

196. **4/21/20 ADDED: May an employer disclose the name of an employee to a public health agency when it learns that the employee has COVID-19?** ***(4/9/20)***

Yes.

197. **4/21/20 ADDED: May a temporary staffing agency or a contractor that places an employee in an employer's workplace notify the employer if it learns the employee has COVID-19?** ***(4/9/20)***

Yes. The staffing agency or contractor may notify the employer and disclose the name of the employee, because the employer may need to determine if this employee had contact with anyone in the workplace.

198. **9/16/20 ADDED: Suppose a manager learns that an employee has COVID-19, or has symptoms associated with the disease. The manager knows she must report it but is worried about violating ADA confidentiality. What should she do?** ***(9/8/20; adapted from 3/27/20 Webinar Question 5)***

The ADA requires that an employer keep all medical information about employees confidential, even if that information is not about a disability. Clearly, the information that an employee has symptoms of, or a diagnosis of, COVID-19, is medical information. But the fact that this is medical information does not prevent the manager from reporting to appropriate employer officials so that they can take actions consistent with guidance from the CDC and other public health authorities.

The question is really what information to report: is it the fact that an employee—unnamed—has symptoms of COVID-19 or a diagnosis, or is it the identity of that employee? Who in the organization needs to know the identity of the employee will depend on each workplace and why a specific official needs this information. Employers should make every effort to limit the number of people who get to know the name of the employee.

The ADA does not interfere with a designated representative of the employer interviewing the employee to get a list of people with whom the employee possibly had contact through the workplace, so that the employer can then take action to notify those

who may have come into contact with the employee, without revealing the employee's identity. For example, using a generic descriptor, such as telling employees that "someone at this location" or "someone on the fourth floor" has COVID-19, provides notice and does not violate the ADA's prohibition of disclosure of confidential medical information. For small employers, coworkers might be able to figure out who the employee is, but employers in that situation are still prohibited from confirming or revealing the employee's identity. Also, all employer officials who are designated as needing to know the identity of an employee should be specifically instructed that they must maintain the confidentiality of this information. Employers may want to plan in advance what supervisors and managers should do if this situation arises and determine who will be responsible for receiving information and taking next steps.

199. **9/16/20 ADDED: An employee who must report to the workplace knows that a coworker who reports to the same workplace has symptoms associated with COVID-19. Does ADA confidentiality prevent the first employee from disclosing the coworker's symptoms to a supervisor?** ***(9/8/20; adapted from 3/27/20 Webinar Question 6)***

No. ADA confidentiality does not prevent this employee from communicating to his supervisor about a coworker's symptoms. In other words, it is not an ADA confidentiality violation for this employee to inform his supervisor about a coworker's symptoms. After learning about this situation, the supervisor should contact appropriate management officials to report this information and discuss next steps.

200. **9/16/20 ADDED: An employer knows that an employee is teleworking because the person has COVID-19 or symptoms associated with the disease, and that he is in self-quarantine. May the employer tell staff that this particular employee is teleworking without saying why?** ***(9/8/20; adapted from 3/27/20 Webinar Question 7)***

Yes. If staff need to know how to contact the employee, and that the employee is working even if not present in the workplace, then disclosure that the employee is teleworking without saying why is permissible. Also, if the employee was on leave rather than teleworking because he has COVID-19 or symptoms associated with the disease, or any other medical condition, then an employer cannot disclose the reason for the leave, just the fact that the individual is on leave.

201. **9/16/20 ADDED: Many employees, including managers and supervisors, are now teleworking as a result of COVID-19. How are they supposed to keep**

medical information of employees confidential while working remotely? (*9/8/20; adapted from 3/27/20 Webinar Question 9)*

The ADA requirement that medical information be kept confidential includes a requirement that it be stored separately from regular personnel files. If a manager or supervisor receives medical information involving COVID-19, or any other medical information, while teleworking, and is able to follow an employer's existing confidentiality protocols while working remotely, the supervisor has to do so. But to the extent that is not feasible, the supervisor still must safeguard this information to the greatest extent possible until the supervisor can properly store it. This means that paper notepads, laptops, or other devices should not be left where others can access the protected information.

Similarly, documentation must not be stored electronically where others would have access. A manager may even wish to use initials or another code to further ensure confidentiality of the name of an employee.

202. **If an employer is hiring, may it screen applicants for symptoms of COVID-19? *(3/18/20)***

Yes. 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.

203. **May an employer take an applicant's temperature as part of a post-offer, pre-employment medical exam? *(3/18/20)***

Yes. Any medical exams are permitted after an employer has made a conditional offer of employment. However, employers should be aware that some people with COVID-19 do not have a fever.

204. **4/21/20 ADDED: May an employer delay the start date of an applicant who has COVID-19 or symptoms associated with it? *(3/18/20)***

Yes. According to current CDC guidance, an individual who has COVID-19 or symptoms associated with it should not be in the workplace.

205. **4/21/20 ADDED: May an employer withdraw a job offer when it needs the applicant to start immediately but the individual has COVID-19 or symptoms of it? *(3/18/20)***

Based on current CDC guidance, this individual cannot safely enter the workplace, and therefore the employer may withdraw the job offer.

206. **4/21/20 ADDED: May an employer postpone the start date or withdraw a job offer because the individual is 65 years old or pregnant, both of which place them at higher risk from COVID-19? *(4/9/20)***

No. 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.

207. **4/21/20 ADDED: If a job may only be performed at the workplace, are there reasonable accommodations for individuals with disabilities absent undue hardship that could offer protection to an employee who, due to a preexisting disability, is at higher risk from COVID-19? *(4/9/20)***

There may be reasonable accommodations that could offer protection to an individual whose disability puts him at greater risk from COVID-19 and who therefore requests such actions to eliminate possible exposure. Even with the constraints imposed by a pandemic, some accommodations may meet an employee's needs on a temporary basis without causing undue hardship on the employer.

Low-cost solutions achieved with materials already on hand or easily obtained may be effective. If not already implemented for all employees, accommodations for those who request reduced contact with others due to a disability may include changes to the work environment such as designating one-way aisles; using plexiglass, tables, or other barriers to ensure minimum distances between customers and coworkers whenever feasible per CDC guidance or other accommodations that reduce chances of exposure.

Flexibility by employers and employees is important in determining if some accommodation is possible in the circumstances. Temporary job restructuring of marginal job duties, temporary transfers to a different position, or modifying a work schedule or shift assignment may also permit an individual with a disability to perform safely the essential functions of the job while reducing exposure to others in the workplace or while commuting.

208. 4/21/20 ADDED: If an employee has a preexisting mental illness or disorder that has been exacerbated by the COVID-19 pandemic, may he now be entitled to a reasonable accommodation (absent undue hardship)? *(4/9/20)*

Although many people feel significant stress due to the COVID-19 pandemic, employees with certain preexisting mental health conditions, for example, anxiety disorder, obsessive-compulsive disorder, or post-traumatic stress disorder, may have more difficulty handling the disruption to daily life that has accompanied the COVID-19 pandemic.

As with any accommodation request, employers may: ask questions to determine whether the condition is a disability; discuss with the employee how the requested accommodation would assist him and enable him to keep working; explore alternative accommodations that may effectively meet his needs; and request medical documentation if needed.

209. 4/21/20 ADDED: In a workplace where all employees are required to telework during this time, should an employer postpone discussing a request from an employee with a disability for an accommodation that will not be needed until he returns to the workplace when mandatory telework ends? *(4/9/20)*

Not necessarily. An employer may give higher priority to discussing requests for reasonable accommodations that are needed while teleworking, but the employer may begin discussing this request now. The employer may be able to acquire all the information it needs to make a decision. If a reasonable accommodation is granted, the employer also may be able to make some arrangements for the accommodation in advance.

210. 4/21/20 ADDED: What if an employee was already receiving a reasonable accommodation prior to the COVID-19 pandemic and now requests an additional or altered accommodation? *(4/9/20)*

An employee who was already receiving a reasonable accommodation prior to the COVID-19 pandemic may be entitled to an additional or altered accommodation, absent undue hardship. For example, an employee who is teleworking because of the pandemic may need a different type of accommodation than what he uses in the workplace. The employer may discuss with the employee whether the same or a different disability is the basis for this new request and why an additional or altered accommodation is needed.

211. 4/21/20 ADDED: During the pandemic, if an employee requests an accommodation for a medical condition either at home or in the workplace, may an employer still request information to determine if the condition is a disability? *(4/17/20)*

Yes, 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).

212. 4/21/20 ADDED: During the pandemic, may an employer still engage in the interactive process and request information from an employee about why an accommodation is needed? *(4/17/20)*

Yes, if it is not obvious 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).

213. 4/21/20 ADDED: If there is some urgency to providing an accommodation, or the employer has limited time available to discuss the request during the pandemic, may an employer provide a temporary accommodation? *(4/17/20)*

Yes. Given the pandemic, some employers may choose to forgo or shorten the exchange of information between an employer and employee known as the “interactive process” (discussed in FAQs 211 and 212, above) and grant the request. In addition, when government restrictions change, or are partially or fully lifted, the need for accommodations may also change. This may result in more requests for short-term accommodations. Employers may wish to adapt the interactive process - and devise end dates for the accommodation – to suit changing circumstances based on public health directives.

Whatever the reason for shortening or adapting the interactive process, an employer may also choose to place an end date on the accommodation (for example, either a specific date such as May 30, or when the employee returns to the workplace part- or full-time due to changes in government restrictions limiting the number of people who may congregate). Employers may also opt to provide a requested accommodation on

an interim or trial basis, with an end date, while awaiting receipt of medical documentation. Choosing one of these alternatives may be particularly helpful where the requested accommodation would provide protection that an employee may need because of a pre-existing disability that puts her at greater risk during this pandemic. This could also apply to employees who have disabilities exacerbated by the pandemic.

Employees may request an extension that an employer must consider, particularly if current government restrictions are extended or new ones adopted.

214. 9/16/20 UPDATED: May an employer invite employees now to ask for reasonable accommodations they may need in the future when they are permitted to return to the workplace? (4/17/20; updated 9/8/20 to address stakeholder questions)

Yes. Employers may inform the workforce that employees with disabilities may request accommodations in advance that they believe they may need when the workplace re-opens. This is discussed in greater detail in FAQ 219. If advance requests are received, employers may begin the “interactive process” – the discussion between the employer and employee focused on whether the impairment is a disability and the reasons that an accommodation is needed. If an employee chooses not to request accommodation in advance, and instead requests it at a later time, the employer must still consider the request at that time.

215. 4/21/20 ADDED: Are the circumstances of the pandemic relevant to whether a requested accommodation can be denied because it poses an undue hardship? *(4/17/20)*

Yes. An employer does not have to provide a particular reasonable accommodation if it poses an “undue hardship,” which means "significant difficulty or expense." In some instances, an accommodation that would not have posed an undue hardship prior to the pandemic may pose one now.

216. 4/21/20 ADDED: What types of undue hardship considerations may be relevant to determine if a requested accommodation poses "significant difficulty" during the COVID-19 pandemic? *(4/17/20)*

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 in this 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

difficult 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 if there may be an alternative that could be provided that does not pose such problems.

217. 4/21/20 ADDED: What types of undue hardship considerations may be relevant to determine if a requested accommodation poses "significant expense" during the COVID-19 pandemic? *(4/17/20)*

Prior to 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 relevant 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 current circumstances, there may be many no-cost or very low-cost accommodations.

218. 5/20/20 ADDED: Do the ADA and the Rehabilitation Act apply to applicants or employees who are classified as "critical infrastructure workers" or "essential critical workers" by the CDC? *(4/23/20)*

Yes. These CDC designations, or any other designations of certain employees, do not eliminate coverage under the ADA or the Rehabilitation Act, or any other equal employment opportunity law. Therefore, employers receiving requests for reasonable accommodation under the ADA or the Rehabilitation Act from employees falling in these categories of jobs must accept and process the requests as they would for any other employee. Whether the request is granted will depend on whether the worker is an individual with a disability, and whether there is a reasonable accommodation that can be provided absent undue hardship.

219. 6/30/20 ADDED: Is an employee entitled to an accommodation under the ADA in order to avoid exposing a family member who is at higher risk of

severe illness from COVID-19 due to an underlying medical condition? *(6/11/20)*

No. Although the ADA prohibits discrimination based on association with an individual with a disability, that protection is limited to disparate treatment or harassment. The ADA does not require that an employer accommodate an employee without a disability based on the disability-related needs of a family member or other person with whom she is associated.

For example, an employee without a disability is not entitled under the ADA to telework as an accommodation in order to protect a family member with a disability from potential COVID-19 exposure.

Of course, an employer is free to provide such flexibility if it chooses to do so. An employer choosing to offer additional flexibility beyond what the law requires should be careful not to engage in disparate treatment on a protected EEO basis.

220. **9/16/20 ADDED: When an employer requires some or all of its employees to telework because of COVID-19 or government officials require employers to shut down their facilities and have workers telework, is the employer required to provide a teleworking employee with the same reasonable accommodations for disability under the ADA or the Rehabilitation Act that it provides to this individual in the workplace? *(9/8/20; adapted from 3/27/20 Webinar Question 20)***

If such a request is made, the employer and employee should discuss what the employee needs and why, and whether the same or a different accommodation could suffice in the home setting. For example, an employee may already have certain things in their home to enable them to do their job so that they do not need to have all of the accommodations that are provided in the workplace.

Also, the undue hardship considerations might be different when evaluating a request for accommodation when teleworking rather than working in the workplace. A reasonable accommodation that is feasible and does not pose an undue hardship in the workplace might pose one when considering circumstances, such as the place where it is needed and the reason for telework. For example, the fact that the period of telework may be of a temporary or unknown duration may render certain accommodations either not feasible or an undue hardship. There may also be constraints on the normal availability of items or on the ability of an employer to conduct a necessary assessment.

As a practical matter, and in light of the circumstances that led to the need for telework, employers and employees should both be creative and flexible about what can be done when an employee needs a reasonable accommodation for telework at home. If possible, providing interim accommodations might be appropriate while an employer discusses a request with the employee or is waiting for additional information.

221. **9/16/20 ADDED: Assume that an employer grants telework to employees for the purpose of slowing or stopping the spread of COVID-19. When an employer reopens the workplace and recalls employees to the worksite, does the employer automatically have to grant telework as a reasonable accommodation to every employee with a disability who requests to continue this arrangement as an ADA/Rehabilitation Act accommodation?** ***(9/8/20; adapted from 3/27/20 Webinar Question 21)***

No. Any time an employee requests a reasonable accommodation, the employer is entitled to understand the disability-related limitation that necessitates an accommodation. If there is no disability-related limitation that requires teleworking, then the employer does not have to provide telework as an accommodation. Or, if there is a disability-related limitation but the employer can effectively address the need with another form of reasonable accommodation at the workplace, then the employer can choose that alternative to telework.

To the extent that an employer is permitting telework to employees because of COVID-19 and is choosing to excuse an employee from performing one or more essential functions, then a request—after the workplace reopens—to continue telework as a reasonable accommodation does not have to be granted if it requires continuing to excuse the employee from performing an essential function. The ADA never requires an employer to eliminate an essential function as an accommodation for an individual with a disability.

The fact that an employer temporarily excused performance of one or more essential functions when it closed the workplace and enabled employees to telework for the purpose of protecting their safety from COVID-19, or otherwise chose to permit telework, does not mean that the employer permanently changed a job's essential functions, that telework is always a feasible accommodation, or that it does not pose an undue hardship. These are fact-specific determinations. The employer has no obligation under the ADA to refrain from restoring all of an employee's essential duties at such time as it chooses to restore the prior work arrangement, and then evaluating any requests for continued or new accommodations under the usual ADA rules.

222. **9/16/20 ADDED: Assume that prior to the emergence of the COVID-19 pandemic, an employee with a disability had requested telework as a reasonable accommodation. The employee had shown a disability-related need for this accommodation, but the employer denied it because of concerns that the employee would not be able to perform the essential functions remotely. In the past, the employee therefore continued to come to the workplace. However, after the COVID-19 crisis has subsided and temporary telework ends, the employee renews her request for telework as a reasonable accommodation. Can the employer again refuse the request? (9/8/20; adapted from 3/27/20 Webinar Question 22)**

Assuming all the requirements for such a reasonable accommodation are satisfied, the temporary telework experience could be relevant to considering the renewed request. In this situation, for example, the period of providing telework because of the COVID-19 pandemic could serve as a trial period that showed whether or not this employee with a disability could satisfactorily perform all essential functions while working remotely, and the employer should consider any new requests in light of this information. As with all accommodation requests, the employee and the employer should engage in a flexible, cooperative interactive process going forward if this issue does arise.

223. **9/16/20 ADDED: Might the pandemic result in excusable delays during the interactive process? (9/8/20; adapted from 3/27/20 Webinar Question 19)**

Yes. The rapid spread of COVID-19 has disrupted normal work routines and may have resulted in unexpected or increased requests for reasonable accommodation. Although employers and employees should address these requests as soon as possible, the extraordinary circumstances of the COVID-19 pandemic may result in delay in discussing requests and in providing accommodation where warranted. Employers and employees are encouraged to use interim solutions to enable employees to keep working as much as possible.

224. **9/16/20 ADDED: Federal agencies are required to have timelines in their written reasonable accommodation procedures governing how quickly they will process requests and provide reasonable accommodations. What happens if circumstances created by the pandemic prevent an agency from meeting this timeline? (9/8/20; adapted from 3/27/20 Webinar Question 19)**

Situations created by the current COVID-19 crisis may constitute an “extenuating circumstance”—something beyond a Federal agency’s control—that may justify

exceeding the normal timeline that an agency has adopted in its internal reasonable accommodation procedures.

225. 4/21/20 ADDED: What practical tools are available to employers to reduce and address workplace harassment that may arise as a result of the COVID-19 pandemic? *(4/9/20)*

Employers can help reduce the chance of harassment by explicitly communicating to the workforce that fear of the COVID-19 pandemic should not be misdirected against individuals because of a protected characteristic, including their national origin, race, or other prohibited bases.

Practical anti-harassment tools provided by the EEOC for small businesses can be found here:

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

226. 4/21/20 ADDED: Are there steps an employer should take to address possible harassment and discrimination against coworkers when it re-opens the workplace? *(4/17/20)*

Yes. An employer may 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 may also make clear that it will immediately review any allegations of harassment or discrimination and take appropriate action.

227. 6/30/20 ADDED: How may employers respond to pandemic-related harassment, in particular against employees who are or are perceived to be Asian? *(6/11/20)*

Managers should be alert to demeaning, derogatory, or hostile remarks directed to employees who are or are perceived to be of Chinese or other Asian national origin, including about the coronavirus or its origins.

All employers covered by Title VII should ensure that management understands in advance how to recognize such harassment. Harassment may occur using electronic communication tools – regardless of whether employees are in the workplace, teleworking, or on leave – and also in person between employees at the worksite. Harassment of employees at the worksite may also originate with contractors, customers or clients, or, for example, with patients or their family members at health care facilities, assisted living facilities, and nursing homes. Managers should know their legal obligations and be instructed to quickly identify and resolve potential problems, before they rise to the level of unlawful discrimination.

Employers may choose to send a reminder to the entire workforce noting Title VII's prohibitions on harassment, reminding employees that harassment will not be tolerated, and inviting anyone who experiences or witnesses workplace harassment to report it to management. Employers may remind employees that harassment can result in disciplinary action up to and including termination.

228. 6/30/20 ADDED: An employer learns that an employee who is teleworking due to the pandemic is sending harassing emails to another worker. What actions should the employer take? *(6/11/20)*

The employer should take the same actions it would take if the employee was in the workplace. Employees may not harass other employees through, for example, emails, calls, or platforms for video or chat communication and collaboration.

229. 4/21/20 ADDED: Under the EEOC's laws, what waiver responsibilities apply when an employer is conducting layoffs? *(4/9/20)*

Special rules apply when an employer is offering employees severance packages in exchange for a general release of all discrimination claims against the employer. More information is available in EEOC's technical assistance document on severance agreements.

230. 9/16/20 ADDED: What are additional EEO considerations in planning furloughs or layoffs? *(9/8/20; adapted from 3/27/20 Webinar Question 13)*

The laws enforced by the EEOC prohibit covered employers from selecting people for furlough or layoff because of that individual's race, color, religion, national origin, sex, age, disability, protected genetic information, or in retaliation for protected EEO activity.

231. 4/21/20 ADDED: As government stay-at-home orders and other restrictions are modified or lifted in your area, how will employers know what steps they can take consistent with the ADA to screen employees for COVID-19 when entering the workplace? (4/17/20)

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 is such evidence. Therefore, employers will be acting consistent 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**. Similarly, the CDC recently posted information on return by certain types of critical workers.

Employers should make sure not to engage in unlawful disparate treatment based on protected characteristics in decisions related to screening and exclusion.

232. 4/21/20 ADDED: An employer requires returning workers to wear personal protective gear and engage in infection control practices. Some employees ask for accommodations due to a need for modified protective gear. Must an employer grant these requests? *(4/17/20)*

An employer may require employees to wear protective gear (for example, masks and gloves) and observe infection control practices (for example, regular hand washing and social distancing protocols).

However, where an employee with a disability needs a related reasonable accommodation under the ADA (e.g., 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 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 and not an undue hardship on the operation of the employer's business under the ADA or Title VII.

233. **6/30/20 ADDED: What does an employee need to do in order to request reasonable accommodation from her employer because she has one of the medical conditions that CDC says may put her at higher risk for severe illness from COVID-19? *(5/5/20)***

An employee – or a third party, such as an employee's doctor – must let the employer know that she needs a change for a reason related to a medical condition (here, the underlying condition). Individuals may request accommodation in conversation or in writing. While the employee (or third party) does not need to use the term "reasonable accommodation" or reference the ADA, she may do so.

The employee or her representative should communicate that she has a medical condition that necessitates a change to meet a medical need. After receiving a request, the employer may ask questions or seek medical documentation to help decide if the individual has a disability and if there is a reasonable accommodation, barring undue hardship, that can be provided.

234. **6/30/20 ADDED: The CDC identifies a number of medical conditions that might place individuals at "higher risk for severe illness" if they get COVID-19. An employer knows that an employee has one of these conditions and is concerned that his health will be jeopardized upon returning to the workplace, but the employee has not requested accommodation. How does the ADA apply to this situation? *(5/7/20)***

First, if the employee does not request a reasonable accommodation, the ADA does not mandate that the employer take action.

If the employer is concerned about the employee's health being jeopardized upon returning to the workplace, the ADA does not allow the employer to exclude the employee – or take any other adverse action – *solely* because the employee has a disability that the CDC identifies as potentially placing him at "higher risk for severe illness" if he gets COVID-19. Under the ADA, such action is not allowed unless the employee's disability poses a "direct threat" to his health that cannot be eliminated or reduced by reasonable accommodation.

The ADA direct threat requirement is a high standard. As an affirmative defense, direct threat requires an employer to show that the individual has a disability that poses a "significant risk of substantial harm" to his own health under 29 C.F.R. section 1630.2(r) (regulation addressing direct threat to health or safety of self or others). A direct threat assessment cannot be based solely on the condition being on the CDC's list; the determination must be an individualized assessment based on a reasonable medical judgment about this employee's disability – not the disability in general – using the most current medical knowledge and/or on the best available objective evidence. The ADA regulation requires an employer to consider the duration of the risk, the nature and severity of the potential harm, the likelihood that the potential harm will occur, and the imminence of the potential harm. Analysis of these factors will likely include considerations based on the severity of the pandemic in a particular area and the employee's own health (for example, is the employee's disability well-controlled), and his particular job duties. A determination of direct threat also would include the likelihood that an individual will be exposed to the virus at the worksite. Measures that an employer may be taking in general to protect all workers, such as mandatory social distancing, also would be relevant.

Even if an employer determines that an employee's disability poses a direct threat to his own health, the employer still cannot exclude the employee from the workplace – or take any other adverse action – unless there is no way to provide a reasonable accommodation (absent undue hardship). The ADA regulations require an employer to consider whether there are reasonable accommodations that would eliminate or reduce the risk so that it would be safe for the employee to return to the workplace while still permitting performance of essential functions. This can involve an interactive process with the employee. If there are not accommodations that permit this, then an employer must consider accommodations such as telework, leave, or reassignment (perhaps to a different job in a place where it may be safer for the employee to work or that permits telework). An employer may only bar an employee from the workplace if, after going through all these steps, the facts support the conclusion that the employee poses a significant risk of substantial harm to himself that cannot be reduced or eliminated by reasonable accommodation.

235. 6/30/20 ADDED: What are examples of accommodation that, absent undue hardship, may eliminate (or reduce to an acceptable level) a direct threat to self? *(5/5/20)*

Accommodations may include additional or enhanced protective gowns, masks, gloves, or other gear beyond what the employer may generally provide to employees returning

to its workplace. Accommodations also may include additional or enhanced protective measures, for example, erecting a barrier that provides separation between an employee with a disability and coworkers/the public or increasing the space between an employee with a disability and others. Another possible reasonable accommodation may be elimination or substitution of particular "marginal" functions (less critical or incidental job duties as distinguished from the "essential" functions of a particular position). In addition, accommodations may include temporary modification of work schedules (if that decreases contact with coworkers and/or the public when on duty or commuting) or moving the location of where one performs work (for example, moving a person to the end of a production line rather than in the middle of it if that provides more social distancing).

These are only a few ideas. Identifying an effective accommodation depends, among other things, on an employee's job duties and the design of the workspace. An employer and employee should discuss possible ideas; the Job Accommodation Network (www.askjan.org) also may be able to assist in helping identify possible accommodations. As with all discussions of reasonable accommodation during this pandemic, employers and employees are encouraged to be creative and flexible.

236. 6/30/20 ADDED: As a best practice, and in advance of having some or all employees return to the workplace, are there ways for an employer to invite employees to request flexibility in work arrangements? *(6/11/20)*

Yes. The ADA and the Rehabilitation Act permit employers to make information available in advance to **all** employees about who to contact – if they wish – to request accommodation for a disability that they may need upon return to the workplace, even if no date has been announced for their return. If requests are received in advance, the employer may begin the interactive process. An employer may choose to include in such a notice all the CDC-listed medical conditions that may place people at higher risk of serious illness if they contract COVID-19, provide instructions about who to contact, and explain that the employer is willing to consider on a case-by-case basis any requests from employees who have these or other medical conditions.

An employer also may send a general notice to all employees who are designated for returning to the workplace, noting that the employer is willing to consider requests for accommodation or flexibilities on an individualized basis. The employer should specify if the contacts differ depending on the reason for the request – for example, if the office or person to contact is different for employees with disabilities or pregnant workers than for employees whose request is based on age or child-care responsibilities.

Either approach is consistent with the ADEA, the ADA, and the May 29, 2020 CDC guidance that emphasizes the importance of employers providing accommodations or flexibilities to employees who, due to age or certain medical conditions, are at higher risk for severe illness.

Regardless of the approach, however, employers should ensure that whoever receives inquiries knows how to handle them consistent with the different federal employment nondiscrimination laws that may apply, for instance, with respect to accommodations due to a medical condition, a religious belief, or pregnancy.

237. 6/30/20 ADDED: What should an employer do if an employee entering the worksite requests an alternative method of screening due to a medical condition? *(6/11/20)*

This is a request for reasonable accommodation, and an employer should proceed as it would for any other request for accommodation under the ADA or the Rehabilitation Act. If the requested change is easy to provide and inexpensive, the employer might voluntarily choose to make it available to anyone who asks, without going through an interactive process. Alternatively, if the disability is not obvious or already known, an employer may ask the employee for information to establish that the condition is a disability and what specific limitations require an accommodation. If necessary, an employer also may request medical documentation to support the employee's request, and then determine if that accommodation or an alternative effective accommodation can be provided, absent undue hardship.

Similarly, if an employee requested an alternative method of screening as a religious accommodation, the employer should determine if accommodation is available under Title VII.

238. 6/30/20 ADDED: The CDC has explained that individuals age 65 and over are at higher risk for a severe case of COVID-19 if they contract the virus and therefore has encouraged employers to offer maximum flexibilities to this group. Do employees age 65 and over have protections under the federal employment discrimination laws? *(6/11/20)*

The Age Discrimination in Employment Act (ADEA) prohibits employment discrimination against individuals age 40 and older. The ADEA would prohibit a covered employer from involuntarily excluding an individual from the workplace based on his or her being 65 or older, even if the employer acted for benevolent reasons such as protecting the employee due to higher risk of severe illness from COVID-19.

Unlike the ADA, the ADEA does not include a right to reasonable accommodation for older workers due to age. However, employers are free to provide flexibility to workers age 65 and older; the ADEA does not prohibit this, even if it results in younger workers ages 40-64 being treated less favorably based on age in comparison.

Workers age 65 and older also may have medical conditions that bring them under the protection of the ADA as individuals with disabilities. As such, they may request reasonable accommodation for their disability as opposed to their age.

273. **9/8/20 ADDED If an employer is choosing to offer flexibilities to other workers, may older comparable workers be treated less favorably based on age? *(9/8/20; adapted from 3/27/20 Webinar Question 12)***

No. If an employer is allowing other comparable workers to telework, it should make sure it is not treating older workers less favorably based on their age.

239. **6/30/20 ADDED: If an employer provides telework, modified schedules, or other benefits to employees with school-age children due to school closures or distance learning during the pandemic, are there sex discrimination considerations? *(6/11/20)***

Employers may provide any flexibilities as long as they are not treating employees differently based on sex or other EEO-protected characteristics. For example, under Title VII, female employees cannot be given more favorable treatment than male employees because of a gender-based assumption about who may have caretaking responsibilities for children.

240. **6/30/20 ADDED: Due to the pandemic, may an employer exclude an employee from the workplace involuntarily due to pregnancy? *(6/11/20)***

No. Sex discrimination under Title VII of the Civil Rights Act includes discrimination based on pregnancy. Even if motivated by benevolent concern, an employer is not permitted to single out workers on the basis of pregnancy for adverse employment actions, including involuntary leave, layoff, or furlough.

241. **6/30/20 ADDED: Is there a right to accommodation based on pregnancy during the pandemic? *(6/11/20)***

There are two federal employment discrimination laws that may trigger an accommodation for employees based on pregnancy.

First, pregnancy-related medical conditions may themselves be disabilities under the ADA, even though pregnancy itself is not an ADA disability. If an employee makes a

request for reasonable accommodation due to a pregnancy-related medical condition, the employer must consider it under the usual ADA rules.

Second, Title VII, as amended by the Pregnancy Discrimination Act, specifically requires that women affected by pregnancy, childbirth, and related medical conditions be treated the same as others who are similar in their ability or inability to work. This means that a pregnant employee may be entitled to job modifications, including telework, changes to work schedules or assignments, and leave to the extent provided for other employees who are similar in their ability or inability to work. Employers should ensure that supervisors, managers, and human resources personnel know how to handle such requests to avoid disparate treatment in violation of Title VII.

State Issues

242. 3/27/20 UPDATED: We have employees in New Jersey. Has New Jersey made any changes to its paid sick leave requirements as a result of COVID-19?

On Wednesday, March 25, New Jersey Governor Phil Murphy signed a bill to expand the protections and benefits under existing state laws due to the COVID-19 pandemic. The text of the state law is available here. The law amends existing earned sick leave provisions, which generally require employers to allow employees to accrue up to 40 hours of sick leave each year, expands the definition of "serious health condition" for purposes of the NJ Family Leave Act, extends temporary disability insurance for certain COVID-19 related reasons, and expands family leave insurance.

243. 3/27/20 ADDED: What paid sick leave requirements related to COVID-19 apply under New York state law?

On Wednesday, March 18, New York Governor Andrew Cuomo signed a bill to provide paid sick leave and job protection during the COVID-19 pandemic. The new law sets standards for employers based on the number of employees as of January 1, 2020 and net income, imposing various requirements to provide unpaid and paid sick leave. Employees of employers with 99 or fewer employees may also be eligible for expanded statutory disability and paid family leave benefits related to the pandemic. See our article for more information on the NY law's requirements.

244. Are there any states who will provide state-based paid sick leave as a result of COVID-19?

States are responding on almost a daily basis to COVID-19 leave-related issues. The DOL has a database of state family leave laws, which provides information about individual states that have similar or more generous family and medical leave laws.

Return to Work Issues

245. 5/5/20 ADDED: Is our organization permitted to resume regular operations?

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

246. 5/5/20 ADDED: What workforce screening measures can we introduce when bringing employees back?

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

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

According to the EEOC, based on CDC guidance and public health authorities' statements as of March 2020, the COVID-19 pandemic meets the direct threat standard. The CDC and public health authorities have acknowledged the community spread of COVID-19 in the United States and have issued precautions to slow the

spread. Those actions, along with actions taken by state and local authorities, support an EEOC finding that a significant risk of substantial harm would be posed by having someone with COVID-19, or symptoms of it, present in the workplace.

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

Note: According to the EEOC, 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, in late April, the CDC added additional potential symptoms of COVID-19 to its list.

247. 5/5/20 ADDED: Can an employer test all employees for COVID-19 as a condition for returning to work?

Probably, but an employer should carefully consider its policies and processes.

The nasopharyngeal swab and antibody/serology blood testing for COVID-19 are considered medical exams under the Americans with Disabilities Act (ADA). While pre-employment medical exams and disability-related inquiries are generally prohibited except under certain circumstances related to an employee's ability to perform her job, the EEOC has said generally that pandemic conditions may allow an employer to screen and test employees under the ADA, but specifies certain parameters (EEOC FAQ). However, the EEOC has stated that requiring antibody testing before allowing employees to re-enter the workplace is not allowed under the ADA. See FAQ 186.

Employers should also be aware that there might be additional or conflicting state or local public health, privacy, employment, nondiscrimination, or civil rights law considerations related to testing employees, as well as industry-specific considerations; employers should proceed with universal employee testing only under the advisement of their own employment law attorneys.

Separately, because COVID-19 testing is likely "medical care" for purposes of ERISA, an employer providing testing outside of its underlying group health plan – for example, either on a voluntary basis to any employee or as a condition of returning to work for all employees – could cause the employer to inadvertently create a stand-alone group health plan subject to ERISA's fiduciary, documentation, notice, and reporting requirements. There may be an argument based on past informal guidance from the DOL that COVID-19 testing is one of a certain type of one-time services that don't rise to the level of an employee benefit. There may also be an argument that the purpose of COVID-19 testing for "return to work" is not for the health of the employee but the safety of the workplace and that COVID-19 testing would presumably be covered separately under the group health plan for participants as required by FFCRA. However, other past DOL guidance and federal court rulings have also each determined that an ERISA plan can exist in situations where an employer requires a physical exam as a condition of employment.

In addition to the ERISA compliance requirements, an employer should consider whether the program can even be structured to comply with the ACA. Specifically, unless the testing program is considered to be an "excepted benefit" as defined by HIPAA portability rules (see FFCRA FAQs #11 and #12 addressing adding COVID-19 to existing excepted benefits, which appears to be the only way to meet the excepted benefits standard), a stand-alone COVID-19 testing program would be unable to meet the ACA's preventive services requirements and thus be noncompliant.

Finally, an employer could avoid the ERISA and ACA/HIPAA portability compliance issues by providing COVID-19 testing through a vendor but run the cost through either its own group health plan or whatever health coverage the employee has.

Again, employers wishing to institute a COVID-19 testing program outside of their group health plan as part of their return to work strategy, should consult their own legal counsel.

248. 5/5/20 ADDED: Should an employee be treated as a new employee or continuing employee for purposes of health coverage?

When eligibility for health insurance coverage is tied to ACA employment status, employers should be sure to determine their employees' ACA status before reinstating coverage. Many employees may have been in stability periods as full-time employees when laid off, for example, and employers may be required, upon rehire, to treat those employees as continuing employees (instead of as new employees) who are entitled to reinstatement of health coverage as soon as practicable.

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

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

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

249. 5/5/20 ADDED: What considerations are important for the reinstatement of non-health coverage after a furlough or layoff?

Employees whose employment was terminated or who experienced a lengthy furlough or unpaid leave of absence may have lost eligibility for their non-health benefits, such as life insurance or long term disability. Thus, an evidence of insurability requirement may apply for certain non-health benefits, which may come as a surprise for both employers and employees alike. Thus, it is important to review benefits eligibility requirements in this context before reinstating – or not reinstating – non-health benefits.

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

COVID-19 Vaccination Coverage

250. 12/7/20 ADDED: Are group health plans required to cover COVID-19 vaccinations?

Yes. Under the Coronavirus Aid, Relief, and Economic Security (CARES) Act, group health plans must cover COVID-19-related preventive services without cost-sharing. This means that plans must cover *without cost sharing* a COVID-19 vaccination and its

administration, regardless of how the administration is billed, and regardless of whether an individual must receive one or more doses of the vaccine. This includes coverage of the administration of the immunization in instances where a third party, such as the federal government, pays for the vaccine. For example, if there is no cost to the provider, for example, because it is provided for free by the federal government to the provider, a group health plan would not be required to reimburse the provider for the cost of the vaccine itself, but the plan would pay for the office visit related to administration of the vaccine.

251. 12/7/20 ADDED: When must group health plans begin to cover COVID-19 vaccinations?

In general, the preventive service rules require that plans provide coverage of recommended preventive services for plan years that begin on or after the date that is one year after the date the recommendation or guideline is issued. The CARES Act, however, provides for an accelerated timeline for coverage of qualifying coronavirus preventive services, requiring coverage within 15 business days after the vaccine has been recommended by the Advisory Committee on Immunization Practices (ACIP) and adopted by the Centers for Disease Control (CDC). Note, although that the Interim Final Regulations include a provision with respect to the 15-day accelerated timing requirement, that requirement will not apply after the expiration of the COVID-19 public health emergency.

252. 12/7/20 ADDED: Is a group health plan required to cover COVID-19 vaccinations that are provided out-of-network?

Yes. Plans must cover, without cost sharing, a COVID-19 vaccine, regardless of whether the service is delivered by an in-network or out-of-network provider. Note, although that the Interim Final Regulations include a provision with respect to the coverage of out-of-network vaccines without cost-sharing, that requirement will not apply after the expiration of the COVID-19 public health emergency.

253. 12/7/20 ADDED: If a vaccine is administered by an out-of-network provider, how does our health plan decide in what amount to reimburse the provider?

For an out-of-network provider, a plan or issuer must reimburse the provider for the qualifying coronavirus preventive service (e.g., administration of a vaccine) “in an amount that is reasonable, as determined in comparison to the prevailing market rates for such service.” The Departments of Labor, Health and Human Services, and Treasury indicated in Interim Final Regulations that they will consider the amount that would be paid under Medicare for the item or service as reasonable.

254. 12/7/20 ADDED: Will our organization be required to pay for the cost of the COVID-19 vaccine?

As of December 2020, the federal government plans to purchase and distribute all COVID-19 vaccinations through state and local health departments. Thus, it is likely that employer-sponsored group health plans will be responsible only for payment of fees relating to administering the vaccine, rather than the full cost of the vaccine.

255. 12/7/20 ADDED: Which of our group health plans are required to comply with the COVID-19 vaccination coverage requirements?

The requirement to cover COVID-19 vaccinations without cost sharing applies to non-grandfathered plans (individual and group) and grandmothered plans. The requirement does not apply to grandfathered health plans, excepted benefits, or short-term, limited-duration insurance. So, a non-grandfathered (as that term is used under the ACA) employer-sponsored medical plan would be required to cover the vaccine without cost sharing, but an excepted benefit dental plan would not.

256. 12/16/20 ADDED: Has the EEOC published guidance on whether we can require all of our employees to be vaccinated against COVID-19 before returning to the workplace?

Yes. On December 16, 2020, the EEOC updated its guidance, What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws, to include questions and answers related to the ADA, Title VII, and GINA and mandatory vaccination programs. Following are those FAQs.

> **K.1. For any COVID-19 vaccine that has been approved or authorized by the Food and Drug Administration (FDA), is the administration of a COVID-19 vaccine to an employee by an employer (or by a third party with whom the employer contracts to administer a vaccine) a "medical examination" for purposes of the ADA?** *(12/16/20)*
>
> No. The vaccination itself is not a medical examination. As the Commission explained in guidance on disability-related inquiries and medical examinations, a medical examination is "a procedure or test usually given by a health care professional or in a medical setting that seeks information about an individual's physical or mental impairments or health." Examples include "vision tests; blood, urine, and breath analyses; blood pressure screening and cholesterol testing; and diagnostic procedures, such as x-rays, CAT scans, and MRIs." If a vaccine is administered to an employee by an employer for protection against contracting COVID-19, the employer is not seeking

information about an individual's impairments or current health status and, therefore, it is not a medical examination.

Although the administration of a vaccination is not a medical examination, pre-screening vaccination questions may implicate the ADA's provision on disability-related inquiries, which are inquiries likely to elicit information about a disability. If the employer administers the vaccine, it must show that such pre-screening questions it asks employees are "job-related and consistent with business necessity." See Question K.2.

K.2. According to the CDC, health care providers should ask certain questions before administering a vaccine to ensure that there is no medical reason that would prevent the person from receiving the vaccination. If the employer requires an employee to receive the vaccination from the employer (or a third party with whom the employer contracts to administer a vaccine) and asks these screening questions, are these questions subject to the ADA standards for disability-related inquiries? *(12/16/20)*

Yes. Pre-vaccination medical screening questions are likely to elicit information about a disability. This means that such questions, if asked by the employer or a contractor on the employer's behalf, are "disability-related" under the ADA. Thus, if the employer requires an employee to receive the vaccination, administered by the employer, the employer must show that these disability-related screening inquiries are "job-related and consistent with business necessity." To meet this standard, an employer would need to have a reasonable belief, based on objective evidence, that an employee who does not answer the questions and, therefore, does not receive a vaccination, will pose a direct threat to the health or safety of her or himself or others. See Question K.5. below for a discussion of direct threat.

By contrast, there are two circumstances in which disability-related screening questions can be asked without needing to satisfy the "job-related and consistent with business necessity" requirement. First, if an employer has offered a vaccination to employees on a voluntary basis (i.e. employees choose whether to be vaccinated), the ADA requires that the employee's decision to answer pre-screening, disability-related questions also must be voluntary. 42 U.S.C. 12112(d)(4)(B); 29 C.F.R. 1630.14(d). If an employee chooses not to answer these questions, the employer may decline to administer the vaccine but may not retaliate against, intimidate, or threaten the employee for refusing to answer any questions. Second, if an employee receives an employer-required vaccination from a third party that does not have a contract with the employer, such as a pharmacy or other health care

provider, the ADA "job-related and consistent with business necessity" restrictions on disability-related inquiries would not apply to the pre-vaccination medical screening questions.

The ADA requires employers to keep any employee medical information obtained in the course of the vaccination program confidential.

K.3. Is asking or requiring an employee to show proof of receipt of a COVID-19 vaccination a disability-related inquiry? *(12/16/20)*

No. There are many reasons that may explain why an employee has not been vaccinated, which may or may not be disability-related. Simply requesting proof of receipt of a COVID-19 vaccination is not likely to elicit information about a disability and, therefore, is not a disability-related inquiry. However, subsequent employer questions, such as asking why an individual did not receive a vaccination, may elicit information about a disability and would be subject to the pertinent ADA standard that they be "job-related and consistent with business necessity." If an employer requires employees to provide proof that they have received a COVID-19 vaccination from a pharmacy or their own health care provider, the employer may want to warn the employee not to provide any medical information as part of the proof in order to avoid implicating the ADA.

K.4. Where can employers learn more about Emergency Use Authorizations (EUA) of COVID-19 vaccines? *(12/16/20)*

Some COVID-19 vaccines may only be available to the public for the foreseeable future under EUA granted by the FDA, which is different than approval under FDA vaccine licensure. The FDA has an obligation to: [E]nsure that recipients of the vaccine under an EUA are informed, to the extent practicable under the applicable circumstances, that FDA has authorized the emergency use of the vaccine, of the known and potential benefits and risks, the extent to which such benefits and risks are unknown, that they have the option to accept or refuse the vaccine, and of any available alternatives to the product.

The FDA says that this information is typically conveyed in a patient fact sheet that is provided at the time of the vaccine administration and that it posts the fact sheets on its website. More information about EUA vaccines is available on the FDA's EUA page.

K.5. If an employer requires vaccinations when they are available, how should it respond to an employee who indicates that he or she is unable to receive a COVID-19 vaccination because of a disability? *(12/16/20)*

The ADA allows an employer to have a qualification standard that includes "a requirement that an individual shall not pose a direct threat to the health or safety of individuals in the workplace." However, if a safety-based qualification standard, such as a vaccination requirement, screens out or tends to screen out an individual with a disability, the employer must show that an unvaccinated employee would pose a direct threat due to a "significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation." 29 C.F.R. 1630.2(r). Employers should conduct an individualized assessment of four factors in determining whether a direct threat exists: the duration of the risk; the nature and severity of the potential harm; the likelihood that the potential harm will occur; and the imminence of the potential harm. A conclusion that there is a direct threat would include a determination that an unvaccinated individual will expose others to the virus at the worksite. If an employer determines that an individual who cannot be vaccinated due to disability poses a direct threat at the worksite, the employer cannot exclude the employee from the workplace—or take any other action—unless there is no way to provide a reasonable accommodation (absent undue hardship) that would eliminate or reduce this risk so the unvaccinated employee does not pose a direct threat.

If there is a direct threat that cannot be reduced to an acceptable level, the employer can exclude the employee from physically entering the workplace, but this does not mean the employer may automatically terminate the worker. Employers will need to determine if any other rights apply under the EEO laws or other federal, state, and local authorities. For example, if an employer excludes an employee based on an inability to accommodate a request to be exempt from a vaccination requirement, the employee may be entitled to accommodations such as performing the current position remotely. This is the same step that employers take when physically excluding employees from a worksite due to a current COVID-19 diagnosis or symptoms; some workers may be entitled to telework or, if not, may be eligible to take leave under the Families First Coronavirus Response Act, under the FMLA, or under the employer's policies. *See also Section J, EEO rights relating to pregnancy*.

Managers and supervisors responsible for communicating with employees about compliance with the employer's vaccination requirement should know how to recognize an accommodation request from an employee with a

disability and know to whom the request should be referred for consideration. Employers and employees should engage in a flexible, interactive process to identify workplace accommodation options that do not constitute an undue hardship (significant difficulty or expense). This process should include determining whether it is necessary to obtain supporting documentation about the employee's disability and considering the possible options for accommodation given the nature of the workforce and the employee's position. The prevalence in the workplace of employees who already have received a COVID-19 vaccination and the amount of contact with others, whose vaccination status could be unknown, may impact the undue hardship consideration. In discussing accommodation requests, employers and employees also may find it helpful to consult the Job Accommodation Network (JAN) website as a resource for different types of accommodations, www.askjan.org. JAN's materials specific to COVID-19 are at https://askjan.org/topics/COVID-19.cfm.

Employers may rely on CDC recommendations when deciding whether an effective accommodation that would not pose an undue hardship is available, but as explained further in Question K.7., there may be situations where an accommodation is not possible. When an employer makes this decision, the facts about particular job duties and workplaces may be relevant. Employers also should consult applicable Occupational Safety and Health Administration standards and guidance. Employers can find OSHA COVID-specific resources at: www.osha.gov/SLTC/covid-19/.

Managers and supervisors are reminded that it is unlawful to disclose that an employee is receiving a reasonable accommodation or retaliate against an employee for requesting an accommodation.

K.6. If an employer requires vaccinations when they are available, how should it respond to an employee who indicates that he or she is unable to receive a COVID-19 vaccination because of a sincerely held religious practice or belief? *(12/16/20)*

Once an employer is on notice that an employee's sincerely held religious belief, practice, or observance prevents the employee from receiving the vaccination, the employer must provide a reasonable accommodation for the religious belief, practice, or observance unless it would pose an undue hardship under Title VII of the Civil Rights Act. Courts have defined "undue hardship" under Title VII as having more than a *de minimis* cost or burden on the employer. EEOC guidance explains that because the definition of religion is broad and protects beliefs, practices, and observances with which the employer may be unfamiliar, the employer should ordinarily assume that an

employee's request for religious accommodation is based on a sincerely held religious belief. If, however, an employee requests a religious accommodation, and an employer has an objective basis for questioning either the religious nature or the sincerity of a particular belief, practice, or observance, the employer would be justified in requesting additional supporting information.

K.7. What happens if an employer cannot exempt or provide a reasonable accommodation to an employee who cannot comply with a mandatory vaccine policy because of a disability or sincerely held religious practice or belief? *(12/16/20)*

If an employee cannot get vaccinated for COVID-19 because of a disability or sincerely held religious belief, practice, or observance, and there is no reasonable accommodation possible, then it would be lawful for the employer to exclude the employee from the workplace. This does not mean the employer may automatically terminate the worker. Employers will need to determine if any other rights apply under the EEO laws or other federal, state, and local authorities.

K.8. Is Title II of GINA implicated when an employer administers a COVID-19 vaccine to employees or requires employees to provide proof that they have received a COVID-19 vaccination? *(12/16/20)*

No. Administering a COVID-19 vaccination to employees or requiring employees to provide proof that they have received a COVID-19 vaccination does not implicate Title II of GINA because it does not involve the use of genetic information to make employment decisions, or the acquisition or disclosure of "genetic information" as defined by the statute. This includes vaccinations that use messenger RNA (mRNA) technology, which will be discussed more below. As noted in Question K.9., however, if administration of the vaccine requires pre-screening questions that ask about genetic information, the inquiries seeking genetic information, such as family members' medical histories, may violate GINA.

Under Title II of GINA, employers may not (1) use genetic information to make decisions related to the terms, conditions, and privileges of employment, (2) acquire genetic information except in six narrow circumstances, or (3) disclose genetic information except in six narrow circumstances.

Certain COVID-19 vaccines use mRNA technology. This raises questions about genetics and, specifically, about whether such vaccines modify a recipient's genetic makeup and, therefore, whether requiring an employee to

get the vaccine as a condition of employment is an unlawful use of genetic information. The CDC has explained that the mRNA COVID-19 vaccines "do not interact with our DNA in any way" and "mRNA never enters the nucleus of the cell, which is where our DNA (genetic material) is kept." (See https://www.cdc.gov/coronavirus/2019-ncov/vaccines/different-vaccines/mrna.html for a detailed discussion about how mRNA vaccines work). Thus, requiring employees to get the vaccine, whether it uses mRNA technology or not, does not violate GINA's prohibitions on using, acquiring, or disclosing genetic information.

K.9. Does asking an employee the pre-vaccination screening questions before administering a COVID-19 vaccine implicate Title II of GINA? *(12/16/20)*

Pre-vaccination medical screening questions are likely to elicit information about disability, as discussed in Question K.2., and may elicit information about genetic information, such as questions regarding the immune systems of family members. It is not yet clear what screening checklists for contraindications will be provided with COVID-19 vaccinations.

GINA defines "genetic information" to mean:

- Information about an individual's genetic tests;
- Information about the genetic tests of a family member;
- Information about the manifestation of disease or disorder in a family member (i.e., family medical history);
- Information about requests for, or receipt of, genetic services or the participation in clinical research that includes genetic services by the an individual or a family member of the individual; and
- Genetic information about a fetus carried by an individual or family member or of an embryo legally held by an individual or family member using assisted reproductive technology.

29 C.F.R. § 1635.3(c). If the pre-vaccination questions do *not* include any questions about genetic information (including family medical history), then asking them does not implicate GINA. However, if the pre-vaccination questions *do* include questions about genetic information, then employers who want to ensure that employees have been vaccinated may want to request proof of vaccination instead of administering the vaccine themselves.

GINA does not prohibit an individual employee's own health care provider from asking questions about genetic information, but it does prohibit an

employer or a doctor working for the employer from asking questions about genetic information. If an employer requires employees to provide proof that they have received a COVID-19 vaccination from their own health care provider, the employer may want to warn the employee not to provide genetic information as part of the proof. As long as this warning is provided, any genetic information the employer receives in response to its request for proof of vaccination will be considered inadvertent and therefore not unlawful under GINA. *See* 29 CFR 1635.8(b)(1)(i) for model language that can be used for this warning.

257. 12/16/20 ADDED: Does OSHA permit us to require employees to obtain a vaccine before returning to the workplace?

To date, the Occupational Safety and Health Administration (OSHA) has not issued specific guidance on whether an employer may require its employees to obtain COVID-19 vaccines. However, OSHA has recognized a duty to provide a safe workplace in the context of COVID-19. More specifically, OSHA has provided the following FAQ:

> What can I do if I believe my employer is not protecting me from exposure to SARS-CoV-2, the virus that causes COVID-19, on the job?
>
> Under federal law, you are entitled to a safe workplace. Your employer must provide a workplace free of known health and safety hazards. If you have concerns, you have the right to speak up about them without fear of retaliation.
>
> If you believe you are being exposed to SARS-CoV-2, the virus that causes COVID-19, or that your employer is not taking appropriate steps to protect you from exposure to the virus at work, talk to your supervisor or employer about your concerns. OSHA provides recommendations for measures workers and employers can take to prevent exposures and infections.
>
> You have the right to file a complaint if you feel you are being exposed to a serious health or safety hazard. If you have suffered retaliation because you voiced concerns about a health or safety hazard, you have the right to file a whistleblower protection complaint.
>
> If you believe you have contracted COVID-19 on the job, OSHA recommends several steps you should take, including notifying your supervisor. Your employer can take actions that will keep others in your workplace healthy and may be able to offer you leave flexibilities while you are away from work.
>
> Visit OSHA's Workers page to learn more.

258. 12/16/20 ADDED: Assuming that OSHA requirements, EEOC regulations, and other state or federal laws permit our organization to require employees to obtain a vaccine before returning to the workplace, can we use information from our health plan related to claims for vaccines to determine who should be permitted to return to the workplace?

Under the Privacy Rule of the Health Insurance Portability and Accountability Act (HIPAA), an employer cannot use protected health information (PHI) from its health plan for employment purposes (such as deciding whether an individual can return to the workplace) without a written authorization from the employee. Claims data showing which employees received vaccinations from your employer-sponsored health plan would be PHI; thus, unless your employees sign written authorizations permitting you to use their vaccination claims data for such purposes, you cannot simply take vaccination claims data from your health plan to determine which employees have received their vaccines and thus should be permitted to return to the workplace.

259. 12/16/20 ADDED: Assuming that OSHA requirements, EEOC regulations, and other state or federal laws permit our organization to require employees to obtain COVID-19 vaccines before returning to the workplace, if we require employees to provide documentation that they received vaccines, do we have to protect that documentation under HIPAA?

Assuming that federal and state law permit you to require employees to show documentation that they've received a vaccine prior to returning to the workplace, then you must maintain the privacy and confidentiality of that documentation, but the documentation will be treated as employment records in your hands – potentially under the Americans with Disabilities Act – rather than PHI in your hands because it is not related to your employer-sponsored health plan. Under ADA guidance, an employer may store all medical information related to COVID-19 in existing medical files.

260. 12/16/20 ADDED: Can an employer provide an incentive to employees who receive a coronavirus vaccine?

Unless a policy decision is made to treat the vaccination for the coronavirus differently – either by Congress or one or more of the agencies with jurisdiction over areas related to COVID-19, immunizations, or group health plans (for example, the Centers for Disease Control and Prevention, the Equal Employment Opportunity Commission (EEOC), or the Departments of Health and Human Services, Labor and Treasury) – the compliance implications of an employer offering an incentive for its employees (and possibly their family members) to receive the vaccine could fall under the rules that govern wellness

programs. Under the various wellness program rules, the considerations would largely mirror the considerations that must be made when a wellness program pays an incentive for receiving a flu vaccine. If the only thing an employee would be required to do to be eligible for a financial incentive reward is receive the vaccine, the program would be subject to both the EEOC's rules under the American's with Disabilities Act (ADA) and the Genetic Information Nondiscrimination Act (GINA), as well as the Health Insurance Portability and Accountability Act (HIPAA)/Patient Protection and Affordable Care Act (ACA) wellness rules for participatory programs.

The only requirement that applies to participatory programs under the HIPAA/ACA rules is that the program be made available equally to all similarly situated individuals regardless of their health status. There is no limit to a reward that may be offered. However, under the EEOC rules (which will apply because receiving a COVID-19 vaccine will constitute a "disability-related inquiry" under the ADA), there will be several different requirements imposed. Because of a series of court decisions, the rules for incentive limits under the ADA will be unclear until the EEOC finalizes its revised rules. Given that ambiguity, the most conservative approach for wellness programs is to avoid designs that offer an incentive in exchange for obtaining medical care, including vaccinations. While many employers still have these types of wellness programs, even with some risk of noncompliance, it is generally recommended that employers considering these types of programs consult with legal counsel to understand the risks of continuing with a wellness program design while incentive limits under the ADA are not clearly defined.

261. 12/14/20 ADDED: If we cover COVID-19 vaccinations (subject to any applicable federal, state, or local laws) for all of our employees regardless of whether they are covered under our major medical plan, have we created a new health plan subject to ERISA?

Possibly. Because providing a COVID-19 vaccination would be "medical care" for purposes of ERISA, an employer providing testing outside of its underlying group health plan – for example, either on a voluntary basis to any employee or as a condition of returning to work for all employees – could cause the employer to inadvertently create a stand-alone group health plan subject to ERISA's fiduciary, documentation, notice, and reporting requirements. There may be an argument based on past informal guidance from the DOL that providing COVID-19 vaccinations is one of a certain type of one-time services that don't rise to the level of an employee benefit. There may also be an argument that the purpose of providing COVID-19 vaccinations for "return to work" is not for the health of the employee but the safety of the workplace and that COVID-19

testing would presumably be covered separately under the group health plan for participants as required by FFCRA. However, other past DOL guidance and federal court rulings have also each determined that an ERISA plan can exist in situations where an employer requires a physical exam as a condition of employment.

In addition to the ERISA compliance requirements, an employer should consider whether the program can even be structured to comply with the ACA. Specifically, unless the testing program is considered to be an "excepted benefit" as defined by HIPAA portability rules (see FFCRA FAQs #11 and #12 addressing adding COVID-19 to existing excepted benefits, which appears to be the only way to meet the excepted benefits standard), a stand-alone COVID-19 testing program would be unable to meet the ACA's preventive services requirements and thus be noncompliant.

Finally, an employer could avoid the ERISA and ACA/HIPAA portability compliance issues by providing COVID-19 vaccinations through a vendor but run the cost through either its own group health plan or whatever health coverage the employee has.

Again, employers wishing to institute a COVID-19 vaccination program outside of their group health plan as part of their return to work strategy, should consult legal counsel.

Other Resources

262. 4/21/20 ADDED: Where can we find more information on returning to work essential employees who may have been exposed to COVID-19?

The EEOC has guidance under the ADA, which for example, would allow employers, prior to each shift, to take the temperature of an employee who may have been exposed to COVID-19.

- What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws
- Pandemic Preparedness in the Workplace and the Americans with Disabilities Act

263. 4/21/20 ADDED: Where can we find more information on OSHA reporting requirements for suspected work-related COVID-19 illnesses?

OSHA has published specific standards related to COVID-19, which include reporting requirements.

264. 4/21/20 ADDED: Where can we find more information on handling matters such as cleaning and disinfecting our workplace?

The CDC has Interim Guidance for Businesses and Employers to Plan and Respond to Coronavirus Disease 2019 (COVID-19) on cleaning and disinfecting workplaces, physically distancing employees, and maintaining a healthy work environment.

265. 4/21/20 ADDED: Where can I learn more about retirement relief available under the CARES Act?

Gallagher has an article highlighting essential provisions under the CARES Act, including retirement plan hardship distribution relief, plan loans, and more.

266. 4/21/20 ADDED: Where can I learn more about payroll protection loans under the CARES Act?

Gallagher's Human Resources & Compensation Consulting, in partnership with Cozen O'Connor, developed Frequently Asked Questions: Financial Assistance for Small, Mid-sized and Distressed Sector Businesses, which provides helpful information on payroll protection loans.

267. 5/5/20 ADDED: Where can I get more information for my employees' questions about health benefits during the COVID-19 crisis?

The DOL has issued FAQs addressing questions employees may have about their health benefits.

- COVID-19 FAQs for Participants and Beneficiaries

268. 5/5/20 ADDED: Where can I get more information about COVID-19-related employee retention credits?

The IRS has issued FAQs about the employee retention credits, answering questions such as who is an eligible employer, what are qualified wages, and what makes the employee retention credit fully refundable?

- COVID-19-Related Employee Retention Credits: General Information FAQs

269. 3/13/21 ADDED: Where can I find the DOL FAQs on FFCRA leave?

The DOL FFCRA FAQs are available at:
https://www.dol.gov/agencies/whd/pandemic/ffcra-questions

270. 5/5/20 ADDED: Does Gallagher have other resources on COVID-19?

Yes. Check out the following resources:

- Gallagher, COVID-19 Employer Compliance Handbook: https://ajg.adobeconnect.com/covid19erhandbook/
- Gallagher's COVID-19 Pandemic Response Hub: https://www.ajg.com/us/coronavirus-covid-19-pandemic/