MAYNARD
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COVID-19 CORONAVIRUS FAQs FOR EMPLOYERS

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COVID-19 CORONAVIRUS FAQs FOR EMPLOYERS

I. FAMILIES FIRST CORONAVIRUS RESPONSE ACT (FFCRA)

1. What is the effective date of the Families First Coronavirus Response Act (FFCRA), which includes the Emergency Paid Sick Leave Act and the Emergency Family and Medical Leave Expansion Act?

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.

2. Under the new law, what constitutes a single employer for purposes of the "fewer than 500 employees" measurement? Does it apply based on FEIN, legal entity, controlled groups, etc.?

For purposes of the expanded Family and Medical Leave Act (FMLA) leave, unless further agency guidance provides otherwise, the employer determination presumably would be made using existing FMLA integrated employer and joint employer rules for potentially combining businesses as a common, integrated employer or treating workers as employees of two or more joint employers, based on a number of factors. Further guidance will be needed to determine whether the same rules apply for purposes of the paid sick leave.

3. Does the new law apply to nonprofits? If so, how can nonprofits take advantage of the tax credit?

Yes. Although nonprofits are exempt from income taxes, they are generally still required to pay to employment (a.k.a. payroll) taxes. The credit may be used to offset these amounts.

4. What constitutes an employee for purposes of the "fewer than 500 employees" measurement and for purposes of determining who is entitled to benefits under the FFCRA?

You have fewer than 500 employees if, at the time your employee's leave is to be taken, you employ fewer than 500 full-time and part-time employees within the United States. In making the determination, you should include employees on leave; temporary employees who are jointly employed by you and another employer (regardless of whether the jointly-employed employees are maintained on only your or another employer's payroll); and day laborers supplied by a temporary agency (regardless of whether you are the temporary agency or the client firm if there is a continuing employment relationship). You do not, however, need to include independent contractors.

For purposes of the expanded FMLA leave provisions, the definition of employee is the same as under existing FMLA rules, which generally apply the definition of employee as used for purposes of the Fair Labor Standards Act (FLSA). The new paid sick leave provisions also apply the FLSA's definition of employee. The FLSA's definition generally uses the same facts and circumstances-based analysis as used for purposes of common law employee vs. independent contractor determinations. The following Fact Sheet published by the DOL contains basic information about this analysis: Fact Sheet #13: Employment Relationship Under the FLSA.

5. Do employers have to count union employees subject to a collective bargaining agreement (CBA)?

Yes. Employers with union employees still count such employees for purposes of applying the new law; however, you will have some relief to comply with your CBAs.

6. How does the "fewer than 500 employees" measurement apply for companies using a professional employer organization (PEO)?

Although the new law is not clear on this point, the general consensus is that it should apply at the client level. For the extended FMLA portion, presumably, the integrated employer and joint employer tests for normal FMLA purposes would still apply. It is possible that the joint employer test could apply to a PEO (depending on the circumstances), in which case an employee would count toward the 500 threshold for BOTH the client company and the PEO. The application of such tests (or similar tests) to the new paid sick leave portion of the law is less clear.

7. As a staffing company, will we need to include our W-2 hourly people who work at our client sites in the employee count?

The new law is also not completely clear on this point; however, the DOL has issued guidance suggesting that the "joint" employer analysis used for purposes of the existing FMLA law would apply to both the expanded FMLA and new paid sick leave provisions. The implication is that you would need to include all staffing employees. Staffing and client employers are generally considered to be "joint" employers under FMLA, meaning both companies count staffing employees for purposes of determining whether the company meets the 50 or more (regular FMLA) or the under 500 (new FMLA and paid sick leave) standards.

8. Does the 50 or more employee threshold still apply to the FMLA?

Yes, for purposes of existing FMLA leave, but not for purposes of the expanded FMLA leave under the new law, which applies the "fewer than 500 employees" standard.

9. Is there a minimum number of employees to which the emergency paid sick leave and FMLA expansion apply?

There is no minimum number of employees to be covered by the paid sick leave or the expanded FMLA. The DOL has been given the authority to exempt businesses with under 50 employees if the paid leave would jeopardize the viability of the business. We will have to wait and see whether the DOL issues such exemption in the coming weeks. If so, employers with under 50 employees would likely be able to petition the Secretary of Labor for a hardship waiver.

10. For the expanded FMLA leave, is the rule that an employee is not eligible unless there are at least 50 employees on the employer's payroll within 75 miles of the employee's worksite going to be waived?

Such rule will continue to apply for purposes of existing FMLA leave. Although it is still unclear, it does not appear that such rule would apply for purposes of the expanded FMLA leave under the new law.

11. The 30 days of employment rule for FMLA is only for Coronavirus-related cases, correct? If we have another FMLA case that is not related to Coronavirus, does the normal one-year standard still apply?

Correct. The expanded FMLA leave under the FFCRA is be a special kind of FMLA leave with a much lower bar for employees to qualify. For an employee to be eligible for the proposed new FMLA benefit, the employee would need only to have worked for 30 consecutive calendar days preceding the need for leave. Other FMLA leave is unaffected.

12. The new FMLA rule covers employees who have worked for at least 30 days. Is this specific to actually having worked for 30 days, or would it apply to someone who has simply been an active employee for 30 calendar days?

For purposes of the expanded FMLA leave, an employee is considered to have been employed by the employer for at least 30 calendar days if the employer had the employees on its payroll for the 30 calendar days immediately prior to the day the employee's leave would begin. For example, if the employee wants to take leave on April 1, 2020, he/she would need to have been on the employer's payroll as of March 2, 2020. Provided they meet this requirement, they would be entitled to the benefit. However, the hours worked may be relevant to determining the amount of the benefit to which such employee is entitled.

13. If you are under 25 employees, the FMLA provisions in full do not apply, or just the provision regarding restoring an employee to his/her former position?

If under 25 employees and certain other conditions are met, only the restoration of position requirement does not apply (*i.e.*, requirement to restore the employee to their position when they return from leave); however, the DOL has been given the authority to exempt businesses with under 50 employees if the paid leave would jeopardize the viability of the business. We will have to wait and see whether the DOL issues such exemption in the coming weeks.

14. For normal FMLA leave, you must work at least a certain number of hours per week on average to qualify. Would this still apply to the extended FMLA leave?

No. The rule under normal FMLA is that an employee will generally qualify if he/she worked a total of 1,250 hours of service in the 12 months immediately preceding the start of the FMLA leave. That does not apply under the expanded FMLA leave provision, which only requires employment for 30 calendar days (and, as currently written, has no minimum hour requirement).

15. What does "regular rate of pay" mean?

Regular rate of pay is a calculation specified in the Fair Labor Standards Act (FLSA). It is the rate used to determine the applicable overtime rate for non-exempt, hourly employees.

For purposes of the FFCRA, the regular rate of pay used to calculate your paid leave is the average of your regular rate over a period of up to six months prior to the date on which you take leave. If you have not worked for your current employer for six months, the regular rate used to calculate your paid leave is the average of your regular rate of pay for each week you have worked for your current employer.

16. How does the "regular rate of pay" calculation work for employees paid on commission, with tips, or on a piecework basis?

If an employee is paid with commissions, tips, or piece rates, these wages will be incorporated into the regular rate of pay calculation.

17. Does the requirement to pay two-thirds of an employee's regular rate of pay apply to exempt employees?

Yes. It applies to all, regardless of exempt status under the FLSA. The new law simply says that paid leave (whether 100% or 2/3 paid leave) is based on the employee's regular rate of pay, as defined under the FLSA. Although exempt employees are not subject to the FLSA rules like minimum wage and overtime, that does not change the definition of regular rate under the FLSA with regard to those employees.

18. Does the requirement to pay the full regular rate of pay apply to those who take leave to care for a child under 18 years of age, or does the two-thirds regular rate of pay apply?

Two-thirds.

19. Is there a cap on "regular rate of pay" for purposes of the new law? Will highly compensated employees get a full two-thirds of their regular pay and the employer get the full tax credit?

There are caps under the new paid leave laws that prevent highly compensated employees from receiving a benefit over a certain amount. The cap for paid FMLA leave is $200 per day and $10,000 in the aggregate. The cap for paid sick leave is $511 per day and $5,110 in the aggregate, or if the reason for leave is to care for someone with COVID-19 or a child because of school or childcare facility closure, or unavailability of a childcare provider, the cap is $200 per day and $2,000 in the aggregate.

20. For states that already have paid leave laws, how does the new law apply?

The FFCRA paid leave provisions will apply to employers in such states, possibly in addition to the state paid leave laws, depending upon what a given state's laws provide.

21. How long does the new law apply? Just until the pandemic is over or is it ongoing?

The new FMLA leave and paid sick leave laws only apply until December 31, 2020. Other parts of the law (*e.g.*, the provisions requiring health plans to cover COVID-19 testing) will continue.

22. For what reasons can an employee take paid sick leave or expanded FMLA leave under the new law?

An employee can take expanded FMLA leave under the new law only if the employee is unable to work (or telework) because he or she must care for a child (under 18 years old) because the child's school or place of care is closed, or the child's childcare provider is unavailable, due to COVID-19. An employee can take paid sick leave under the new law if the employee is unable to work (or telework) due to the following COVID-19 related reasons:

- The employee is subject to a government quarantine/isolation order related to COVID-19;
- The employee has been advised by a health care provider to quarantine for COVID-19 concerns;
- The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis;
- The employee is caring for an individual who is subject to an order as described above or has been advised by a health care provider as described above;
- The employee is caring for a son or daughter if the child's school or place of care has been closed or the child's childcare provider is unavailable due to COVID-19 precautions; or
- 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.

23. Will employees be able to receive both paid sick leave and paid FMLA leave?

Possibly. They stack on top of one another in a sense. The new paid sick leave would essentially apply for up to the first 2 weeks, and the expanded FMLA leave would apply for up to the next 10 weeks. However, the final version of the expanded FMLA leave section only applies for those caring for a child under 18 whose school/daycare closed or whose childcare is unavailable. Those taking leave for other reasons only qualify for the 2 weeks of paid sick leave (but could qualify for unpaid leave under existing laws thereafter).

24. If an employee takes expanded FMLA leave to care for a child under 18 due to a school closure, who completes the FMLA certification form?

The FMLA generally permits, but does not require, employers to make their employees provide certification when requesting FMLA leave. The certification rules for expanded FMLA leave under the FFCRA may apply the same way, but the law is unclear on that point. We will see if the DOL clarifies what certification requirements will apply (and whether they are required or permissive for employers) under the expanded FMLA leave and new paid sick leave laws.

25. Can an employer require a doctor's note for a sick absence?

Yes. An employer still has a right to require it. We recommend caution in inundating the healthcare system, so balance your need to know versus the risk of going to the doctor right now.

26. Hospitals are not diagnosing due to lack of test kits. How do employees gain sick leave in those cases?

You will have to decide what you think is appropriate. You have a right to require proof of illness to grant sick leave. Most of our clients are relaxing that obligation. We even have employers who have conditionally approved FMLA but provided employees up to 45 days to provide certification.

27. What will the government require of employers to prove eligibility for assistance from the government to recover the costs?

It is not clear under the law or existing guidance. It is unlikely that there would be a documentation requirement for each case; however, we generally recommend retaining whatever documentation/records are available to prove the validity of such tax credit claims.

28. Per the new law, would we be required to provide paid sick leave for employees who have symptoms but no positive diagnosis?

Possibly. The right to take paid sick leave under the new law is not based on a positive COVID-19 diagnosis, but on (among other things) a federal, state, or local quarantine/isolation order, a recommendation to self-quarantine by a health care provider due to COVID-19 concerns, or the employee experiencing COVID-19 symptoms and seeking medical diagnosis.

29. If the law does not take effect until April 1, is the employer required to back pay employees who would have been covered by the law had it been enacted during the emergency leave? Will the employer be required to provide paid leave to anyone that is already out or was out and has returned from quarantine?

The employer will only be required to provide paid leave to those who are eligible and request leave on or after April 1. Backpay for those taking leave before that date will not be required.

30. If I decide to provide FMLA leave now, before the effective date on April 1, will I be able to get a tax credit for benefits paid before the effective date?

The law, as written, does not provide for the tax credit to apply retroactively for leave permitted before the effective date of the new paid sick leave and FMLA leave provisions (April 1, 2020). However, it is possible that the IRS could provide guidance allowing for it.

31. Does any of this apply to independent (1099) contractors? How do the tax credits apply for independent contractors?

Lawful independent contractors are not employees; so, the new paid leave laws do not apply to them as employees. Independent contractors, however, are typically self-employed; so, to the extent their ability to work or telework is affected by COVID-19 for one of the reasons enumerated in the law, they may qualify for their own tax credits under the new law.

32. Who pays for the paid sick leave and FMLA leave under the new law, the employer or government?

The paid sick leave and FMLA leave are employer-paid, with the ability to collect a reimbursement from the government in the form of a fully-reimbursable payroll tax credit.

33. Is there a time frame as to when the company would be refunded those payroll tax credits?

Employers would generally be reimbursed after filing their next quarterly payroll/employment tax returns. However, the IRS has announced that it will issue guidance that will allow employers to retain both employment and income taxes withheld from employees' paychecks up to the amount needed to cover the cost of the paid leave (rather than remitting such amounts directly to the IRS and then requesting reimbursement at the end of the quarter), and if the paid leave exceeds such amounts, the employer could apply immediately to the IRS for accelerated reimbursement. We are awaiting guidance as to how the accelerated reimbursement application process would work.

34. How should an employer track the rates of pay to ensure an accurate tax credit is granted?

You should track rates of pay the same way you normally would for purposes of the FLSA's overtime rules. So long as the benefit you are paying is based on the individual's regular rate of pay, the credit will be equal to the benefit you provide, up to the caps under the new law. The IRS has not indicated at this point whether they will require specific document to be included when claiming the tax credit.

35. Can we have employees that are on paid sick leave do any type of work? What about people who might be able to work partial hours from home?

The new law does not address scenarios where an employee on paid leave may be able to perform work. The law does, however, provide that paid leave applies for those that are unable to work *or telework* because of the enumerated reasons. If an employee is unable to come to the workplace but is otherwise able to telework, the employer may be able to require such person to work from home. However, there may be situations where this would not apply because the employee's qualifying reason prevents him/her from even being able to telework (e.g., when the employee is actually sick with COVID-19). We would need to see regulations or other guidance to know for certain how paid leave would apply is such situations.

36. Would this also apply to employees who are under lockdown or "shelter in place" orders?

Probably so. The paid sick leave law applies to employees who are unable to work because "the employee is subject to a Federal, State, or local quarantine or isolation order related to COVID-19." This appears to encompass shelter in place orders, but we will wait to see if the DOL's subsequent guidance provides confirmation.

37. Do the new paid sick leave and/or expanded FMLA leave laws apply to employees who are furloughed? What if my business was forced to shut down by a state or city-mandated closure?

It is possible that it could apply to employees who have been furloughed because their employer's businesses were forced to close; however, we await future guidance on this question.

38. What is the definition of Public Health Authority?

The term Public Health Authority was used in a previous version of the Bill. The final version of the FFCRA does not use such term. Instead, it states that the new paid sick leave will apply if the employee is unable to work due to (among other reasons) the employee being subject to a federal, state, or local quarantine or isolation order related to COVID-19, or the employee being advised by a health care provider to self-quarantine due to COVID-19 concerns.

39. What qualifies as reasonable notice by the employee for purposes of taking FMLA leave or paid sick leave?

For purposes of the new paid sick leave, after the first day an employee takes paid sick leave, the employer may require reasonable notice procedures for such employee to be able to continue paid sick leave. For purposes of the expanded paid and unpaid FMLA leave for caring for child whose school, daycare, or other childcare is unavailable due to the Coronavirus, the employee must provide reasonable notice if the necessity for such leave is foreseeable. The general rule under the FMLA is at least 30 days advance notice, but only to the extent the necessity for leave is foreseeable that far in advance. Otherwise, the employee must simply provide notice as soon as possible and practical.

40. What obligation does the employer have to inform employees of their new FMLA and paid sick leave rights?

All existing FMLA rules for providing notice of FMLA rights will continue to apply. Additionally, under the new paid sick leave law, employers are required to post a notice in conspicuous places on the premises of the employer where notices to employees are customarily posted. The DOL will be making a model notice available soon for such purpose.

41. If we already offer paid sick time or paid vacation/PTO time, can that count toward our obligation to provide paid sick leave under the new law?

The FFCRA gives employers no credit for any leave (paid or otherwise) provided under an employer's existing policies. The paid leave under the FFCRA would be in addition to what you already provide.

42. Can employers require employees to use their existing paid sick days or paid vacation/PTO days first?

The FFCRA prohibits forcing an employee to use their already accrued paid leave first.

43. If employees have already used some FMLA time this year, will that limit their time under the expanded FMLA provisions?

Yes. Unless further guidance says otherwise, the new law merely expands the reason for being eligible to take FMLA leave to include caring for a child whose school/daycare is closed or child care is unavailable due to the Coronavirus, and it provides for up to two weeks of unpaid followed by ten weeks of paid leave. However, it does not expand the maximum total FMLA time available. An employee's use of FMLA time, however, does not affect his/her ability to use the new paid sick leave if eligible.

44. If we have a self-funded health plan, are we required to cover COVID-19 testing or is it optional? Does the requirement relate only to actual COVID-19 testing, or does it also cover screening or doctor visits for someone with symptoms?

The FFCRA requires all group health plans (including self-funded plans) and group health insurance issuers to cover FDA-approved COVID-19 diagnostic testing products without any cost sharing requirements (including deductibles, copayments, and coinsurance), prior authorization, or other medical management requirements. Costs covered include the items and services furnished during a provider visit (office, telehealth, urgent care, and emergency room) to the extent those items and services relate to the furnishing or administration of the testing product or the evaluation of the individual's need for the testing product.

II. EMPLOYER / EMPLOYEE RIGHTS

1. If an employee refuses to come to work because he or she feels uncomfortable being around others due to potential COVID-19 exposure, do we have to accommodate the employee? Do we still have to pay the employee?

No. An employee has no right to refuse to perform work out of a generalized fear. You certainly want to be sensitive to those issues, but a general fear gives the employee no right to refuse to work. Although you do not have an obligation to accommodate the request not to come to the workplace at this time (under current law), we think most employers would accommodate that and most health professionals would recommend accommodating that if possible. If you have no way to accommodate a request to work from home, you have no obligation at this time to pay the employee who will not come to work out of a generalized fear alone.

2. We have several employees that have health ailments and are more likely at higher risk than most. Can such employee make the decision to stay home due to their underlying health ailment/condition?

Employees do not have a legal right to stay home because of fear of getting sick. The underlying conditions of such employees may, combined with the crisis, support a serious health condition finding under our existing FMLA rules. Such a condition may also support a recommendation by a health care provider to self-quarantine, in which case such employee would be entitled to paid sick leave under the new law.

3. Can we require personnel to notify us if they are infected? If so, how should we do so?

You have a legal right to require employees to notify you if they have tested positive, had contact with someone who tested positive, or believe they would test positive if a test were available. How you require that depends on your employee communication systems.

4. Can we send an employee home if we believe the employee is sick?

Yes. If an employer has a reasonable belief that an employee is sick, the employer has a right to send the employee home.

5. Can we send an employee home who has been in confined space with a sick employee (or other individual) but is showing no signs of illness?

You have a right to take that action. Anecdotally, health professionals have been consistent in recommending 14 days of self-isolation for individuals who come into contact with an individual diagnosed with COVID-19.

6. Can employees refuse to travel if travel is regularly required of their job?

Under OSHA, an employee can only refuse to work when there is a realistic threat present. Given the current climate, is it difficult to tell whether normal travel would give rise to a realistic threat, but it would depend upon the circumstances. We recommend trying to work out an amicable resolution with the employee regarding travel for work.

7. Can we restrict employees' personal travel?

Yes. Under normal circumstances, you generally would not be able to prohibit otherwise legal activity, such as travel abroad by an employee. However, given the current environment, it would not be unreasonable to restrict such travel, and there are no federal laws that would prohibit you from terminating an employee who refuses to abide by that request, provided it is administered in a nondiscriminatory way. Note, however, that there may be state laws that would prohibit such restrictions on employees.

8. Can we ask an employee to get tested for COVID-19 if he or she has been on personal travel?

Generally, yes. However, testing presents a significant conflict here. Some health professionals want more testing so they can give more specific self-isolation instructions. Other health professionals want to closely guard testing availability to reduce the over-tasking of the health care delivery system. Many of our clients are trying to avoid instructing an employee to get tested to avoid the risk to the healthcare providers and the burden to the system in light of the limited value that testing provides.

9. Can we refuse to let an employee work from home if he or she has the option during the pandemic? What if the employee is at high risk?

Yes. It is the employer's right to decide who is allowed to work from home and who is not.

10. As a small business owner, I may not be able to let all similarly situated people work remotely. Is there a problem with allowing some people to work remotely and disallowing others?

As long as you have a legitimate business reason for who you let work remotely and who you do not, you will not have a legal risk in making that decision.

11. What if we have a pregnant employee and her doctor recommends that she work from home?

You should accommodate that request in the same manner you would accommodate a similar request from a non-pregnant employee with a similar short-term medical issue.

12. If we have a pregnant employee who works in the lobby with customers coming in, should we allow her to stay home?

As it relates to pregnant employees, the Pregnancy Discrimination Act obligates us to treat them the same as other employees with similar short-term physical limitations, if the employee *requests* an accommodation. We have no right to instruct the employee to take any action because of her pregnancy.

13. If an employee has a pre-existing condition and is encouraged to stay home, are we required to pay the employee?

Under the new paid sick leave law, if the requirement to stay home is based on the recommendation of a health care provider, then you are required to give paid sick leave. Depending upon the particular condition, it is possible that the decision to encourage the employee to stay home could implicate the ADA or another similar

federal or state law, in which case you would need to try to accommodate the employee if possible. You can always require the person to work remotely and continue to pay him/her if that is a possibility for the given employee/position. Otherwise, unless another provision entitling such employee to paid leave under the new or an existing paid leave law applies, it will be up to the employer to make that determination in coordination with its policies and contracts.

14. Can we require workers to take their accrued vacation now, and/or require workers to take paid holiday time now and to work the holidays when they come around?

Maybe. Some state laws will treat paid leave as earned wages and you have to be careful implementing anything new that might reduce an employee's vested benefits under such state laws. As it relates to the new sick and FMLA leave, once the new law goes into effect on April 2, employers must provide the sick and/or FMLA leave to those who qualify and claim it before the employer may require the employee to use any otherwise available leave benefits their employer may offer. Note, however, that nothing in the new law indicates that employers may not require employees to use other paid leave prior to the effective date of the FFCRA.

15. Can we require an employee to stay home after spending a week in an area with widespread Coronavirus cases without her displaying any symptoms? If so, do we have to pay the employee?

If you tell an employee who is ready, willing, and able to work that he/she cannot based on your conclusions about his/her safety or the safety of others, the best course is to pay the employee. Legally, however, you do not have to pay a non-exempt employee unless he/she is working. You have to pay a salaried exempt employee his/her weekly salary for any workweek in which he/she performed any work, subject to requiring that the employee use accrued paid leave for non-working days.

16. If we force employees to telework, do we have to pay for employees' internet or remote work equipment (computer, phone, etc.)?

You are not required to pay for the employees' equipment; however, you may want to evaluate whether you want to pay for some equipment generally or on a case-by-case basis as a part of your overall teleworking policy.

III. HIPAA AND CONFIDENTIALITY

1. Can we share the name of the employee with the virus if those impacted ask?

Maybe, but we generally recommend against it unless it is absolutely necessary. Remember that the minimum necessary standard under the HIPAA privacy rule still applies, meaning that you (as the plan sponsor of your company's health plan) can only share the minimum amount of protected health information (PHI) necessary for the given purpose of the disclosure. The difficult part of this determination is that you are really acting in two capacities: (1) as plan sponsor of the health plan and (2) as employer.

If you request or require your employees to inform you of a COVID-19 infection, then you generally are doing so as an employer for purposes of protecting your workforce. When acting as an employer, you are not acting as a covered entity under HIPAA. However, you may also be subject to privacy rules under other laws like the ADA or state laws. Regardless of HIPAA applicability, employees will be sensitive to confidentiality. We recommend asking the employee who tests positive to identify employees with whom he/she worked closely (within 6 feet) and then contacting those employees to advise them of the potential exposure, but avoid disclosing the name of the infected individual.

2. Can we ask the infected employee if they are comfortable with you disclosing their name? Written consent to disclose?

Yes. If you feel disclosure of the employee's name is necessary, we would recommend getting written consent, both in the form of a HIPAA individual authorization as plan sponsor and in the form of a general authorization as employer.

3. Can we share an employee's COVID-19 diagnosis with public health authorities?

Yes, but the key, as always, is to limit the disclosure to the minimum necessary for the given purpose. When there is a legitimate need to share information with public health authorities and others responsible for ensuring public health and safety, covered entities may share PHI to enable the authorities to carry out their public health responsibilities.

4. If we have an employee that tested positive, do we have to report it to the public health authority?

Currently, there is no federal requirement to report employees who have tested positive for COVID-19. We are also not aware of any state or local requirements to do so, but the situation is fluid. Nevertheless, we would recommend reporting positive tests, without disclosing personal information, for purposes of assisting public health authorities in the fight against the COVID-19 outbreak.

5. Can I take an employee's temperature at work to determine whether he/she might be infected?

Yes. The Equal Employment Opportunity Commission (EEOC) confirmed that taking an employee's temperatures is permissible given the current circumstances. The ADA generally places restrictions on medical inquiries from an employer, including taking an employee's temperature; however, the EEOC recognized the need to allow employers to do things like take employees' temperatures now because the CDC and state and local health authorities have acknowledged the outweighing risk of COVID-19 community spread. Note that some state privacy laws may require advance notice; so, it is important to check the privacy laws for the state(s) in which you operate.

IV. EXEMPT AND NON-EXEMPT EMPLOYEES UNDER THE FLSA

1. Do we have to pay our salaried non-exempt employees for the whole week even if they do not work for the whole week? What about salaried exempt employees.

Salaried exempt employees generally must receive their full salary in any week in which they perform any work, subject to certain very limited exceptions. Salaried non-exempt employees, under the FLSA, generally must only be paid for the time actually worked. Otherwise, the obligation to pay full salary will be contractual and/or may be subject to state wage laws.

2. Can an employer reclassify an exempt employee to non-exempt so that we can reduce the employee's hours for a certain period of time?

It remains the employer's right to classify an employee as exempt. Non-exempt is the default rule. So, yes, this could certainly be implemented at the employer's discretion on a temporary basis.

3. Can I reduce my salaried exempt and/or salaried non-exempt employees' salaries by 10%?

Generally, yes, provided that the reduction does not cause any employee's total salary to drop below required levels under the FLSA. You will also be subject to existing employment contracts, and you will want to make sure the salary reductions are implemented in compliance with any state wage laws.

4. If we transition a salaried exempt employee to hourly non-exempt on furlough, will the employee lose his/her benefits?

Generally, no, but it will depend upon your plan documents. Eligibility may be based on employee class or hours worked. If you wish to maintain benefits for those that may temporarily lose eligibility under the terms of the plans, you should work with your insurance carriers and counsel and amend your plan documents as needed to allow this.

V. UNION EMPLOYEES / COLLECTIVE BARGAINING AGREEMENTS

1. Can we make changes to unionized employees' work schedules or duties in response to the Coronavirus?

You cannot act unilaterally with respect to unionized employees in a way that is inconsistent with a collective bargaining agreement (CBA). To the extent you think you need to do something different from what is provided for under the terms of the CBA, you will need to give notice and an opportunity for the union to bargain before implementing a change. Note that some CBAs contain provisions that allow for employer flexibility in determining work assignments, scheduling, and layoffs; however, you should review your CBA carefully with counsel before making determinations related to union employees.

2. Does our CBA exempt us from having to comply with the FFCRA leave provisions with regard to our union employees?

No. Generally, a CBA can provide greater protection than that afforded by law, but it cannot provide less protection. However, the FFCRA does permit employers covered by multiemployer bargaining agreements to make additional contributions to their multiemployer trust or benefit plans in lieu of offering the new paid leave.

VI. RETIREMENT PLANS

1. Will hardship distributions from a 401(k) be taxable?

Eligible hardship distributions are still taxable as ordinary income; however, they are exempt from the 10% penalty for early distributions from a qualified retirement plan.

2. What qualifies an employee for a hardship distribution? Is the financial impact from the Coronavirus outbreak enough to qualify?

Whether an individual qualifies to take a hardship distribution is going to be based on the retirement plan documents/what the plan sponsor allows. The hardship distribution rules have been expanded in recent years, but ultimately, the plan document is still going to control. So, you need to look at the document in addition to what the rules allow.

3. Does anything in the new laws change the ability to take retirement plan distributions or loans?

There is nothing to that effect in the FFCRA; however, the most recently published drafts of the Phase 3 Bill include provisions that would allow for the withdrawal of up to $100,000 from retirement accounts without the imposition of the 10% penalty for Coronavirus-related reasons without the need to otherwise qualify under the existing hardship withdrawal rules. We will see whether these provisions remain in the final version.

4. Can employers change their 401(k) match during this time?

Generally, yes, but only prospectively, and it may depend on the type of plan you have and the provisions in your plan. For example, if you have a safe harbor plan, this will limit your ability to make some mid-year plan changes. Some mid-year changes may be limited by the anti-cutback rules. Others may be allowed but will cause the plan to lose its safe harbor status.

5. Do the 401(k) hardship distribution rules also apply to 403(b) plans and IRAs?

The same general rules apply to 403(b) plans. IRAs are subject to more limited hardship distributions only for specific items like certain healthcare expenses, higher education expenses, and first-time homebuyer expenses.

6. Most plans provide, and most recordkeepers only allow, loan repayments from payroll deductions. How do we handle loan repayments for employees who are furloughed and temporarily not receiving paychecks?

Unfortunately, there is not a good answer to this problem. The retirement plan rules generally require that plan loans be repaid on a regular basis (at least quarterly), and it seems that the only way to do this from an administrative perspective is through pre-tax payroll deductions. You may need to work with your plan's recordkeeper to try to find an administrative solution. Nonetheless, under the Phase 3 law, there will likely be some relief in the form of allowing current distributions and plan loans without penalty or normal repayment requirements.

VII. ADDITIONAL QUESTIONS

1. What is the difference between layoff and furlough?

There is no legal difference between the terms. However, a furlough generally implies that there is simply a mandatory, temporary, unpaid leave, while a layoff implies that there is a full separation of employment. For legal purposes, whether someone's employment has terminated, however, will depend upon the situation, including for what purpose you are making the determination. For example, the rules may differ as to what constitutes termination of employment for purposes of health and welfare plan rights vs. state unemployment eligibility.

2. Does an employer need to give notice to employees for PTO policy changes?

State law is wide and varied on this issue because PTO is treated as a vested right to compensation under many state laws. We would encourage you to work with employment counsel in your state before implementing such a change.

3. If employees go on COBRA, and if we rehire them back, will they be subject to a new waiting period to be eligible for benefits?

Waiting periods would be waived if the employees were on FMLA or other protected leave. Otherwise, whether the rehired employees are subject to a new waiting period would be determined under your plan documents.

4. Are there workplace cleaning standards we should follow if an employee tests positive for COVID-19?

For workplace cleaning standards, we recommend consulting your local environmental services provider. We have found them to be working actively to develop industry standard cleaning techniques. The CDC also has provided cleaning recommendations on their website: CDC Environmental Cleaning and Disinfecting Recommendation.

5. Do we need an employer response plan?

There is no requirement under any applicable law to have such a plan. We recommend it to establish that you act prudently in the face of these threats and comply with the generalized obligation to provide a safe work environment.

6. Will an employee who alleges to have contracted COVID-19 at work be eligible for workers' compensation?

Workers' compensation insurance generally does not cover an employee who contracts a virus. Carriers have made some exceptions for healthcare workers who contract a virus where the occurrence arose out of and occurred in the course of employment, but these exceptions are rare.

7. How do we find out if our business is an essential service?

You should start by reading of the state/local governmental order limiting essential services (because different orders are defining essential services differently). However, we certainly think you want to arm your people with something in writing that establishes their "essential work" if you have them out in the midst of an order to shelter in place. Maynard Cooper is currently working with a number of clients to address this very question. For those operating in areas subject to shelter in place orders, we recommend working with counsel to determine and/or establish a reasonable position for whether your business constitutes an essential service to be able to continue to operate in some capacity.

8. Can we still ask employees to pay their benefit premiums while on unpaid leave?

Generally, yes. Your cafeteria plan document will typically provide the options that are available for employees to pay premiums and other benefit costs during paid or unpaid leave. In many cases, the plan document may leave it up to the discretion of the administrator. You will, however, want to consider how the continued premium payments will work administratively for employees who normally pay premiums through pre-tax payroll deductions when they are no longer receiving a paycheck.