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RLG *Updated* Top COVID-19 FAQs for Employers
(current as of April 6, 2020)

This is a continuation of our March 31, 2020 FAQs which can found here.

15. Someone has tested positive in the workplace. What should we do?

First, we encourage you to allow employees to express their feelings as they may be scared or anxious. Next, you should have a plan in place to minimize the risk of the virus spreading. If you don't have a plan, you should put some protocols in place.

When you speak with the employee you will want to ask them which coworkers they have been in "close contact" with within the prior two weeks. (The CDC defines "close contact" as "a person that has been within six feet of the infected employee for a prolonged period of time.") If everyone in your company has been working from home during the last two weeks, this may be unlikely there was contact. However, you should still ask if the infected person had contact with any coworkers. You should alert those who have been in close contact with the employee as soon as possible, repeat the advice given on the CDC site and direct them to their own physician. You should tell everyone who was possibly exposed at work to the positive employee about the exposure, without revealing the employee's identity. This information is time sensitive so you will want to alert the coworkers as soon as possible, using email, if that's the only way possible.

Essentially, your message should be: "Someone in our workplace has tested positive for COVID-19 (or has COVID-19 symptoms), and they have identified you as a close contact according to the CDC definition. If you are at work, we ask you to leave [immediately – depending on situation]. Once home, self-isolate, monitor yourself for any symptoms, and talk to your doctor, if you have or develop symptoms." Be sure to ask how you can support the employee during this process.

16. Does contracting COVID-19 constitute having a disability under the Americans with Disabilities Act (ADA)?

For exposed employees who experience no symptoms, or only mild, temporary symptoms, COVID-19 on its own, is unlikely to qualify as a "disability" under the ADA. However, an employee who contracts COVID-19 may be entitled to reasonable accommodation and protection under the ADA if the employee's reaction to COVID-19 is severe or if it complicates or exacerbates one or more of an employee's other health condition(s)/disabilities. The ADA requires employers to assess whether a particular employee is "disabled" under the ADA on a case-by-case basis, taking into account the employee's particular reaction to the illness, their symptoms and any other relevant considerations. In addition, COVID-19 may qualify as a disability under applicable

state disability laws with definitions of "disability" that are less stringent than the ADA's definition.

17. When can that employee actually use EPSL for self-quarantine?

An employee is only eligible for EPSL, for their own quarantine, if a health care provider directs or advises the employee to stay home or otherwise quarantine themselves because the health care provider believes that the employee may have COVID-19 or is particularly vulnerable to COVID-19 and prevents the employee from working or teleworking. This means that an employee saying they are scared to come to work is not enough for EPSL nor is it enough for an employee to not work, when you have telework available for them. If the employee fits one of the other reasons for EPSL, then he/she may be able to take it for one of those reasons.

18. How is it that someone could get 14 weeks of leave for EFMLA and EPSL combined?

In addition to EPSL, employees are entitled to take up to 12 weeks of EFMLA leave for "a qualifying need related to a public health emergency." This "qualifying need" is limited to circumstances where an employee is unable to work (or telework) to care for a minor child if the child's school or place of childcare has been closed or is unavailable. Thus, an employee cannot exceed a total of 12 weeks of leave during the applicable 12-month period, including EFMLA. Any amount of FMLA leave an employee uses earlier in that same 12-month period reduces EFMLA entitlement. For example, if during an applicable FMLA 12-month period an employee takes 6 weeks of FMLA leave, the employee has 6 weeks of EFMLA leave left to use in that same period. Similarly, during a single FMLA 12-month period, an employee can use a combination of FMLA and EFMLA leave, up to a maximum amount of 12 weeks.

If an employee exhausts all 12 workweeks of FMLA or EFMLA, the employee can still use of any remaining EPSL leave that has not already been taken, in which case it is possible that the employee could end up taking 14 weeks (instead of 12).

19. If a Child's School or Child Care is Closed, What Must the Statement Provide?

In the case of a leave request based on a school closing or childcare provider unavailability, the statement from the employee should include:

1. The name and age of the child (or children) to be cared for,
2. The name of the school that has closed or place of care that is unavailable, and
3. 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,
4. 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.

As highlighted in Nos. 3 and 4 above, the IRS takes the position that ***the employee alone*** must be providing care to the child, making clear that leave then would be unavailable if both parents or

another individual is present to care for the child. Also, in the case of a 15- to 17-year old child, the employee must identify "special circumstances" requiring the employee to provide care. If the employee cannot do so, they cannot take EPSL or EFMLA.

20. What are the "real" reasons employees can take EPSL?

For EPSL, an employee can take up to ten days/two weeks of paid sick leave for any one of ***six*** reasons:

1. The employee is subject to a quarantine or isolation order. An employee may only take the leave when the employee would otherwise be able to perform the work or telework permitted by the employer had the order not been in place. Note that if an employer's business is shutdown as a result of an order, it is not required to provide paid leave to employees, because the *employer* – not the employee – is the subject of the order to shut down. In other words, EPSL and EFMLA will not apply where an employer no longer has work for an employee. For example, an employee has work available to him/her for telework. The employee is not entitled to EPSL if work is available and they can work from home (this assumes they are not experiencing COVID-19 symptoms or taking care of someone with COVID-19 symptoms … or taking care of a child who is off of school (more on that later!)). If there is work in the workplace (not telework) and the employee chooses not to work, that is not a basis for EPSL – even if there is a shelter in place. The DOL gives an example of an employee not being able to telework because of a power outage … really? Ok, if the employee can't telework because of a power outage, they can maybe get EPSL, but I would be cautious about how this is implemented.

2. The employee is advised by a health care provider to self-quarantine. DOL provides the roadmap for leave when the employee is advised to self-quarantine. In this situation, a health care provider must advise the employee to self-quarantine on a belief that one of the following apply:

    a) the employee has COVID-19;
    b) the employee *may have* COVID-19; or
    c) the employee is particularly vulnerable to COVID-19; and
    d) the employee in this situation also must be ***unable*** to work or telework.

3. The employee is experiencing symptoms and seeking a medical diagnosis for COVID-19. The regulations clarify that an employee who experiences the symptoms of fever, dry cough, shortness of breath, or other COVID-19 symptoms identified by the CDC *and* is affirmatively taking steps to obtain a medical diagnosis, may be eligible for paid leave. Both the symptoms and the step-taking are critical here. Also included in the period of leave is time spent making, waiting for, or attending an appointment for a test for COVID-19.

4. The employee is caring for an individual who has been quarantined or been advised to self-quarantine. An "individual" means either an immediate family member,

roommate, or a person with whom the employee has a relationship and would be expected to care for the employee if the roles here were reversed.

5. The employee is caring for a child because of school or childcare closures. Where the employee requests leave to care for a child whose school or place of care is closed, DOL adopts recently-issued IRS guidance by limiting EPSL and EFMLA only to those situations where the employee must actually care for the child and no other suitable person (*e.g.*, co-parents, co-guardians, or the usual childcare provider) is available to care for the child during the period. If another caretaker is available to care for the child, the employee is not entitled to leave.

6. The employee is experiencing any other substantially similar condition that may arise as designated by the Secretary of Health and Human Services. We still have no idea what this means. The DOL states that will issue guidance when and if this becomes defined by the Department of Health and Human Services.

21. An employee has tested positive for coronavirus after traveling to a high-risk area for business reasons. What are our obligations, if any, to report this?

The Occupational Safety and Health Administration (OSHA) urges employers to report incidents of coronavirus known or suspected to have been contracted by employees while working. State occupational safety and health agencies may impose similar obligations. Employers should treat suspected occupational coronavirus infection cases as reportable incidents. This is a departure from OSHA guidelines that exempt recording of common colds and influenza infections, even when a worker is infected on the job. 29 C.F.R. § 1904.5(b)(2)(viii).

22. May an employer ask employees who do not have coronavirus symptoms to disclose whether they have a medical condition that could make them vulnerable to coronavirus complications?

Generally, no. The EEOC states that in the absence of severe pandemic conditions (unclear as to how "severe" is defined), asking employees without symptoms whether they have underlying medical conditions or disabilities that may render them more vulnerable to coronavirus complications is considered a prohibited disability-related inquiry. However, in the context of accommodating employees with high-risk conditions, employers are permitted to let employees know of accommodations available to those with high-risk conditions (or other disabilities) that are more affected by the pandemic. If an individual employee volunteers that they have a disability or underlying medical condition that puts the employee at high risk, whether in connection with a request for time off, telework arrangement, personal protective equipment or other reasonable accommodation, the employer must keep this voluntarily disclosed information confidential. Employers may still engage in an interactive dialogue with employees who request a specific reasonable accommodation to determine the reasonableness of the request, whether the accommodation (or an alternative) will enable the employee to perform the essential functions of his job, and whether the accommodation poses an undue burden.

23. Employees are complaining about working and what they think is our failure to clean and sanitize work areas. Thus, they don't want to work. Can we tell them to stop their group chat about these issues or manage it somehow?

The National Labor Relations Act (NLRA) applies to unionized and non-union employers and protects employees' right to engage in concerted activity for their mutual aid and protection, which includes, without limitation, discussing the terms and conditions of their employment and any workplace safety or hygiene risks. If two or more covered employees are engaged in discussions about perceived workplace safety hazards, their communications may constitute protected concerted activity, and disciplining them for these discussions or attempting to chill their protected concerted activity may result in an unfair labor practice charge. We encourage employers to continue to update employees on internal cleaning and sanitizing processes and even get feedback from employees on what the company can improve on as it relates to their protection in the workplace.

24. If we lay someone off, how do we know they will get unemployment? What if we reduce salary by a percentage? Will a salaried exempt person get UI benefits if they receive a reduction in pay?

Most UI offices are saying the same thing: "You should apply for unemployment benefits if your employer reduced your wages. The UI Program asks questions about other sources of income when you request payment (vacation pay, sick pay, Social Security benefits, pensions, etc.). Report the payments you received accurately, and we will determine your eligibility for the week." Thus, you should encourage anyone to apply and the UI office will analyze the reduction with benefits allowed.