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RLG *Updated* Top COVID-19 FAQs for Employers
(current as of April 15, 2020)

This is a continuation of our April 6, 2020 FAQs, which can be found here.

25. Does an employer have to accommodate an employee who refuses to come to work because of a preexisting mental health condition that is exacerbated by COVID-19?

Possibly. Recent EEOC guidance provides that absent an undue hardship, employers may need to accommodate employees with existing mental illnesses who may have more difficulty dealing with the disruptions caused by the COVID-19 pandemic. Examples of mental illnesses identified by the EEOC that may require an accommodation include anxiety disorder, obsessive-compulsive disorder and post-traumatic stress disorder.

Employers should follow the usual method of determining what accommodation, if any, should be provided. This includes determining whether a disability exists, engaging in the interactive process with the employee, requesting medical documentation when appropriate, and determining whether a reasonable accommodation exists or whether such an accommodation would cause an undue hardship.

26. When can an employer require the use of PTO when an employee is on FFCRA leave?

- An employer can never require an employee to substitute PTO for EPSL. The employee can elect that substitution, but an employer cannot force the use of PTO for this reason.
- If an employee is taking leave to care for a son or daughter whose school or place of care is closed, or childcare provider is unavailable, due to COVID-19 related reasons, the employee qualifies for both EPSL and EFMLA. It is the employee's choice whether to use EPSL during the initial two unpaid weeks of EFMLA (for which both types of leave will run concurrently) or save the EPSL for later use for another qualifying reason. An employer cannot force an employee to use EPSL during those initial two unpaid weeks of EFMLA.
- It appears that an employer can require an employee to use PTO during the two weeks of unpaid EFMLA (if they are not using EPSL, in which case you run them concurrently) if the employer's policy requires use of PTO when an employee is taking unpaid *regular* FMLA. In other words, an employer can require an employee to use available PTO during the unpaid portion of an EFMLA school closure or loss-of-child care COVID-19 leave. If an employer so requires, the PTO runs concurrently with their EFMLA.

- An employer and employee can agree to "top-off" EPSL or EFMLA (up to the employee's regular pay) but the employer cannot require it.

Please note: Many states have paid sick and safe leave laws and those must be taken into account here. If the employer is in such a state, please seek legal counsel on which leave can (or must) be taken first.

27. Can an employer require an employee who is not working due to COVID-19, or presumed COVID-19, to provide a negative test or a doctor's release before allowing him/her to return to work?

Testing is still extremely limited and healthcare providers are still overburdened. Some states have issued orders prohibiting employers from requiring a doctor's release or other certification as a condition of returning to work. Instead, an employee should be allowed to return to work no fewer than three days after they last had a fever (without the need for medication) and no fewer than seven days after first becoming symptomatic.

28. Can an employer allow a critical infrastructure worker to continue to work after their potential exposure to COVID-19?

The CDC defines "potential exposure" as having had household contact or close contact (within six feet) with an individual with a suspected or confirmed case of COVID-19. Recent relaxed guidelines by the CDC advise that an employee may be permitted to continue to work following a potential COVID-19 exposure if the employee remains asymptomatic and the employer implements additional precautions, which include:

- The employer should check the employee's temperature and assess symptoms prior to the employee starting work and entering the workplace.
- The employee should continue to self-monitor their temperature and symptoms and immediately alert the employer if they experience any COVID-19 symptoms.
- The employee should wear a face mask in the workplace for 14 days following the last exposure (the employer can provide face masks or can approve the employee's supplied cloth face covering).
- The employee should practice social distancing and remain six feet away from other employees and the public.
- The employer should routinely clean and disinfect all common areas, shared electronic equipment and bathrooms.

Critical infrastructure employees who become sick during the workday should continue to be sent home immediately. You should notify those who had contact with the ill employee when the employee had symptoms, and those the employee had exposure to for the two days prior to the symptoms appearing.

If employers are using employees to perform workplace cleaning, and are using cleaners other than household cleaners with more frequency than an employee would use at home, employers must also ensure workers are trained on the hazards of the cleaning chemicals used in the workplace

and maintain a written program in accordance with OSHA's Hazard Communication standard (29 CFR 1910.1200). Employers can download the manufacturer's Safety Data Sheet (SDS) and share with employees as needed, and make sure the cleaners used are on your list of workplace chemicals used as part of your Hazard Communication Program.

29. How can we help our employees distinguish between a suspected but unconfirmed case of COVID-10 or another kind of illness?

This is not an easy determination. You will want to use the factors like whether they had a suspected but unconfirmed case of COVID-19 in their household or questions regarding travel, etc. Employers should err on the side of caution but not become panicked when someone has symptoms. The EEOC says that an employer can inquire into an employee's symptoms, even if such questions are disability-related, as you would be considered to have a "reasonable belief based on objective evidence that the severe form of pandemic influenza poses a direct threat." The most common symptoms of COVID-19 are fever and a dry cough. This helpful chart can help you and your employees distinguish between the COVID-19 coronavirus, the seasonal flu, or a common cold.

30. Is an employer required to provide or pay for a cloth face covering for its employees?

Most likely, if the employer requires its employees to wear cloth face coverings at work.

OSHA standards generally require employers to provide personal protective equipment (PPE) to employees free of charge, with some exceptions. Employers are not required to pay for "everyday" clothing (and one could argue that cloth face coverings are "everyday clothing") but employers should provide and/or pay for the coverings *if they require employees to wear them in the workplace*.

Some state and local governments are requiring masks or face coverings to be worn in public and by employees who interact with the public or other employees. In such situations, and depending on the state or local law, employers would be required to provide and/or pay for them.

31. Is COVID-19 a recordable illness for purposes of OSHA Logs?

OSHA has published recent guidance on this issue. OSHA recordkeeping requirements mandate covered employers record certain work-related injuries and illnesses on their OSHA 300 log. You must record instances of workers contracting COVID-19 if the worker contracts the virus while on the job. The illness is not recordable if worker was exposed to the virus while off the clock.

You are responsible for recording cases of COVID-19 if:

- The case is a confirmed case of COVID-19;
- The case is work-related, as defined by 29 CFR 1904.5; and
- The case involves one or more of the general recording criteria set forth in 29 CFR 1904.7 (e.g. medical treatment beyond first-aid, days away from work).

Recognizing the difficulty in determining whether COVID-19 was contracted while on the job, OSHA will not enforce its recordkeeping requirements that would require employers in areas where there is ongoing community transmission to make work-relatedness determinations for COVID-19 cases, except where:

- There is objective evidence that a COVID-19 case may be work-related; and
- The evidence was reasonably available to the employers.

This waiver of enforcement does not apply to employers in the healthcare industry, emergency response organizations (e.g., emergency medical, firefighting and law enforcement services), and correctional institutions in areas where there is ongoing community transmission. These employers must continue to make work-relatedness determinations.

32. What are the potential employment-related claims that will likely come out of COVID-19?

We anticipate that there will be many claims coming out of this pandemic. In particular, we are concerned about the Fair Labor Standards Act (FLSA), such as failure to pay employees while taking temperatures or requiring certain cleaning processes prior to entering the workplace. We also anticipate benefit-related issues, wrongful termination and retaliation claims, because employees feel they were forced to work in unsafe conditions or were denied leave, or even forced into quarantine. We also anticipate OSHA complaints will be front and center for employers that are essential businesses and operating during the stay-at-home orders.

We suggest employers do the following:

- Carefully review insurance policies or renewal policies and work with your agent to create a list of potential coverages available for the COVID-19 or other pandemic situations.
- Review contracts with suppliers, vendors, and customers and determine whether the company is an additional insured under those insurance policies. If so, they should review the policies for potential coverage and add the policies to the list of potential coverages available.
- Document, in as much detail as possible, any known or suspected exposure to the COVID-19 in the workplace. Create procedures to document exposures with the date, time, location, and all known circumstances. Facts will be critical in any coverage disputes.
- Provide notice to insurance companies in accordance with the terms of the policies under both the company policies and any policies where the company is an additional insured. Policyholders often lose coverage for failing to notify in accordance with policy terms.
- Stay up to date on state legislation. Many states are working on or adding workers' compensation coverage for COVID-19 claims.
- Document any employment-related actions you take against an employee for COVID-19 or non COVID-19 related reason.
- Update policies and procedures, showing that you are in constant communication with employees about workplace issues and new/updated policies and practices.

33. Is there an employer notification requirement for the FFCRA?

Yes. Each covered employer must post a notice of the Families First Coronavirus Response Act (FFCRA) requirements in a conspicuous place on its premises. An employer may satisfy this requirement by emailing or direct mailing this notice to employees or posting this notice on an employee information internal or external website. Employers are not required to post this notice in multiple languages, but the DOL is working to translate it into other languages. The FFCRA notice applies only to current employees and employers are under no obligation to provide the notice to prospective employees. If you have a new hire, you must convey this notice to them, as you would a current employee.

34. What are the types of COVID-19 related payroll tax credits available to employers?

The three types of available payroll tax credits correspond to:

- Wages, employer health plan expenses, and Medicare taxes paid by eligible employers for required EPSL under FFCRA (FFCRA Section 7001);
- Wages, employer health plan expenses, and Medicare taxes paid by eligible employers for required EFMLA under FFCRA (FFCRA Section 7003); and
- Wages and employer health plan expenses paid by eligible employers to or on behalf of certain employees during the COVID-19 crisis (CARES Act section 2301).

EFMLA/EPSL Tax Credits: An employer is generally eligible for PPP loans under the CARES Act even if the employer is also receiving EFMLA/EPSL tax credits under FFCRA; however, the amount of "payroll costs" included in the loan will not include the amount of wages/expenses for required EFMLA/EPSL under FFCRA and the loan proceeds may not be used for wages/expenses for required FFCRA EFMLA/EPSL for which a tax credit is allowed.

Employee Retention Tax Credit: The CARES Act provides a refundable payroll tax credit equal to 50% of qualified wages for certain "eligible employers" for wages paid or incurred between March 13, 2020 and December 31, 2020 (an "employee retention tax credit"). An employer may not however "double up" on tax credits for the same wages. Thus, an employer may not take an employee retention tax credit for required EFMLA/EPSL wages under FFCRA for which the employer also receives a payroll tax credit. Further, employers may not receive an employee retention tax credit if the employer also receives a PPP loan.

CARES Act section 2301(l)(3) specifically requires Treasury to issue regulatory guidance on how the IRS will recoup the tax credit if an employer receives a credit and then also receives a PPP loan, so it appears an employer's eligibility for a PPP loan will not be affected by taking the tax credit – rather, there will be some form of repayment or offset of the tax credit if the employer also receives a PPP loan. In this regard, taking the tax credit may affect the amount of forgiveness available (meaning, a reduction in the amount of loan forgiveness may be how Treasury decides to recoup the credit). However, given the current lack of guidance, we do not have certainty on what position Treasury will take.

Payroll Tax Deferral: Under CARES Act section 2302, an employer may defer the employer portion of Social Security taxes due between March 27 and December 31, 2020, provided at least 50% of the deferred taxes are paid by the end of 2021 and the remainder is paid by the end of 2022. However, employers that have their indebtedness forgiven under the Paycheck Protection Program are not eligible to defer these taxes.

Here again, it is unclear from the statutory language precisely how this provision would work. However, on April 10, the IRS issued guidance clarifying that an employer may defer the employer's portion of Social Security taxes until it actually receives a decision from its lender that its PPP loan has been forgiven. At that point, the employer may no longer defer the employer portion of Social Security taxes. Importantly, no Social Security taxes deferred prior to the date of loan forgiveness will immediately become due – the employer is permitted to delay depositing previously-deferred taxes until the applicable due dates (i.e., December 31, 2021 and December 31, 2022).

35. Who Is Eligible for the Additional $600 a Week in Unemployment Benefits?

The DOL issued guidance to states on the Federal Pandemic Unemployment Compensation (FPUC) program, which provides an additional $600 weekly payment to certain people who are receiving state unemployment compensation. Under the FPUC, individuals must first apply for and be approved to receive regular state benefits. Thus, it is now confirmed that anyone who receives an unemployment benefit from the state, whether full or partial, may receive the additional $600 a week. The DOL noted that "if the individual is eligible to receive at least one dollar ($1) of underlying benefits for the claimed week, the claimant will receive the full $600 FPUC." However, people who are not entitled to an underlying benefit for any given week will also not be eligible for FPUC benefits for that week. The additional $600 is payable through the unemployment benefit week ending on or before July 31. So, in a state where the benefit week ends on a Saturday, FPUC benefits may be paid through July 25, and if a benefit week ends on a Sunday, the FPUC benefits may be paid through July 26.