

**Frequently Asked Questions**

# **Responding to COVID-19 in the Workplace**

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## **FAQ: Responding to Covid-19 in the Workplace**

FNA Insurance Services has developed the following FAQs to help HR leaders and business owners respond to the many employee relations issues resulting from the coronavirus crisis. These FAQs address many of the complex challenges facing our clients. Some content has been taken from federal publications, such as EEOC and DOL FAQs. For information on business insurance and risk management issues, visit the [FNA Coronavirus Resource Center](#) on [fnainsurance.com](http://fnainsurance.com)

### **Health and Safety**

#### **1. During a pandemic, may an employer require its employees to adopt infection-control practices, such as regular hand washing, at the workplace?**

**Yes.** Requiring infection control practices, such as regular hand washing, coughing and sneezing etiquette, and proper tissue usage and disposal, does not implicate the ADA.

#### **2. During a pandemic, may an employer require its employees to wear personal protective equipment (e.g., face masks, gloves, or gowns) designed to reduce the transmission of pandemic infection?**

**Yes.** An employer may require employees to wear personal protective equipment during a pandemic. However, where an employee with a disability needs a related reasonable accommodation under the ADA (e.g., non-latex gloves, or gowns designed for individuals who use wheelchairs), the employer should provide these, absent undue hardship.

#### **3. Is COVID-19 Considered an “Illness” under OSHA’s Recordkeeping Rules?**

**It Depends.** OSHA’s recordkeeping rules apply only to injuries or “illnesses.” The rule defines an injury or illness as “an abnormal condition or disorder.” Illnesses include “both acute and chronic illnesses, such as, but not limited to, a skin disease, respiratory disorder, or poisoning.” Despite this broad definition, OSHA has essentially excluded from coverage cases of the common cold or the seasonal flu. OSHA has [made a determination](#) that COVID-19 should not be excluded from coverage of the rule – like the common cold or the seasonal flu – and, thus, OSHA is considering it an “illness.” However, OSHA has stated that only confirmed cases of COVID-19 should be considered an illness under the rule. Therefore, if an employee simply comes to work with symptoms consistent with COVID-19 (but not a confirmed diagnosis), the recordability analysis would not necessarily be triggered at that time.

#### **4. Is a COVID-19 Case Considered Recordable?**

**It Depends.** If an employee has a confirmed case of COVID-19, the employer would need to assess whether the case was “[work-related](#)” under the rule and, if so, whether it met the rule’s additional recordability criteria (i.e., resulted in a fatality, days away from

work, restricted duty, or medical treatment beyond first aid). Given current protocols for treating COVID-19, it is likely that for any case that is confirmed, the additional severity criteria will be met, as affected persons are instructed to self-quarantine and stay home. The primary issue for employers therefore becomes whether a particular case is “work-related.”

A particular illness is work-related under the rule if an event or exposure in the work environment either caused or contributed to the resulting condition or significantly aggravated a pre-existing injury or illness. Work-relatedness is presumed for illnesses that result from events or exposures in the work environment, unless certain exceptions apply. One of those exceptions is that the illness involves signs or symptoms that surface at work but result solely from a non-work-related event or exposure that occurs outside of the work environment. Thus, if an employee develops COVID-19 solely from an exposure outside of the work environment, it would not be work-related, and thus not recordable.

The employer’s assessment should consider the work environment itself, the type of work performed, risk of person-to-person transmission given the work environment, and other factors such as community spread. Healthcare work environments, where job activities are more likely to result in person-to-person exposure, would present a more likely scenario of work-relatedness than non-healthcare settings. Because each work environment is different, employers must conduct an individualized assessment when a confirmed case of COVID-19 presents.

#### 5. **Is a COVID-19 Case Reportable?**

**It Depends.** As with the recordability analysis above, if an employee has a confirmed case of COVID-19 that is considered work-related, an employer would need to report the case to OSHA if it results in a fatality or in-patient hospitalization of one or more employees. It is important to note, however, that the reporting obligation is [time-limited](#). Thus, if a fatality due to COVID-19 occurs after 30 days from the workplace incident leading to the illness, an employer is not required to report it. Similarly, if the in-patient hospitalization occurs after 24 hours from the workplace incident leading to the illness, an employer is not required to report. Given the nature of COVID-19 and the disease progression, this may result in fewer reports to OSHA despite expected hospitalization of cases going forward.

### **Impact of COVID-19 on the Workplace and Employee Attendance**

#### 6. **Can I prohibit an employee from personal travel to an affected area?**

**No.** Employers cannot prohibit employees from taking personal trips and vacations.

#### 7. **Can I ask an employee where he or she may be traveling?**

**Yes.** Employers may ask employees where they are traveling.

**8. Can I require an employee who travels to an effected area to take a COVID-19 test and provide the results before returning to work?**

**Likely No.** However, employers can ask employees to self-quarantine for 14-days prior to returning to work.

**Ability to Work or Requirement Not to Work**

**9. If an employee is diagnosed with COVID-19, can I require that he or she provide a release to work from his/her doctor prior to returning to work?**

**Yes, But.** The CDC, OSHA, and the DOL all urge employers to be flexible. It is likely that healthcare providers are overwhelmed with patients and care therefor, documentation requests are likely going to be put aside for some time.

**10. Can I send sick employees home? Similarly, may employers prevent employees who may be sick or have a contagious condition from coming to work?**

**Yes, But.** Be sure to treat all contagious conditions the same. Employees should be sent home not because of fear of COVID-19 but in a consistent effort to minimize other employees' exposure to any sort of contagious condition. In fact, the CDC recommends that employers require all sick employees to stay home.

**11. Do I have to allow employees to work from home?**

**No, But.** Employers generally are not required to allow employees to work from home. However, the EEOC has been clear that allowing a worker to work from home may be a reasonable accommodation under the ADA. Moreover, if employers have allowed employees to work from home for other reasons then they should be consistent in allowing work-from-home arrangements under these circumstances.

The underlying reason for the employees' request to work from home may be a determining factor. Employees who are merely afraid to come to work may not be eligible for work from home. Conversely, employees who have greater health risks associated with exposure or who may have been exposed may be eligible to work from home.

Employers should also consider the OSHA General Duty Clause which imposes on employers' the obligation to provide a safe working environment. Employers may want to allow employees to work remotely if requiring employees (who could otherwise work remotely) to come in the office would great a health and safety risk for the employees.

**12. Can an employer require an employee to disclose his or her diagnosis of COVID-19? Likewise, Can an employer require an employee to disclose his/her exposure to someone diagnosed with COVID-19?**

**It Depends.** Under the FMLA, employers are entitled to all of the information contained on the Certificate of Health Care Provider for Employee's own Serious Health Condition. Likewise, under the ADA, the diagnosis information is allowed so long as it's pursuant to the employer's effort to identify a reasonable accommodation for the employee to perform the essential functions of the job.

The CDC advises that employees who are well but who have a sick family member at home with COVID-19 should notify their supervisor and refer to CDC guidance for how to conduct a risk assessment of their potential exposure. If an employee is confirmed to have COVID-19, employers should inform fellow employees of their possible exposure to COVID-19 in the workplace but maintain confidentiality as required by the Americans with Disabilities Act (ADA). Employees exposed to a co-worker with confirmed COVID-19 should refer to CDC guidance for how to conduct a risk assessment of their potential exposure.

**13. Must I allow an employee to work remotely if the employee is under government-imposed quarantine?**

**It Depends.** WHD encourages employers to be accommodating and flexible with workers impacted by government-imposed quarantines. Employers may offer alternative work arrangements, such as teleworking, and additional paid time off to such employees.

**14. If I temporarily close my business may I lay off some of the employees and retain others in a "furlough" status?**

**Yes, But.** Employers must be sure that they are not disparately selecting those who are laid off versus those who are "furloughed". In other words, employers must be sure that those who are adversely affected are not of one predominant protected class (such as race, religion, gender, age, or disability).

### **Pay and Compensation Rules**

**15. May I deduct time not-worked from an exempt employee's pay?**

**Generally No.** Exempt, salaried employees generally [must receive their full salary](#) in any week in which they perform any work, subject to certain very limited exceptions. Where an employer offers a bona fide benefits plan or vacation time to its employees, there is no prohibition on an employer requiring that such accrued leave or vacation time be taken on a specific day(s). This will not impact the employee's salary basis of payment so long as the employee still receives in payment an amount equal to the employee's guaranteed salary.

However, an employee will not be considered paid “on a salary basis” if deductions from the predetermined compensation are made for absences occasioned by the office closure during a week in which the employee performs any work. Exempt salaried employees are not required to be paid their salary during full weeks in which they perform no work.

#### **16. Do employers have to pay employees their same hourly rate or salary if they work at home?**

**It Depends.** If telework is being provided as a reasonable accommodation for a qualified individual with a disability, or if required by a union or employment contract, then you must pay the same hourly rate or salary.

If this is not the case and you do not have a union contract or other employment contracts, under the FLSA employers generally have to pay employees only for the hours they actually work, whether at home or at the employer’s office. However, the FLSA requires employers to pay non-exempt workers at least the minimum wage for all hours worked, and at least time and one half the regular rate of pay for hours worked in excess of 40 in a workweek. Salaried exempt employees generally must receive their full salary in any week in which they perform any work, subject to certain very limited exceptions

#### **17. May an employer cancel an employee’s pre-scheduled vacation time?**

**Yes.** The FLSA does not require employer-provided vacation time. Therefore, an employer may direct employees when to use (or not use) vacation time and/or take time off. Further, a private employer may direct exempt staff to take vacation or debit their leave bank account in the case of an office closure, whether for a full or partial day, provided the employees receive in payment an amount equal to their guaranteed salary. In the same scenario, an exempt employee who has no accrued benefits in the leave bank account, or has limited accrued leave and the reduction would result in a negative balance in the leave bank account, still must receive the employee’s guaranteed salary for any absence(s) occasioned by the office closure in order to remain exempt.

#### **18. Does the company have to pay for a canceled trip?**

**Generally No.** Employers may make the business decision to assist employees with cancellation fees however most airlines and hotels have created blanket waiver programs allowing flexibility and cancellations.

#### **19. Will workers’ compensation cover an employee who can claims that he/she contracted COVID-19 at work?**

**It Depends.** Workers’ compensation laws regarding communicable/occupational diseases vary from state to state. Generally, the employee would have to show that they were in a higher rate or more susceptible rate than the general public. This is a very high standard which will be difficult to meet unless, for example, their employer sent them to China or Italy (they have a ban) or are healthcare workers providing care for COVID-19 patients. Employers should submit claims to the workers’ compensation carrier and allow the carrier to adjudicate the claim and make the coverage

determination. The Longshore and Harbor Workers' Compensation Act regulations regarding communicable/occupational diseases are similar in that, subject to the situs/status requirements, to be found compensable, the exposure must be the result of a specific incident and not simply exposure to a general health risk.

**20. Are businesses and other employers required to cover any additional costs that employees may incur if they work from home (internet access, computer, additional phone line, increased use of electricity, etc.)?**

**Generally No.** Employers may not require employees who are covered by the FLSA to pay or reimburse the employer for such items that are business expenses of the employer if doing so reduces the employee's earnings below the required minimum wage or overtime compensation. Employers may not require employees to pay or reimburse the employer for such items if telework is being provided to a qualified individual with a disability as a reasonable accommodation under the Americans with Disabilities Act.

### **Medical Inquiries**

**21. Can I take the temperature of each employee, each day, to be sure that there aren't any workers who may be ill?**

**It Depends.** Measuring an employee's body temperature is a medical examination prohibited by the Americans with Disabilities Act (ADA).

However, in 2009 the EEOC issued [guidance](#) in connection with the H1N1 influenza virus pandemic and concluded that temperature checks of individual employees in the event of a pandemic may be legally permissible under the ADA if it is job-related and consistent with business necessity. A similar determination has been made regarding COVID-19. Temperature checks may be used to determine the presence of COVID-19 in an employee if done in a non-discriminatory manner. This means that employers who wish to use temperature-taking should have the same employee take temperatures (preferably one who has experience taking temperatures) for each incident and the employer should set a threshold temperature to ensure a fair, standardized process.

**22. May an employer covered by the ADA and Title VII of the Civil Rights Act of 1964 compel all of its employees to take the influenza vaccine regardless of their medical conditions or their religious beliefs during a pandemic?**

**No.** An employee may be entitled to an exemption from a mandatory vaccination requirement based on an ADA disability that prevents him from taking the influenza vaccine. This would be a reasonable accommodation barring undue hardship (significant difficulty or expense). Similarly, under Title VII of the Civil Rights Act of 1964, once an employer receives notice that an employee's sincerely held religious belief, practice, or observance prevents him from taking the influenza vaccine, the employer must provide a reasonable accommodation unless it would pose an undue hardship as defined by Title VII ("more than de minimis cost" to the operation of the employer's business, which is a lower standard than under the ADA).

**23. Can we require an employee to notify the company if they have been**

**exposed, have symptoms, and/or have tested positive for the COVID-19 coronavirus?**

**Yes.** Employers should require any employee who becomes ill at work with COVID-19 coronavirus symptoms to notify their supervisor. Employees who are suffering from symptoms should be directed to remain at home until they are symptom-free for at least 24 hours. While outside of work, if an employee begins experiencing symptoms, has been exposed to someone that is exhibiting symptoms, or has tested positive, the employee should contact your company by telephone or email and should not report to work.

**24. An employee has tested positive for COVID-19, can we share this with our employees? No, However.** if the employer learns of the employee's medical information, condition, diagnosis etc. through the health plan, then that information is likely Protected Health Information (PHI) and protected under HIPAA. In that case, the employer (or employees of the employer) who know absolutely cannot share the medical diagnosis or other medical information unless it is facing a true medical emergency where the employee's diagnosis becomes imperative for health and safety reasons or the employee has given a written HIPAA-compliant authorization to share the information. In certain circumstances, the employer may also disclose information to public health authorities without authorization, although those circumstances are limited.

However, an employer has an obligation to inform employees if there is/has been a threat to their safety in the workplace. As such, an employer has an obligation to inform employees (especially those working in the same area as the affected employee) that an employee is/was sick with COVID-19. Under HIPAA, an employer cannot give specific names, but a general statement should be sent out.

**25. An employee has self-quarantined due to potential exposure to COVID-19, can we share this information with our employees?**

**No.** If an employee has self-quarantined due to potential exposure to COVID-19, this information is considered to be PHI. In that case, the employer (or employees of the employer) who know absolutely cannot share the medical diagnosis or other medical information unless it is facing a true medical emergency where the employee's diagnosis becomes imperative for health and safety reasons or the employee has given a written HIPAA-compliant authorization to share the information.

### **Leaves of Absence**

**26. Are employees eligible to take FMLA for his or her own diagnosis for COVID-19?**

**It Depends.** The two most relevant qualifying events are: (1) employee's own serious

health condition; and (2) to provide care for a family member with a serious health condition. A “serious health condition” is an illness, injury, impairment, or physical or mental condition that involves inpatient care or continuing treatment by a health care provider. This means that the FMLA will not apply to an employee who is simply afraid to come to work. To qualify as a serious health condition, the employee is unable to work, perform any one of the essential functions of his or her position, attend school, or perform other regular daily activities because of the serious health condition. A serious health condition also requires a regime of treatment or recovery from the serious health condition.

So long as FMLA eligibility requirements are satisfied, employees who are diagnosed with the Coronavirus or are medically quarantined for suspicion of having Coronavirus may be eligible for FMLA since Coronavirus satisfies both the inpatient care and the continuing treatment prongs of the FMLA.

## 27. Must an employer grant leave to an employee caring for a family member that is diagnosed with COVID-19?

**Yes.**

Congress has passed the **Families First Coronavirus Response Act (FFCRA)**. Within that bill, employees are awarded paid leave (known as Emergency Paid Leave) for certain enumerated reasons. One reason is to care for a family member who has been the subject of a quarantine or isolation order by a federal, state, or local government. Another is if that family member has been advised by a health care provider to self-quarantine. Because an individual diagnosed with COVID-19 would be quarantined by a health care provider or the government as a matter of course, the employee will be given up to 80 hours (for a full-time employee) to care for such a family member. This leave is paid at 2/3 the employee's regular rate of pay, up to \$200 per day and \$2,000 in total.

The FMLA may also provide an avenue for an employee to take leave to care for a COVID-19 afflicted family member. FMLA has a narrow definition of “family member,” therefore, if the employee is seeking leave to care for a family member that is not covered under FMLA, then FMLA would not apply. Furthermore, the family member must be experiencing a “serious health condition,” and the employee's need for leave is because (1) the family member is unable to care for his/her own medical, safety or other needs; (2) the family member needs help in being transported to the doctor; and/or (3) the employee is providing psychological comfort and reassurance to the family member.

## 28. Must I allow an employee to take time off because he or she is afraid of contracting COVID- 19?

**Generally No.** Employers have been encouraged to review current leave of absence / time off policies and be ready to be more flexible. While “being afraid to come to work” is itself not a qualifying leave reason under any regulated leave entitlement, employers may nonetheless consider how flexibility to their leave of absence / time off policies – which includes telecommuting policies – help balance the current situation. Maintaining open lines of communication is encouraged.

### 29. Must I allow parents time off to care for children who have been dismissed from school?

**Yes.** Both the Emergency Paid Sick Leave and the FMLA Expansion that were created under the FFCRA provide time off for employees to care for minor children when the child's school or daycare is unavailable due to the COVID-19 pandemic. The two leaves combined provide an employee with up to 12 weeks of paid leave at 2/3 his or her regular rate up to \$200 per day (maximum \$12,000).

### 30. Must I provide paid sick leave to employees who are out of work because they have COVID-19 or have been exposed to a family member with influenza?

**Yes.** Emergency Paid Sick Leave under the FFCRA provides paid leave for employees who are quarantined by the government or a health provider because of COVID or COVID-like symptoms. Full-time employees are given 80 hours of time off and part-time employees are given time off equal to their average number of hours worked in 2 weeks.

### 31. May employers change their existing paid sick leave or paid time off policy?

**Yes But.** Employers may change their sick leave or paid time off policy so long as it is done in a manner that does not discriminate between employees because of a protected class (such as race, gender, age, religion, national origin, and/or disability). While employers contemplate revising their paid time off programs given the current situation, employers are encouraged to think through several important considerations, such as (1) what are the qualifying reasons for the pay; (2) do employees need to provide documentation to be paid; (3) what will the pay rate be; (4) how does the pay coordinate with other benefits, e.g., Short Term Disability. This applies to any "pandemic pay" or "relief pay" programs employers may consider providing.

An employer may not alter their time-off policy to remove any time that the employee would otherwise be entitled to under the FFCRA.

### 32. Will employees who are personally affected by COVID-19 receive Short Term Disability benefits?

**It Depends.** Generally, Short Term Disability insurance carriers have indicated that they are remaining status quo with respect to their STD claims handling. They will review each claim submitted on a case-by-case basis, whether the reason for initiating a STD claim is due to quarantine or because the employee has been diagnosed with COVID-19. In either scenario, the employee has to satisfy the definition of "disability" per the STD plan.

### 33. May employers change their STD plan designs to provide STD benefits to individuals affected by COVID-19?

**Generally No.** If you have a fully insured STD plan with a disability insurance carrier, the short answer is "no." If you have a self-funded STD plan, the disability carrier/vendor may work with you to expand your STD program, particularly to provide STD benefits for those quarantined due to COVID-19. However, be prepared to provide very specific parameters and definitions to the disability carrier/vendor for how this expanded STD benefit would exist. Furthermore, clients have asked whether they can eliminate any STD elimination period for those filing for STD benefits due to COVID-19. We advise

against this because of disability discrimination concerns.

**34. Has COVID-19 impacted statutory disability insurance and paid family/medical leave requirements?**

**Yes But.** Not all statutory disability insurance and paid family/medical leave requirements have responded similarly. For instance, California has expanded their State Disability Insurance (SDI) and Paid Family Leave (PFL) benefits to cover those quarantined or diagnosed with COVID-19. By contrast, Washington's Paid Family Medical Leave (PFML) has expanded to cover those diagnosed with COVID-19, but not those who are quarantined. Furthermore, not all states with statutory disability and/or paid family/medical leave requirements have made changes – as of now, some have not yet expanded their programs.

**35. If I outsource leave administration to a third party vendor, will they track COVID-19-related absences for me?**

**It Depends.** Third party vendors who provide leave administration services, including Short Term Disability benefit administration, are closely monitoring the impact of COVID-19 and assessing how best to evolve their administrative services in turn. If you outsource leave administration, we encourage you to contact your vendor partner to understand how their capabilities and services are or are not changing.

**Employee Benefits**

**36. Do employer sponsored health plans cover testing for and treatment of COVID-19?**

**Yes.** Under the [Families First Coronavirus Response Act](#), all health plans, whether private, governmental or church plans, are required to cover COVID-19 testing without cost sharing. This does not extend to treatment.

**37. Is there cost sharing for these services?**

**No.** Under the Families First Coronavirus Response Act, all health plans, whether insured, self-insured, private, governmental or church plans, are required to cover screening and COVID-19 testing without cost sharing.

**38. Can High Deductible Health Plans (HDHPs) provide testing for and treatment of COVID-19 without cost sharing?**

**Yes.** Under [IRS Notice 2020-15](#), an HDHP may cover testing and treatment related to COVID-19 without compromising the plan's status as a Qualified High Deductible Health Plan.

**39. Can employer sponsored health plans be modified to expand their coverage for treatment of COVID-19, such as waiving deductibles, or lowering ER copays related to COVID-19 for treatment (in addition to the required coverage for screening and testing)?**

**Maybe Yes, But** fully-insured health plans are limited to the changes their insurance carrier will allow. Individual carriers establish their own policies for plan modification, which includes not allowing any form of modification.

Self-insured plans may make mid-year plan design changes by working with their TPA and stop-loss carriers.

#### 40. Do self-insured plans face any unique risks related to modification of plan terms?

**Yes.** Employers with self-insured plans face potential risks related to their stop-loss coverage if they make mid-year plan design changes. Stop-loss policies apply to claims properly incurred under the terms of the plan in effect at the beginning of the plan year. Mid-year modification of plan terms risks claims incurred under the new plan terms being denied by the stop-loss carrier. Employers who “carve out” (i.e., use a different stop-loss carrier than TPA) their stop-loss coverage are especially at risk as the carrier will not be made aware of any plan design changes unless notified by the employer. However, since the plan is legally-required to cover testing, stop-loss carriers should cover it. Even so, self-insured employers with stop-loss may want to confirm that with their stop-loss carriers.

#### 41. Can telemedicine be included in the categories of services covered without cost sharing?

**It Depends.** Several states have required and some insurance carriers have recently announced they will provide their integrated telemedicine services to plan participants without cost sharing. Self-insured plans have discretion whether they cover telemedicine without cost sharing or not.

A potential problem arises however with HDHPs as current guidance does not allow plans to cover items through telemedicine (other than COVID-19 related testing and treatment) without cost sharing. HDHPs offering telemedicine (other than COVID-19 related testing and treatment)

without cost sharing may technically make employees ineligible to make HSA contributions. However, trade groups are in communication with the IRS on this issue.

#### 42. An employee is on a leave of absence related to COVID-19, what happens to their benefits?

**It Depends.** This answer will vary depending on the applicability of FMLA and/or state leave of absence laws to the employee’s request for leave. If FMLA applies, benefits are protected for up to 12 weeks of leave. During this time, employees on leave are entitled to maintain the same benefits offered to active employees and at the same rates. Employees are however required to pay their portion of benefits while on leave. Employers can offer one or more of the following options for payment:

- **Payment up front.** Under this method the employee pays for their benefits prior to taking leave. This **cannot** be the only option offered to employees.
- **Periodic payments.** Under this method employees on leave make regular payments to the employer directly for their benefits. This method can also include payroll deductions if any portion of the leave is paid, such as via the use of PTO

- or vacation time.
- **Payment upon returning to work.** Under this method, the employer pays the premium in full and the employee repays the employer for their portion of the premium when they return to work.

Employers must describe what options for payment are available under the plan and offer these options to all eligible employees under the plan.

Employers may also establish their own leave policies that may extend benefits in situations where FMLA does not apply, or after FMLA is exhausted. Employers policies must be written into the plan language. Employers who do not have a leave policy currently written into their plans, but wish to add one will need to work with their insurance provider (for fully-insured plans) or third-party administrator and stop-loss carriers (for self-funded plans).

#### **43. An employee on FMLA has not paid their portion of their premiums, can we terminate their coverage for non-payment?**

**It Depends.** This answer is dependent on the options the employer offers for payment of benefits while on FMLA described in the question above. Employers who offer payment upon returning to work cannot terminate benefits for non-payment while on leave.

If an employer requires payments to be made periodically while on leave benefits can be terminated when payment is 30 days late (unless the employer allows a longer grace period). To terminate benefits, the employer must provide written notice to the employee that the payment has not been received and allow at least 15 days after the date of the letter before coverage may be terminated.

Certain states (such as New York and New Jersey) have passed statewide executive orders extending the deadlines for premium payments of certain forms of insurance. An example of such an order can be found [HERE](#).

#### **44. How do we count hours of service under the ACA employer mandate for employees on leave due to COVID-19?**

**It Depends.** The ACA rules regarding hours of service and how they should be counted during an initial or a standard measurement period vary depending on the employee's source of income during a furlough, their illness, or the illness of a family member, or a reduction in hours of employment. Below please find a summary on how the rules work:

- a. If the employer continues to pay employees' salary without disruption as a result of a furlough, temporary closure, or if employees' work hours are reduced, these hours WILL count as hours worked.
- b. If an employee uses vacation and/or sick time while in quarantine, due to illness, during a furlough or temporary closure, or to supplement their income during a reduction in hours, those hours WILL count as hours worked.
- c. If the employee receives state disability insurance benefits, state Paid Family Leave benefits, or state Unemployment Insurance benefits, those

- hours WILL NOT count as hours worked.
- d. If employee receives benefits under an employer paid or an employee paid (pre-tax) disability insurance program, the hours WILL count as hours worked.

Self-funded employers should review their plan documents to ensure measurement periods and stability periods are referenced, as stop-loss carriers will follow the terms of the plan document when paying claims. For insured plans, it is important to confirm that carriers are honoring measurement periods and benefit continuation rules during a furlough or reduction in hours.

#### **45. Our business has slowed down, and we are temporarily furloughing/laying off employees, what happens to their health insurance?**

**It Depends.** If employees are terminated/laid off, even if potentially for a limited amount of time they will no longer be eligible for benefits as active employees and will be eligible for COBRA and/or state continuation coverage, as applicable.

If employees are furloughed (i.e., still employed but not actively working due to a business slowdown), they may potentially be eligible to continue coverage. Employers are urged to check with their insurance or stop-loss carriers on this point. However, if the furlough is unpaid, the cafeteria plan rules will allow employees to change their election to drop health and other coverages, if they so choose. (Note also that ACA rules may apply to applicable large employers. See the question above).

#### **46. Can we amend our plan to allow employees to be temporarily furloughed and remain eligible for benefits?**

**It Depends.** If furloughs are not currently addressed in the plan language, it may be possible to modify existing plan terms to allow for the continuation of benefits while on furlough.

Employers will need to work with their insurance carrier or TPA and stop-loss carriers on any modification of plan terms.

However, furloughed employees may not have the means to pay for continued coverage. Therefore, unless the employer is willing to absorb the costs, continuing coverage may not be practical. If the employer expects the employee to repay the premiums upon return to work, the employer should have employee's sign an agreement that allows for the repayment of past premiums upon the employee's reinstatement to a full-time position. If employees lose access to employer sponsored coverage, they can enroll in Exchange coverage, if they request enrollment within 60-days of the loss. Depending on their household income, employees may also receive premium tax credits to pay for their coverage or qualify for Medicaid coverage.

#### **47. If we change the status of full-time employees to part-time, what happens to their benefits?**

**It Depends.** If an ongoing full-time employee transfers to a position that would have been considered part-time if the employee had originally been hired into that position

(including by having his/her hours cut to a point where the employee would be considered part-time), the employer has two options:

1. Continue to offer coverage until the end of the stability period (typically the plan year). This is the only option for most employees; **or**
2. Offer coverage for three full months following the change in status and then terminate coverage on the first day of the fourth month following the status change (sometimes called the “[downshift](#)” rule).

Employers must also consider the following points with regard to the downshift rule:

- To be eligible to use the downshift rule, the employee must have been offered minimum value coverage continuously from the at least the first day of the fourth calendar month after they are hired through the date of the employment change. Therefore, employees whose hours were measured over a measurement period and determined to be full time are not eligible.
- To terminate coverage, the employer must measure the employee’s hours during the 3 full months following the status change to determine if the employee average less than 130 hours per month. If the employee average more than 130 hours per month then coverage cannot be terminated and the employer must again measure hours for another 3 months
- If coverage is terminated, the employer will use the monthly method for counting hours for the remainder of the measurement period. This means that if the employee loses coverage and goes to the exchange and receives a subsidy, the employer will be penalized for not offering coverage for any month the employee works more than 130 hours.

Note that a reduction in hours of employment that does not also make them ineligible for coverage is not a family status change. Therefore, unless the reduction in hours makes employees ineligible for benefits, the employees cannot change their elections in make benefit plan changes.

#### **48. Can we reduce the hours required to be eligible under our plan from 30 per week to 20 per week to maintain eligibility for employees working reduced hours?**

**It Depends.** Plans may be able to modify existing plan eligibility if their insurance or stop-loss carriers agree to the changes. Before considering modification of plan eligibility, employers should consider the long-term impact of this. For example, if only those who work 30 or more hours per week on average are currently eligible, reducing eligibility to 20 or more hours per week may allow those whose hours are reduced to remain eligible, but it will also create plan eligibility for those not currently eligible. Employers will need to work with their insurance or stop-loss carriers on any modification of plan terms.

#### **49. If employees are terminated and rehired, what happens to their benefits?**

**It Depends.** Under the ACA, Applicable Large Employers (ALEs) with 50 or more full-time equivalent employees must treat those employees who are rehired within 13 weeks (26 weeks for educational institutions) of separation as ongoing employees. These employees must become eligible immediately upon rehire, or as soon as administratively practicable.

Alternatively the ACA allows ALEs to use the Rule of Parity. Under this rule, employees who are separated for at least four consecutive weeks and the separation is longer than their last period of employment can treat these rehired employees as newly hired employees who must satisfy the applicable waiting period for benefits eligibility.

We discuss these rules in more detail [here](#). Additionally, employers may be more generous than required by the ACA so long as their practice is consistent with their plan language.

#### **50. Can we as the employer pay all or a portion of the cost of COBRA for employees who are laid off?**

**Yes, But** there are potential complications employers need to consider, such as eliminating an employee's opportunity to enroll in Exchange coverage and qualify for premium tax credits. We discussed this in detail [here](#). Employers may choose to subsidize all or a portion of the cost of COBRA for a period of time. Employers are urged to take a consistent approach for all impacted employees and should be aware of all the potential issues raised by subsidizing COBRA.

#### **51. Does our STD or LTD policy cover employees who are quarantined?**

**It Depends.** STD and LTD policies are designed to provide financial protection for covered individuals suffering from their own disability. An employee who is diagnosed with COVID-19 may be eligible for STD or LTD depending on the terms of the policy. Quarantine is not by itself a disability and thus generally would not fall under an applicable STD or LTD plan. However, a small minority of STD plans do cover quarantine. Clients should work with their FNA consultant to confirm.

#### **52. How do leaves of absence impact Flexible Spending Accounts (FSAs), Health Reimbursement Arrangements (HRAs) and Health Savings Accounts (HSAs)?**

**It Depends.** Employees on leaves of absence continue to have access to health FSAs and HRAs subject to the terms of the plan. HSAs are individual accounts that belong to the account holder and therefore are not impacted by leaves of absence.

However, employees may want to make election changes for their Health FSAs and HSAs, depending on their economic situations. Employees can change HSA contributions at any time. For Health FSAs, employees will need to have a permitted change in status. Going on an unpaid leave would generally qualify.

#### **53. How do leaves of absence impact Dependent Care Assistance Programs**

## **(DCAP)/Dependent Care FSAs?**

**It Depends.** DCAPs or Dependent Care FSAs may only be used on expenses considered employment-related. This means the expenses are for the care of one or more qualifying individuals and are incurred to enable the employee (or the employee's spouse) to be gainfully employed. An individual can be considered gainfully employed and experience short, temporary absences from work, such as for vacation or illness. The IRS safe harbor treats an absence of up to two consecutive weeks as a short temporary absence. Therefore, DCAP funds can still be used during the first two weeks of a leave of absence. Expenses incurred during a leave of absence that exceeds two weeks cannot be reimbursed by a DCAP without falling outside the applicable safe harbor, absent special circumstances.

### **54. Can employees change their elections for Dependent Care Assistance Programs (DCAP)/Dependent Care FSAs if their dependent care facilities close due to the virus?**

**Likely, Yes.** While there is no direct guidance on point, the rules regarding DCAPs or Dependent Care FSAs are pretty flexible in allowing election changes. Examples in the regulations allow employees to make changes if they change dependent care providers or to reduce their election if their child starts school and dependent care expenses are reduced. Based on these examples, it seems likely the IRS would allow an employee to reduce his/her DCAP/Dependent Care FSA election to \$0 due to the closure of a day care facility if no alternative arrangements are available, or if the employee is no longer working.

### **55. If we lay off employees and are now under 50 full-time equivalent employees are we still an applicable large employer and subject to the employer mandate? Are we still required to do reporting?**

**Yes.** An employer who is an ALE based on their 2019 employee counts is considered an ALE for the entire 2020 calendar year. This means they need to offer coverage to their full-time employees or pay a penalty for all of 2020. They will also need to report on the coverage offered for 2020 in early 2021. This applies even if the employer no longer has 50 or more full-time equivalent employees. It is possible however that, depending on 2020 employee counts, this employer may not be an ALE in 2021.

### **56. Is COVID-19 expected to cause prescription drug shortages?**

**No.** As of now, the major drug companies have indicated they do not expect any shortages of prescription drugs related to COVID-19.

### **57. Can employer plans allow prescriptions to be refilled more regularly to potentially mitigate disruption due to supply shortages?**

**It Depends.** Many insurance carriers have already announced changes to their rules on timing of prescription refills. These changes allow participants to obtain refills sooner than otherwise allowed by the plan. Employers with fully-insured plans are urged to

confirm with their insurance carriers what, if any changes have been made.

Employers with self-insured plans have leeway to modify existing plan terms, subject to (a) what the TPA and PBM can accommodate; and (b) what their stop loss carrier will allow. Employers with self-insured plans who wish to modify existing plan terms regarding prescription drugs will need to consult with their TPA, PBM and stop-loss carriers.

## 58. Are there other benefits issues to consider?

**Life and Disability Plans:** Life and disability insurance carriers may require that employees be actively-at-work for coverage to be honored. Please work with your FNA broker and your life and disability carrier to ensure benefit continuation will not be disrupted in the event of a furlough/temporary closure or when employee's hours are reduced below eligibility criteria. If you are changing life and disability carriers during this pandemic, confirm that they will not delay insuring employees who are not actively-at-work as a result of a closure or who have experienced a reduction in hours of employment.

**Commuter Benefits:** Notify employees to cease contributions into a commuter benefit program, if they are expected to work for home for a month or more. They can also reduce the monthly elections to reflect a decrease in the number of days they anticipate to commute into the office. If employees are terminated, note that unused amounts in their commuter benefit plans will forfeit, unless employees submit expenses for reimbursement incurred prior to the date of termination.

### **Cost Cutting Measures** **Layoffs/Reductions in Pay/Hours and Furloughs** *(See also Employee Benefits Section)*

## 59. Can I reduce my non-exempt (hourly) employees' rate of pay to help reduce expenses?

**Yes, But.** An employer is required by statute to pay a non-exempt employee at least the federal or state (whichever is higher) minimum wage (unless an employee has an employment agreement establishing a contractual rate of pay). The 2020 federal minimum wage is \$10.80 per hour.

## 60. Can I reduce my exempt (salaried) employees' rate of pay to help reduce expenses?

**Yes, But.** An employer is required by to pay an exempt employee at least the federal or state (whichever is higher) minimum salary (unless an employee has an employment agreement establishing a contractual rate of pay). The 2020 federal minimum salary is \$684 or \$35,568 annually.

## 61. Can I reduce my non-exempt employee's scheduled hours?

**Yes.** An employer is required to pay only the hours actually worked by their non-exempt employees. Therefore, they are able to reduce scheduled hours for those employees. They may allow their hourly employees to supplement their wages with any available

paid time off pursuant to the terms of the employer's leave policies.

**62. Can I reduce my exempt employee's scheduled hours?**

**Yes But.** An employer is free to determine its employee's work schedules. However, employers may not reduce an exempt employee's pay by the hours (or days) worked. The general rule for salaried/exempt employees is that they are required to be paid if they perform work at some point during the workweek. Unless your business is shut down (or an employee does not perform any work) for more than an entire workweek, your exempt employees are generally entitled to be paid for the entire week in which they worked.

**63. Can I furlough or place my employees in a leave status instead of terminating them?**

**Yes.** A furlough or leave of absence is a temporary suspension of employment for a specified period of time during which employees do not receive wages. An employer may implement a furlough as a cost-saving mechanism. For example, in response to a downturn in business, an employer may choose to place employees on furlough, rather than institute a permanent reduction in force. Employers must be careful when placing exempt employees on furlough, to ensure it is carried out in a manner that does not void their exempt status.

**64. May I select certain employees to remain "employed" (but may or may not be working") and others that will separated from the company?**

**Yes But.** An employer implementing a RIF must carefully consider its layoff selection criteria to prevent a disparate impact on employees in a particular protected class (where, for example, employees in a protected class, such as race or age, are affected more than what would be statistically expected given the demographics of all employees in the selection pool). This can involve various statistical analyses. Employers also should avoid any implication that employees were selected for having engaged in prohibited activity, such as making a discrimination complaint.

Employers should use objective, non-discriminatory and consistently applied selection criteria. Adopting pure seniority-based layoff criteria is the best way to minimize liability exposure. Employers should avoid using subjective criteria to make selections for a RIF, as they allow laid-off workers to claim that decision-makers' true motives were discriminatory and that the subjective factors were a pretext for unlawful decisions. Other layoff selection criteria that have withstood legal scrutiny by some courts include elimination of:

- An entire job function
- A particular department
- Redundant positions

Using high compensation levels as a selection criterion is not considered disparate treatment if it is not motivated by age. However, using this criterion can leave an employer more vulnerable to disparate impact claims under the ADEA because higher earning individuals tend to be among the older and more experienced employees.

## 65. Can I separate an employee on an FMLA leave of absence?

**Yes But.** Employers are not required to continue FMLA benefits or reinstate employees who would have been laid off or otherwise had their employment terminated had they continued to work during the FMLA leave period as, for example, due to a general layoff. An employee on FMLA leave is not protected from actions that would have affected him or her if the employee was not on FMLA leave. (U.S. Department of Labor - *FMLA Compliance Guide*). However, employers must be able to prove that the employee would have been laid off regardless of the FMLA leave.

## 66. Is there any special notice I must provide to employees during a mass layoff or business closure?

**It Depends.** The federal Worker Adjustment and Retraining Notification Act (WARN Act) covers employers that employ either:

- 100 or more employees, excluding part-time employees.
- 100 or more employees, including part-time employees, if the employees collectively work at least 4,000 hours each week excluding overtime.

An employer is not required to give notice under the WARN Act if:

- A plant closing affects only a temporary facility.
- A plant closing or mass layoff occurs because:
  - The particular facility, project, or undertaking was completed; and
  - Affected employees were hired with the understanding that their employment was limited to that facility, project, or undertaking.
  - A closing or layoff constitutes a strike or lockout not meant to evade the WARN Act.

If the WARN Act requirements are triggered, the employer must give written notice at least 60 days in advance of the plant closing or mass layoff to:

- The union representative of each affected employee (if applicable).
- Each affected employee not represented by a union.
- The state dislocated worker unit or office
- The chief elected official of the unit of local government where the layoff or plant closing will occur
- The federal government if foreign nationals working on certain visas are laid off. Consult immigration experts whenever foreign nationals on visas are affected by a reduction in force.

In addition, some states apply their own notice requirements on employers implementing a RIF (these state statutes are often called “mini-WARN Acts”). Employers should check the states where their layoff or plant closing will occur to determine whether state WARN Act requirements apply.



















