ADP Coronavirus (COVID-19) FAQ

Workplace Policies & Legislative Changes

UPDATED: July 10, 2020

OVERVIEW

The ADP Coronavirus (COVID-19) FAQ is designed to help you navigate the challenges you and your workforce are facing. This robust resource includes general information about COVID-19, important workplace policies, employee health and safety measures, significant legislative changes and more.

As a critical partner that millions of workers rely on, we understand the importance of our operation to our clients' businesses and their employees' livelihoods. We are taking unprecedented measures to ensure our associates are safe while our clients and their employees have the essential services and guidance they need to get through these trying times.

The information provided by ADP is for general informational purposes only and is not legal, accounting, or tax advice. The information and services provided by ADP should not be deemed a substitute for the advice of such professionals who can better address your specific concern and situation. Any information provided here is by nature subject to revision and may not be the most current information available on the subject matter discussed.

TABLE OF CONTENTS

ITEMS TO NOTE

- The information in this document is subject to change based on developments regarding COVID-19 regulations and guidelines. **As of June 12, 2020**, this material is current and accurate.

- **The Families First Coronavirus Response Act ("Families First Act") took effect on April 1, 2020**. It is not retroactive. See FFCRA section below for additional guidance.

- **The Coronavirus Aid, Relief, and Economic Security Act** ("CARES" Act) was enacted on March 27, 2020 and is the third major legislative initiative to address public health concerns and economic distress associated with COVID-19. The CARES Act is the

largest economic stimulus bill in American history and provides relief to individuals and businesses across the United States. See CARES Act section below for guidance.

- This is not an exhaustive list of all state / local legislation recently enacted or guidance issued due to COVID-19.

ADDITIONAL RESOURCES

- The **EEOC** has released helpful guidance addressing the intersection of the Coronavirus in the workplace with the Americans with Disabilities Act ("ADA"). Please click here for the latest information.

- **OSHA** has also released guidance pertaining to COVID-19. Click here for the latest information.

- The **DOL** has released information on the FFCRA and a temporary Rule. Please click here for Q&A and here for the temporary Rule. In addition, the DOL has released helpful guidance for employers on FFCRA paid leave. Please click here for Employer Paid Leave guidance.

- The **IRS** has released "Deferral of employment tax deposits and payments through December 31, 2020." Please click here for IRS FAQs.

- ADP is tracking emergency **state and local legislation** impacting paid sick leave, unemployment eligibility and other issues related to COVID-19. Click here for the latest Compliance Alerts by jurisdiction. For the latest **state and local agency guidance** on how paid sick leave, unemployment insurance, and other employment requirements apply to COVID-19, click here.

GENERAL INFORMATION

Q: Where can I find information about COVID-19?

A: The Centers for Disease Control and Prevention (CDC), the U.S. Occupational Safety and Health Administration and the World Health Organization have created dedicated webpages with information on COVID-19.

In addition, state and local health officials are developing guidelines and resources on the illness. Check your state and local Department of Health for additional information.

WORKPLACE SAFETY / OSHA COMPLIANCE

Q: What should I do if an employee informs me they have COVID-19? Should I tell co-workers? [Updated 05/13/2020]

A: If an employee is confirmed to have COVID-19, employers should inform other employees of their possible exposure to COVID-19 in the workplace but maintain confidentiality (that is, don't reveal who has the illness). Employers should treat all information about an employee's illness as a confidential medical record and keep it separate from the employee's personnel file.

As a precautionary measure, you may want to consider asking all employees who worked closely with that employee to self-quarantine for a 14-day period of time to better ensure that the infection does not spread, unless the workers involved are working in critical infrastructure, in which case, see the next question. In addition, as a best practice, you may want to consider asking a cleaning company to complete a deep cleaning of your workspace. If you work in a shared office building or area, then you may want to inform management so they can take any necessary precautions.

There is no obligation on the part of the employer to report it to the CDC, but employers should contact any applicable public health agencies. If requested to do so, an employer is permitted to share the name of an employee that that employer has learned has COVID-19. Make sure to check state/local laws for additional reporting requirements.

Q: Do I have to report an employee's diagnosis with COVID-19 for OSHA purposes? [Added 04/10/2020]

A: Only if a worker is infected as a result of performing their work-related duties. Employers are only responsible for recording cases of COVID-19 if all of the following are met:

- The case is a confirmed case of COVID-19 as defined by the Centers for Disease Control and Prevention (CDC)
- 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).

See Revised Enforcement Guidance for Recording Cases of Coronavirus Disease 2019 (COVID-19)

Q: Are there different rules for critical infrastructure workers? [Added 04/10/2020]

A: The CDC has issued interim guidance pertaining to when critical infrastructure workers who may have had exposure to person with suspected or confirmed COVID-19 should return to work.

Critical infrastructure workers include those working in the following areas:

- Federal, state and local law enforcement
- 911 call center employees
- Fusion Center employees
- Hazardous material responders from government and the private sector
- Janitorial and custodial staff
- Workers – including contracted vendors – in food and agriculture, critical manufacturing, informational technology, transportation, energy and government facilities

To ensure continuity of operations of essential functions, CDC advises that critical infrastructure workers may be permitted to continue work following potential exposure to COVID-19, provided they remain asymptomatic and additional precautions are implemented to protect them and the community.

A potential exposure means being a household contact or having close contact within 6 feet of an individual with confirmed or suspected COVID-19. The timeframe for having contact with an individual includes the period of time of 48 hours before the individual became symptomatic.

Critical Infrastructure workers who have had an exposure but remain asymptomatic should adhere to certain practices prior to and during their work shift. For more information, please visit the CDC's page at this link: https://www.cdc.gov/coronavirus/2019-ncov/community/critical-workers/implementing-safety-practices.html

Q: May employers ask employees if they have symptoms of COVID-19 infection? [Updated 04/13/2020]

A: Yes. The EEOC advises employers should rely on the CDC, other public health authorities, and reputable medical sources for guidance on emerging symptoms associated with the disease. These sources may guide employers when choosing questions to ask employees to determine

whether they would pose a direct threat to health in the workplace. For example, as of April 9, 2020, additional symptoms beyond fever or cough may include new loss of smell or taste as well as gastrointestinal problems, such as nausea, diarrhea, and vomiting.

Q: May employers send employees home if they develop symptoms of COVID-19 infection?

A: Yes. According to the EEOC. The EEOC has recognized that the CDC says employees who become ill with symptoms of influenza-like illness at work during a pandemic should leave the workplace. Advising such workers to go home is not a disability-related action if the illness is akin to seasonal influenza or the 2009 spring/summer H1N1 virus. Additionally, the action would be permitted under the ADA if the illness were serious enough to pose a direct threat. **Applying this principle to current CDC guidance on COVID-19, the EEOC says that this means an employer can send home an employee with COVID-19 or symptoms associated with it**.

Q: May I take an employee's temperature?

A: The EEOC has advised that, generally, measuring an employee's body temperature is a medical examination. Because the CDC and state and local health authorities have acknowledged community spread of COVID-19 and issued precautions, the EEOC has now advised that employers may measure employees' body temperature. However, the EEOC says that employers should be aware that some people with influenza, including COVID-19, do not have a fever.

Q: If I require all employees to have a daily temperature check, may I maintain a log of the results? [Added 04/13/2020]

A: Yes, but you need to maintain the confidentiality of this information.

Q: May employers ask employees whether they have traveled to designated WHO or CDC affected regions?
A: Yes, absent a claim that an employee has a recognized privacy interest in their travel activities. Employers should take steps to reduce any reasonable expectation of privacy that employees might have in those activities. You should also note that the list of affected regions is changing rapidly. Review current CDC guidance and recommendations on business travel for each country at https://wwwnc.cdc.gov/travel.

Q: May employers bar asymptomatic employees from entering the workplace if they share a household with someone who has (or is suspected to have) COVID-19?

A: Yes, given the close contact ordinarily experienced by household members, employers usually would be justified in barring employees from entering the workplace in these circumstances.

Q: Should I ask employees to notify me if they've come in contact with someone who has COVID-19?

A: Employers may ask employees to notify them if they have been in contact with someone who has COVID-19. If the an employee reports contact with someone who has COVID-19, direct the employee to the CDC's guidance for how to conduct a risk assessment of their potential exposure to assess whether they are low, medium or high-risk.

Q: All my employees touch the timeclock; how can I clean it?

A: As a rule of thumb, timeclocks can be cleaned the same way any sensitive optical equipment like a camera would be. The CDC provides guidance on Cleaning and Disinfecting Your Facility including electronics. Click here for alternative methods for using the ADP Biometric and Pin entry timeclocks.

Q: Can OSHA cite an employer for failing to control hazards related to COVID-19? [Added 04/16/2020]

A: There is no specific OSHA standard covering COVID-19. However, some OSHA requirements may apply to prevent occupational exposure to COVID-19. Among the most relevant are:

- OSHA's Personal Protective Equipment (PPE) standards (in general industry, 29 CFR 1910 Subpart I), which require using gloves, eye and face protection, and respiratory protection.

- When respirators are necessary to protect workers, employers must implement a comprehensive respiratory protection program in accordance with the Respiratory Protection standard (29 CFR 1910.134).

- OSHA has issued temporary guidance related to enforcement of respirator annual fit-testing requirements for healthcare.

- The General Duty Clause, Section 5(a)(1) of the Occupational Safety and Health (OSH) Act of 1970, 29 USC 654(a)(1), which requires employers to furnish to each worker "employment and a place of employment, which are free from recognized hazards that

are causing or are likely to cause death or serious physical harm.

- Hazard Communication standard (in general industry, 29 CFR 1910.1200) requires employers to protect their workers from exposure to hazardous chemicals. Some of the common products used for cleaning and disinfection as well as sanitizers and sterilizers may contain hazardous chemicals.
- The General Duty Clause, Section 5(a)(1) of the Occupational Safety and Health (OSH) Act of 1970, 29 USC 654(a)(1), which requires employers to furnish to each worker "employment and a place of employment, which are free from recognized hazards that are causing or are likely to cause death or serious physical harm.
- OSHA's Personal Protective Equipment (PPE) standards (in general industry, 29 CFR 1910 Subpart I), which require using gloves, eye and face protection, and respiratory protection.
    - When respirators are necessary to protect workers, employers must implement a comprehensive respiratory protection program in accordance with the Respiratory Protection standard (29 CFR 1910.134).
    - OSHA has issued temporary guidance related to enforcement of respirator annual fit-testing requirements for healthcare.
- Hazard Communication standard (in general industry, 29 CFR 1910.1200) requires employers to protect their workers from exposure to hazardous chemicals. Some of the common products used for cleaning and disinfection as well as sanitizers and sterilizers may contain hazardous chemicals.

Q: Does OSHA have resources or guidelines for COVID-19? [Added April 16, 2020]

A: OSHA has published guidance on preparing workplaces for COVID-19. It focuses on actions all employers can take to reduce their workers' risk of exposure to coronavirus. Employers and workers should use this planning guidance to help identify risk levels in workplace settings and to determine any appropriate control measures to implement. Additional guidance may be needed as COVID-19 outbreak conditions change, including as new information about the virus, its transmission, and impacts, becomes available.

You can stay up to date by checking the following resources:

- The Centers for Disease Control and Prevention (CDC) COVID-19 webpage: www.cdc.gov/coronavirus/2019-ncov.

- The OSHA COVID-19 webpage: www.osha.gov/covid-19.

Q: What does OSHA recommend employers to do to reduce workers' risk of exposure to

COVID-19? [Added April 16, 2020]

A: OSHA recommends the following:

- Develop and implement an infectious disease preparedness and response plan that considers and addresses the levels of risk associated with your employees' worksites and job tasks
- Implement basic infection prevention measures including frequent and thorough hand washing
- Develop and implement policies and procedures for prompt identification and isolation of sick people
- Develop, implement, and communicate about workplace flexibilities and protections such as encouraging sick employees to stay home and sick leave policies that are flexible and consistent with public health guidance
- Implement additional safety measures appropriate for your workplace such as additional ventilation and providing up-to-date training to employees on risk factors and protective behaviors

OSHA RECORDKEEPING

Q: Is an employee confirmed with COVID-19 recordable on the OSHA 300 Log? [Added 06/05/2020]

A: COVID-19 can be a recordable illness if a worker is infected as a result of performing their work-related duties. However, employers are only responsible for recording cases of COVID-19 if all of the following are met:

1. The case is a confirmed case of COVID-19 as defined by the Centers for Disease Control and Prevention (CDC)
2. The case is work-related, as defined by 29 CFR 1904.5; and
3. 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).

See Revised Enforcement Guidance for Recording Cases of Coronavirus Disease 2019 (COVID-19).

Always Designing for People™

FACE MASKS AT WORK

Q: Are my employees required to wear masks and other protective equipment in the workplace? [Added 06/05/2020]

A: Some state and local jurisdictions have enacted emergency rules requiring individuals to wear face coverings in public and in certain businesses. Some also require employers to provide such equipment at the employer's expense. Review applicable rules and assess whether employees need to or should wear cloth face coverings, surgical masks, shields, respirators, or other protective equipment. Employers should ensure employees comply in the workplace, if applicable. Also consider training employees on how to properly use protective equipment.

Note: Depending on the job, industry and the circumstances, employers may also be required to provide protective equipment under existing federal and state occupational safety and health regulations.

Q: Should employees wear a face mask to work? [Updated 04/13/20]

A: At this time, the CDC recommends everyone wear a cloth face cover when they have to go out in public. Face coverings are meant to protect other people, not the wearer of the mask. Wearing cloth face covering is not a substitute for social distancing; the CDC continues to recommend that people stay at least six feet away from other people. The CDC has offered information to the public on How to Wear a Cloth Face Covering , cleaning instructions, and even directions on how to make your own covering out of household materials.

OSHA regulations for PPE and respiratory protection require employers to assess the hazards to which their workers may be exposed when determining whether to require PPE. In this context, consider whether your workers may encounter someone infected with COVID-19 in the course of their job duties, or whether they may come into contact with worksites or materials (such as, laboratory samples, waste) contaminated with the virus. The EEOC advises that an employer may require employees to wear a facemask or other personal protective equipment (PPE) 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.

Keep in mind that there are key differences between respirators and the facemasks you see people often wear on the street during outbreaks. A respirator reduces exposure to airborne particles, is tight-fitting, and filters out at least 95 percent of particles in the air. Respirators,

including those intended for use in healthcare settings, are certified by the CDC/NIOSH. By contrast, most facemasks do not effectively filter small particles from the air and don't prevent leakage around the edge of the mask, so they can't be relied upon to protect workers against airborne infectious agents. For the most up to date information, please visit the website of the Occupational Safety and Health Administration at this link: https://www.osha.gov/SLTC/covid-19/standards.html

Finally, employers should be aware that individual state and local jurisdictions may have specific guidelines or requirements applicable to wearing of masks or other protective coverings that also must be taken into consideration.

Q. Can I mandate that my employees wear face masks or other PPE upon return to the workplace? [added 05/15/20]

A. Yes, the EEOC advises that an employer may require employees to wear a facemask or other PPE 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. On the federal level, OSHA regulations for PPE and respiratory protection require employers to assess the hazards to which their workers may be exposed when determining whether to require PPE. In this context, consider whether your workers may encounter someone infected with COVID-19 in the course of their job duties, or whether they may come into contact with worksites or materials (such as, laboratory samples, waste) contaminated with the virus. In addition, there may be state or local laws dictating required use of PPE.

EMPLOYEE REFUSAL TO COME TO WORK

Q: Can I stop my employees from going home because they fear they will become exposed while at work?

A: If your business is open, and your community is not subject to a stay-in-place order, employees who refuse to work may have protections from adverse action. For example, under the Occupational Safety and Health Act, employees may have the right to refuse to work if **all** of the following conditions are met:

- Where possible, they have asked the employer to eliminate the danger, and the employer failed to do so;
- They genuinely believe that an imminent danger exists;
- A reasonable person would agree that there is a real danger of death or serious injury; and

- There isn't enough time, due to the urgency of the hazard, to get it corrected through regular enforcement channels, such as requesting an OSHA inspection.

Section 7 of the National Labor Relations Act (NLRA), which grants employees the right to act together to improve wages and working conditions, may also come into play in this situation.

If employees express apprehension about working and the risk of contracting the illness remains low, employers can try to reassure them by discussing the measures the company has taken to protect employees, referring to information from public health officials about the risks of workplace exposure, and suggesting ways they can help further reduce the possibility of exposure. You may also want to consider offering the option of working from home if possible, a flexible schedule so they can limit contact with others, and/or paid or unpaid leave.

Q: What about employees with a pre-existing disability that might place them at a higher risk for COVID-19? [Updated June 9, 2020]

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

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

Flexibility by employers and employees is important in determining if some accommodation is possible in the circumstances. Temporary job restructuring of marginal job duties, temporary transfers to a different position, or modifying a work schedule or shift assignment may also permit an individual with a disability to perform safely the essential functions of the job while reducing exposure to others in the workplace or while commuting. Additionally, some state/local orders may require that employees who are at high risk due to a pre-existing disability (or a member of a "high-risk" population) be afforded specific accommodation(s).

Q: Does this include mental illness or disabilities? [Added April 13, 2020]

A: Yes. The EEOC recognizes that while many people feel significant stress due to the COVID-19 pandemic, employees with certain preexisting mental health conditions, for example, anxiety disorder, obsessive-compulsive disorder, or post-traumatic stress disorder, may have more difficulty handling the disruption to daily life that has accompanied the COVID-19 pandemic.

As with any accommodation request, employers may: ask questions to determine whether the condition is a disability; discuss with the employee how the requested accommodation would assist him and enable him to keep working; explore alternative accommodations that may effectively meet his needs; and request medical documentation if needed.

Q: Are there any other resources that might help me determine what a reasonable accommodation might be? [Added April 13, 2020]

A: Yes. The Job Accommodation Network (JAN) has published materials specific to COVID-19 are at https://askjan.org/topics/COVID-19.cfm.

Q: What about employees who do not want to return to work because they live with or are in contact with a family member who is at a higher risk for COVID-19? [Added June 12, 2020]

A: An employer's obligation under the ADA to provide reasonable accommodations is limited to an employee's own serious health condition not a family member's condition. However, the FMLA and any applicable state/local law equivalents provide employees with protected time off to care for a family member who has a serious health condition, and it is possible that these laws could potentially apply under various circumstances. Additionally, some state/local jurisdictions have implemented mandatory paid sick and safe time laws that also provide employees with protected time off to care for a family member. And, during the pandemic, some state/local jurisdictions have expanded paid sick and safe time laws to include care for a family member who is at high risk for COVID-19 and/or protected leave for a public health emergency. Moreover, some state/local orders may require that employees with a high-risk family member be afforded specific accommodation(s).

VISITORS

Q: May employers ask visitors to their business locations to disclose their travel activity before authorizing their entry to their premises?

A: Yes, absent a claim that visitors have recognized privacy interests in their travel activities, businesses may ask them if they have traveled to areas of concern.

Q: Does asking visitors to disclose their travel activity, including geographic areas where they have traveled and/or mode of transportation, trigger any privacy obligations?

A: Yes, such requests may trigger notice of collection obligations under the California Consumer Privacy Act (CCPA) or similar obligations under other state privacy laws. If inquiries are made in Europe, GDPR obligations may be triggered.

RETURN TO WORK

Q: Is my business permitted to reopen? [Added June 9, 2020]

A: The decision to reopen must, at a minimum, comply with applicable federal, state, and local orders, directives, and guidelines. Make sure you read and understand all that apply to you, including information from **OSHA**, the **CDC**, and your state and locality. These guidelines may include specific steps that businesses must take before resuming operations, and some may be industry- and location-specific.

Q: Once I'm permitted to reopen, should I do so? [Added June 9, 2020]

A: The return to work process will likely occur in phases with certain types of businesses permitted to resume limited operations before others are allowed to do so. If conflicts exist among directives and guidelines, consider consulting legal counsel.

Even where employers are permitted to allow employees back into the workplace, employers should independently assess whether it is safe to do so, including whether social distancing can be maintained. Employers may also want to consider, when possible, having employees return to work voluntarily at first, or returning employees to the workplace in waves, starting with the most critical workers first. When you decide to reopen once permitted, document the reasons for doing so, as well as the job-related criteria for determining who is allowed back into the workplace.

Q: How should I let employees know that I am recalling them from furlough/layoff? [Added June 9, 2020]

A: Consider sending them a letter explaining the timeline for reopening, what steps you are taking to protect them from COVID-19, and a deadline for them to confirm that they will be returning to work. Return to work letters should typically include the terms of employment, highlighting any changes in pay, benefits, leave, policies or procedures, contact information for questions, as well

as an at-will employment statement. Additionally, include a statement that expresses your appreciation for their commitment, understanding, and flexibility during the COVID-19 crisis.

Also keep in mind any predictive scheduling laws that may apply to your business.

Q: Should I complete "new hire" paperwork for employees who I bring back after being laid off? [Added June 9, 2020]

A: Various federal, state, and local laws and regulations require that employees complete certain paperwork and provide certain notices at the time of hire. Some of these laws address situations in which an employee is returning after a furlough or layoff. For instance, an employer won't generally need to complete a new Form I-9 (to establish identity and work authorization) if the worker is continuing in their employment and has a reasonable expectation of employment at all times due to a temporary layoff for lack of work. If this standard cannot be met, the employer must follow the instructions for "rehired" employees in the USCIS Handbook for Employers. For other new hire paperwork and notice requirements, employers should check the applicable laws and regulations to determine if/how they address employees who are returning to work.

Q: When my employee returns to work, may I require that they provide a doctor's note certifying fitness for duty? [Added April 13, 2020]

A: Yes. According to the EEOC, such inquiries are permitted under the ADA either because they would not be disability-related or, if the pandemic influenza were truly severe, they would be justified under the ADA standards for disability-related inquiries of employees. As a practical matter, however, doctors and other health care professionals may be too busy during and immediately after a pandemic outbreak to provide fitness-for-duty documentation. Therefore, new approaches may be necessary, such as reliance on local clinics to provide a form, a stamp, or an e-mail to certify that an individual does not have the pandemic virus.

Q: May I require employees to get tested for COVID-19 before allowing them to return to the workplace? [Updated May 15, 2020]

A: Requiring an employee to be COVID-19 tested would be considered a medical examination and subject to the rules of the federal Americans with Disabilities Act (ADA) and similar state laws. Under the federal ADA, medical examinations of current employees are prohibited unless they're job-related and a business necessity. This means that the employer must have a reasonable belief based on objective evidence that:

- An employee will be unable to perform the essential functions of their job because of a medical condition; or

- The employee will pose a **direct threat** because of a medical condition that cannot otherwise be eliminated or reduced by reasonable accommodation.

The EEOC has recently advised that an employee with the virus "will pose a direct threat to the health of others." Thus, an employer may choose to administer COVID-19 testing to employees before they enter the workplace to determine if they have the virus. If an employer chooses to test employees, the EEOC cautions employers to ensure that the tests they employ are accurate and reliable by checking the U.S. Food and Drug Administration, CDC, and other public health authority websites for the latest information.

Q: May I require my employees to get an antibody test before returning to work? [Added June 17, 2020]

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

Q: When the government stay-at-home orders are modified or lifted in my area, how will I know what steps I can or should take to screen employees for COVID-19 before they return to work? [Added April 21, 2020]

A: The EEOC has advised that employers can make disability-related inquiries and conduct medical exams (e.g., temperature screening) if the inquiries and exams are consistent with business necessity—that is, if the inquiries and screening are necessary to exclude employees with a medical condition that would pose a "direct threat" to health or safety. What constitutes a "direct threat" depends on the best available objective medical evidence. If an employer takes temperatures and asks questions about symptoms (or requires self-reporting) in a manner consistent with advice from the CDC and public health authorities for their location and type of workplace, then they are likely to be found to be acting consistent with the Americans with Disabilities Act. Employers should ensure that employees are treated equally, and that the

decision to screen and exclude employees is not based on any protected characteristic (e.g., race, age, national origin, etc.).

Q: What should I do to address the potential for harassment and discrimination against coworkers when we re-open the workplace? [Added April 21, 2020]

A: Employers should remind all of their employees that the law prohibits harassment or discrimination against coworkers based on race, national origin, color, sex, religion, age (40 or over), disability, or genetic information—and that those laws still apply in the context of this pandemic. The EEOC recommends that employers remind supervisors and managers of their responsibility to watch for, stop and report any harassment or other discrimination, and that the employer will immediately review any allegations of harassment or discrimination and take appropriate action.

Q: Our employees will have to wear personal protective gear when they return to work. One of my employees has told me that he is allergic to latex gloves, and needs modified protective gear. Do I have to grant his request? [Added April 21, 2020]

A: An employer may require employees to wear protective gear, such as masks or gloves, in the workplace. The EEOC has clarified that if an employee with a disability needs a related reasonable accommodation under the ADA (e.g., non-latex gloves, modified face masks for interpreters or others who communicate with an employee who uses lip reading, or gowns designed for individuals who use wheelchairs), or a religious accommodation under Title VII (such as modified equipment due to religious garb), the employer should discuss the request and provide the modification or an alternative if feasible and not an undue hardship on the operation of the employer's business under the ADA or Title VII.

Q: One of my employees has requested an accommodation for a medical condition while she works at home. May I still request information to determine if the condition is a disability? [Added April 21, 2020]

A: Yes, if the disability is not obvious or already known, an employer may ask questions or request medical documentation to determine whether the employee has a "disability" as defined by the ADA (a physical or mental impairment that substantially limits a major life activity, or a history of a substantially limiting impairment). The employer also may ask whether the employee's disability necessitates an accommodation. The EEOC has advised that appropriate questions may include (1) how the disability creates a limitation, (2) how the requested accommodation will effectively address the limitation, (3) whether another form of accommodation could effectively address the issue, and (4) how a proposed accommodation will

enable the employee to continue performing the "essential functions" of his position (that is, the fundamental job duties).

Q: How much time do we have to provide an accommodation once an employee has requested it? [Added April 21, 2020]

A: In light of the pandemic, the EEOC has advised that employers should be flexible in responding to accommodation requests. Some employers may choose to forgo or shorten the exchange of information between an employer and employee known as the "interactive process," and grant a reasonable accommodation request on a temporary basis. As government restrictions are modified, an employee's need for accommodation may also change, resulting in an increase in requests for short-term accommodations. To deal with these uncertainties, employers may place an end date on the accommodation (for example, either a specific date or when the employee returns to the workplace part- or full-time due to changes in government restrictions limiting the number of people who may congregate). Employers may also opt to provide a requested accommodation on an interim or trial basis, with an end date, while awaiting receipt of medical documentation. Choosing one of these alternatives may be particularly helpful where the requested accommodation would provide protection that an employee may need because of a pre-existing disability that puts her at greater risk during this pandemic. Employees may seek extensions of temporary or trial accommodations, which the employer must consider.

Q: Can I ask my employees if they will need reasonable accommodations when we're eventually permitted to return to the workplace? [Added April 21, 2020]

A: Yes. Even if you are not preparing to enter the workplace now, you may begin the "interactive process" and ask employees with disabilities to request accommodations that they believe they may need when the workplace re-opens.

Q: What types of undue hardship considerations may be relevant to determine if a requested accommodation poses "significant difficulty" during the COVID-19 pandemic? [Added April 21, 2020]

A: The EEOC has advised that employers may consider whether the current pandemic creates "significant difficulty" in acquiring or providing certain accommodations, considering the facts of the particular job and workplace. For example, it may be significantly more difficult in this pandemic to conduct a needs assessment or to acquire certain items, and delivery may be impacted, particularly for employees who may be teleworking. Or, it may be significantly more difficult to provide employees with temporary assignments, to remove marginal functions, or to readily hire temporary workers for specialized positions. The EEOC notes that if a particular accommodation poses an undue hardship, employers and employees should

work together to determine if there may be an alternative that could be provided that does not pose such problems.

Q: What types of undue hardship considerations may be relevant to determine if a requested accommodation poses "significant expense" during the COVID-19 pandemic? [Added April 21, 2020]

A: According to the EEOC, prior to the COVID-19 pandemic most accommodations did not pose a significant expense when considered against an employer's overall budget and resources (always considering the budget/resources of the entire entity and not just its components). The EEOC has now acknowledged that the loss of some or all of an employer's income stream because of this pandemic is a relevant consideration in evaluating an accommodation. In addition, the EEOC has stated that the amount of discretionary funds available at this time and whether there is an expected date that current restrictions on an employer's operations will be lifted (or new restrictions will be added or substituted) may be relevant to whether an accommodation constitutes an undue hardship. Employers should not reject any accommodation that costs money, however; rather, an employer should weigh the cost of an accommodation against its current budget while taking into account constraints created by this pandemic.

Q: How do I effectively return my employees to work in tiers (or phases) in a way that prevents disparate impact and perceived discriminatory practices? What criteria should I be using to make these determinations, i.e., Essential v. Non-Essential personnel, geographies and legislative requirements and/or restrictions, special accommodations, etc.?

A: Make sure all decisions related to returning employees to work are neutral and job-related, and not based on protected characteristics, such as age, race, pregnancy or other factors unrelated to the job. In addition, you should not rely upon factors related to COVID-19 (e.g. illness, use of protected leave, child care unavailability, caregiver obligations, apparent inclusion in at-risk categories). To the extent possible, you should consider using the same neutral and job-related factors that were used to decide on furloughs and terminations.

Q: Is general fear enough for an employee to refuse to return to work? What protections are provided under the NLRA if an employee is refusing to return to work because of safety concerns?

A: General fear is not enough. Both union and nonunion employees generally are protected under Section 7 of the National Labor Relations Act ("NLRA") when they refuse to work under conditions reasonably believed to be unsafe or unhealthy. Employers cannot take adverse

action against employees for actions protected by Section 7 of the NLRA, such as refusals to accept unsafe job assignments, complaining about safety issues, or filing complaints with federal, state or local officials. If an employee expresses concerns over workplace safety, the concerns should be identified and good faith efforts made to address concerns, to the extent possible.

Q: What should I do if my employee refuses to return to work because they are making more money on unemployment rather than working?

A: Unless the employee can identify some other qualifying reason for not returning to work, an employee's refusal to return to work for that reason renders them ineligible for Pandemic Unemployment Assistance (PUA) under the CARES Act. The DOL in its guidance, states that "[B]arring unusual circumstances, a request that a furloughed employee return to his or her job very likely constitutes an offer of suitable employment that the employee must accept. ... While eligibility for PUA does not turn on whether an individual is actively seeking work, it does require that the individual be unemployed, partially employed, or unable or unavailable to work due to certain circumstances that are a direct result of COVID-19 or the COVID-19 public health emergency." Check with your state unemployment office on state eligibility requirements.

PAY CONSIDERATIONS [Added June 9, 2020]

Q: We are going to recall workers, but we only have about 20 hours of work for each employee the first couple of weeks. Can I reduce exempt employees' salaries to reflect the reduced schedule for a couple of weeks? [Added June 9, 2020]

A: Exempt employees must generally receive their full salary in any workweek in which they perform work. Employers are prohibited from reducing exempt employees' salaries based on short-term, day-to-day, or week-to-week operating requirements of the business.

Employers may change exempt employees' salaries prospectively to reflect long-term business needs (as long as it meets applicable minimum salary requirements), but reductions may not be made due to a decrease in the quality or quantity of work performed. For instance, an employer could reduce all exempt employees' salaries by 5 percent for the upcoming fiscal year because of budgetary constraints (provided the reduced salary still meets minimum requirements).

Q: We typically pay our exempt full-time employees $1,000 per week, can we move them to part-time and pay them a salary of $500 per week because of our long-term business needs? [Added June 9, 2020]

A: Under the Fair Labor Standards Act (FLSA), to be classified as exempt from overtime, the employee must generally satisfy all of the following tests:

- Meet the minimum salary requirement (currently $684 under the FLSA, but may be higher under state law);
- With very limited exceptions, the employee must receive their full salary in any week they perform work; *and*
- The employee's primary duties must meet certain criteria.

There is no option to pay a part-time exempt employee below the minimum salary requirement. Generally, if you pay the employee a salary less than the minimum, the employee must be classified as non-exempt (entitled to minimum wage and overtime when applicable). Even if you only reduced their salary to $684 per week (or the state minimum if higher), you may be jeopardizing their exempt status because the change is tied to a reduction of hours.

Q: Given the uncertainty of the business environment, can we reclassify employees from exempt to non-exempt? [Added June 9, 2020]

A: Yes, any employee may be classified as non-exempt (and therefore entitled to minimum wage and overtime when applicable). Keep in mind that you may be required to provide a certain amount of advance notice before implementing this type of change. Under federal law, non-exempt employees must be paid for all hours worked, which includes time spent working plus certain nonproductive time, such as rest breaks, travel time, and training time. If you reclassify employees as non-exempt, all of this time must be included when determining whether you have met the minimum wage and overtime requirements.

Q: What should I consider if I want to reduce non-exempt employees' pay/hours? [Added June 9, 2020]

A: Employers may reduce non-exempt employees' hours and pay prospectively provided the employee is paid at least the minimum wage per hour and overtime when due. Employers should also consider the following:

Advance notice:

Depending on your state or local law, a certain amount of advance notice may be required before making the change.

Always Designing for People™

Discrimination:

All pay practices and pay decisions must be job-related and applied fairly and consistently. It is a best practice to document the reasons for a reduction in pay and/or hours.

Unemployment Benefits:

Employees who have their hours/pay reduced may be eligible for partial unemployment benefits, typically a portion of the pay that they would have received if they were fully unemployed. Keep in mind that employees who quit as a result of a significant reduction in hours/pay may also be eligible for unemployment benefits. Check your state law for details.

Employee Benefits:

A reduction in hours may also affect eligibility for employee benefits, such as health insurance. Refer to your plan documents for details about eligibility. If an employee accrues paid time off as a full-time employee but subsequently changes to part-time, you may be required to either pay the employee for any unused vacation or allow the employee to use the accrued vacation as a part-time employee. Federal law and certain states and local jurisdictions require employers to provide paid leave to employees. In many cases, part-time employees are eligible for such leave and/or may be entitled to use any leave they accrued while a full-time employee. Check the leave laws for details.

Q: What happens if non-exempt employees report to work, but we have no work for them? [Added June 9, 2020]

A: Under federal law, if non-exempt employees report to work but there is no work available, you aren't generally required to pay them for the work hours missed, unless you have promised otherwise. However, some state laws require employers to pay employees for a minimum number of hours when they report to work but are sent home before the end of their scheduled shift. Check your applicable law for rules.

Note: If non-exempt employees perform any work and/or are required to wait for a decision to be made about sending them home, they must be paid for the time spent working and/or waiting.

Q: One of my employees asked for a flexible telework schedule because their child's school is still closed. If I allow this, how do I handle their pay? [Added June 9, 2020]

A: The U.S. Department of Labor (DOL) generally requires that an employee must be paid for all the time between their first and last principal work activities. However, the DOL has announced that it won't apply the continuous workday rule in certain situations where employers give teleworking employees flexibility during the COVID-19 pandemic. For example, an employer and employee may agree to a work schedule of 7 a.m.-9 a.m., 11:30 a.m.-3 p.m., and 7 p.m-9 p.m. on weekdays. In such a case, the employer must compensate the employee for all hours actually worked (7.5 hours in this example), but not all 14 hours between the hours of 7 a.m. and 9 p.m. The continuous workday rule continues to apply to employees who aren't teleworking for COVID-19 related reasons. Employers should check their state laws for similar rules.

Q: Do I have to pay employees for the time they spend putting on and taking off protective equipment? [Added June 9, 2020]

A: If the gear is required by law, the employer, or the nature of the work, then the time an employee spends putting on and taking off gear on the employer's premises must be paid. Under federal law, the time must be paid only when the employer or the nature of the job mandates that it takes place on the employer's premises. According to the Department of Labor, if employees have the option and ability to change at home, there is no requirement for the time to be paid, even if workers choose to change at work *(see Wage & Hour Advisory Memo 2006-2).*

SCREENING EMPLOYEES AND VISITORS [Added June 9, 2020]

Q: May employers ask employees if they have symptoms of COVID-19 infection? [Updated 04/13/2020]

A: Yes. The EEOC advises employers should rely on the CDC, other public health authorities, and reputable medical sources for guidance on emerging symptoms associated with the disease. These sources may guide employers when choosing questions to ask employees to determine whether they would pose a direct threat to health in the workplace. For example, as of April 9, 2020, additional symptoms beyond fever or cough may include new loss of smell or taste as well as gastrointestinal problems, such as nausea, diarrhea, and vomiting.

Q: Should I screen employees before allowing them back into the workplace? [Added June 9, 2020]

A: Some jurisdictions that are allowing businesses to reopen are also requiring employers to implement certain screening practices to help ensure its safe for employees to enter the workplace. Regardless of whether you are subject to such requirements, you may want to

consider various options for screening employees and visitors before they're allowed to enter the workplace, such as temperature checks, COVID-19 testing, and/or self-certifications (see question about restrictions below).

Employers that intend to conduct COVID-19 testing will also need to evaluate which type of test to use (and ensure that it is accurate and reliable), who will perform it and how to protect them, how it will be administered, and the implications of various testing protocols, consulting local health officials when assessing the different options. Be sure to apply all screening protocols uniformly and to treat screening results as confidential medical records.

In the past, the EEOC has said that this exception could apply if the illness is more severe than seasonal flu or a pandemic has been declared in the United States and becomes widespread as assessed by health authorities. Assessments of whether an employee poses a direct threat in the workplace must be based on objective, factual information. Employers are expected to do their best to obtain public health advice that is appropriate for their location and to make reasonable assessments of their workplace conditions based on this information.

The CDC also has information on testing at https://www.cdc.gov/coronavirus/2019-ncov/symptoms-testing/testing.html

Q: Can I request employees do at-home health screenings, including temperature checks? [Added 06/05/2020]

A: Employers can request employees do at-home health screenings, including temperature checks. CDC has published a "self-checker" that can be done by employees at home along with a temperature check.

If the self-checker indicates that an employee should stay home, it is recommended the employee call a designated contact at the worksite to discuss whether that employee should stay home or if an accommodation is needed under the Americans with Disabilities Act.

Q: If I want to screen and monitor employees for COVID-19 symptoms, how do I know what symptoms to look for? [Added June 9, 2020]

A: Employers should look to federal, state, and local guidelines for information on COVID-19 symptoms. In late April, the CDC expanded the list of COVID-19 symptoms. The CDC says the following symptoms may be consistent with COVID-19:

•Cough
•Shortness of breath or difficulty breathing

Or at least two of these symptoms:

•Fever
•Chills
•Repeated shaking with chills
•Muscle pain
•Headache
•Sore throat
•New loss of taste or smell

Q: Are there rules that may restrict screening practices? [Added June 9, 2020]

A: Certain screening practices may be considered medical examinations and therefore subject to rules under the Americans with Disabilities Act (ADA) and similar state laws. Generally, medical examinations must be job-related and consistent with business necessity, meaning an employer would need to conduct a medical exam because they have a reasonable belief that: an employee's ability to perform essential job functions will be impaired by a medical condition; or an employee will pose a direct threat due to a medical condition.

Employers must determine whether a direct threat exists based on the best available objective medical evidence, such as guidance from CDC or other public health authorities. According to the U.S. Equal Employment Opportunity Commission, if an employer's screening practices are consistent with advice from the CDC and public health authorities, then the employer will generally meet ADA rules.

As of March 2020, the COVID-19 pandemic has met the ADA's direct-threat standard, according to the EEOC. If the CDC and state/local public health officials revise their assessment of the spread and severity of COVID-19, that could affect whether a direct threat still exists and whether screening would be permissible. This means that guidance may shift as the crisis recedes, so employers should consider consulting legal counsel before implementing screening protocols.

Q: May I take an employee's temperature? [Added 06/05/2020]

A: The EEOC has advised that, generally, measuring an employee's body temperature is a medical examination. Because the CDC and state and local health authorities have acknowledged community spread of COVID-19 and issued precautions, the EEOC has now advised that

employers may measure employees' body temperature. However, the EEOC says that employers should be aware that some people with influenza, including COVID-19, do not have a fever.

Q: If I determine I am allowed to conduct temperature checks before employees enter the workplace, am I required to pay employees for that time, including waiting in line? [Added June 9, 2020]

A: Some states may require pay in these situations. Under federal law, the determination of whether these types of activities are compensable may depend on whether they are considered an "integral and indispensable" part of the employee's principal work activities. To date, there hasn't been any guidance from the Department of Labor that addresses whether temperature checks qualify for this standard in the context of COVID-19. Employers may want to err on the side of caution and pay employees for the time they spend on the employer's premises waiting for, and undergoing, required temperature checks and/or consult legal counsel to determine how federal and state law would apply to their specific circumstances.

Q: If I require all employees to have a daily temperature check, may I maintain a log of the results? [Added 04/13/2020]

A: Yes, but you need to maintain the confidentiality of this information.

Q: Do I have to give employees notice before conducting screening? [Added June 9, 2020]

A: State privacy laws may require employers to provide notice at the time of collection, describing what information will be collected (e.g., body temperature) and the purposes for which it will be used (e.g., to maintain a safe work environment).

Q: Is an employee entitled to an accommodation under the ADA in order to avoid exposing a family member who is at higher risk of severe illness from COVID-19 due to an underlying medical condition? [Added 6/11/20]

A: No. Although the ADA prohibits discrimination based on association with an individual with a disability, that protection is limited to disparate treatment or harassment. The ADA does not require that an employer accommodate an employee without a disability based on the disability-related needs of a family member or other person with whom she is associated.

For example, an employee without a disability is not entitled under the ADA to telework as an accommodation in order to protect a family member with a disability from potential COVID-19 exposure.

Of course, an employer is free to provide such flexibilities if it chooses to do so. An employer choosing to offer additional flexibilities beyond what the law requires should be careful not to engage in disparate treatment on a protected EEO basis.

This analysis is at the federal level. Employers should also consult applicable state and local laws.

SOCIAL DISTANCING AND OTHER MEASURES TO PROTECT EMPLOYEES [Added June 9, 2020]

Q: Beyond screening, what else can I do to prevent the spread of COVID-19 in the workplace? [Added June 9, 2020]

A: To help prevent the spread of COVID-19, consider:

- Maintaining social distancing (see below)
- Training employees on safety and good hygiene
- Sanitizing the workplace frequently
- Providing protective equipment, such as face masks and hand sanitizer
- Offering and encouraging employees to take additional time to wash their hands and clean workspaces

Q: What are some ways I can help employees maintain social distancing? [Added June 9, 2020]

A: Consider steps to maintain at least six-feet between individuals in the workplace, adjusting the work environment and office norms if necessary. Options include but aren't limited to:

- Allowing employees to telework whenever possible;
- Offering flexible work hours and staggered start-times and shifts;
- Increasing physical space between employees at the worksite (for example, opening every other cash register);
- Putting up partitions between employees;
- Increasing physical space between employees and customers through physical barriers and/or demarcating six-foot intervals;
- Postponing non-essential meetings or events;

•Prohibiting group gatherings in the workplace and limiting access to spaces where groups tend to gather;
•Implementing restrictions on business travel;
•Delivering services remotely or delivering products through curbside pick-up or delivery;
•Discouraging hand shaking;
•Discouraging sharing tools and equipment and food and drinks; and
•Restricting visitors in the workplace.

Q: What are some ways I can help employees maintain social distancing? [Added 06/05/2020]

A: Consider steps to maintain at least six-feet between individuals in the workplace, adjusting the work environment and office norms if necessary. Options include but aren't limited to:

- Allowing employees to telework whenever possible;
- Offering flexible work hours and staggered start-times and shifts;
- Increasing physical space between employees at the worksite (for example, opening every other cash register);
- Putting up partitions between employees;
- Increasing physical space between employees and customers through physical barriers and/or demarcating six-foot intervals;
- Postponing non-essential meetings or events;
- Prohibiting group gatherings in the workplace and limiting access to spaces where groups tend to gather;
- Implementing restrictions on business travel;
- Delivering services remotely or delivering products through curbside pick-up or delivery;
- Discouraging hand shaking;
- Discouraging sharing tools and equipment and food and drinks; and
- Restricting visitors in the workplace.

Q: What elements should training on safety and hygiene include? [Added June 9, 2020]

A: Train employees on safety protocols and widely communicate ways to practice good hygiene, including the following:

•Complying with federal, state, and company safety and health rules
•Wearing protective equipment and understanding its limitations
•Washing hands often with soap and warm water for at least 20 seconds
•Avoiding touching eyes, nose, and mouth

- Cleaning frequently touched surfaces (like doorknobs and countertops) with household cleaning spray or wipes
- Covering coughs and sneezes with a tissue or the inside of the elbow
- Staying home when feeling sick

Q: What can I do to sanitize the workplace? [Added June 9, 2020]

A: Consider the following:

- Disinfect and clean the workplace regularly
- Maintain and adjust HVAC systems and increase ventilation
- Provide tissues and no-touch disposal receptacles
- Provide soap and water in the workplace
- Provide hand sanitizers for when soap and water isn't available

Q: Are my employees required to wear masks and other protective equipment in the workplace? [Added June 9, 2020]

A: Some state and local jurisdictions have enacted emergency rules requiring individuals to wear face coverings in public and in certain businesses. Some also require employers to provide such equipment at the employer's expense. Review applicable rules and assess whether employees need to or should wear cloth face coverings, surgical masks, shields, respirators, or other protective equipment. Employers should ensure employees comply in the workplace, if applicable. Also consider training employees on how to properly use protective equipment.

Note: Depending on the job, industry and the circumstances, employers may also be required to provide protective equipment under existing federal and state occupational **safety and health regulations**.

Q: Do I have to pay employees for the time they spend putting on and taking off protective equipment? [Added 06/05/2020]

A: If the gear is required by law, the employer, or the nature of the work, then the time an employee spends putting on and taking off gear on the employer's premises must be paid. Under federal law, the time must be paid only when the employer or the nature of the job mandates that it takes place on the employer's premises. According to the Department of Labor, if employees have the option and ability to change at home, there is no requirement for the time to be paid, even if workers choose to change at work (see Wage & Hour Advisory Memo 2006-2).

Always Designing for People™

REMOTE WORK

Q: What responsibilities do employers have to employees while they are working from home?

A: For non-exempt employees, the employer should take steps to ensure that all work time is recorded and paid, as well as any overtime. We recommend that employers who anticipate having employees working from home for an extended period of time prepare a simple agreement for employees to sign acknowledging their understanding of the arrangement including the employee's obligation to maintain a safe workspace as well as the temporary nature of the arrangement. Telecommuting arrangements should make clear that employees are expected to maintain safe conditions at the home office and to practice the same safety habits as he/she would in his/her office on the employer's premise. This is likely not practical or necessary for employees asked to work from home for only 14 days during an incubation period. Employers should consult with their workers' compensation carrier(s) to ensure that telecommuting employees fall with the policy's coverage. However, the telecommuting policies and/or agreements should state that the employer assumes no responsibility for injuries that occur in the employee's home office outside the agreed upon "work hours." The telecommuting policy should also state that the employer assumes no responsibility for injuries to third parties who may be present at the employee's home office. Employers should also determine what expenses they will reimburse in this situation. In some states, including California, employers are required to reimburse the employee for reasonable cost of any internet and phone service needed to perform work duties. There may also be tax implications of the employee working from home.

Q: What other steps should employers take to ensure employees work effectively from home during a pandemic?

A: Employers should ensure that the company's IT infrastructure supports the employee(s) working from home and that the employee has the equipment, whether company-provided or personal as well as internet connection to perform all required work. Employers should consider communicating to employees their general expectations including: (1) while working from home, the employee will still be expected to complete their work assignments, be available during regular business hours and communicate with their supervisor and others as needed; (2) the employee should continue to adhere to all Company policies; (3) the employer retains discretion to permit, or not permit or discontinue a telecommuting arrangement at any time; (4) employees are responsible for maintaining the confidentiality of all work-related information and follow the company's confidentiality policies. These items can be covered in the agreement mentioned above. Under these unique circumstances, employers may need to consider making their work

from home arrangements more flexible than usual. For example, if employees are asked to work from home due to community spread of the virus, children are likely to home from school.

Q: What happens if schools close and employees need time off?

A: As of April 1, 2020, the Families First Coronavirus Response Act (FFCRA) amends the FMLA to allow an employee who has been employed at least 30 days and who is unable to work (or telework) to take up to 12 weeks of leave to care for the employee's son or daughter (under 18 years of age) *if* the child's elementary or secondary school or place of care has been closed, or the childcare provider is unavailable, due to COVID-19.

Employees taking this leave shall be paid at 2/3 their regular rate or 2/3 the applicable minimum wage, whichever is higher, up to $200 per day and $2,000 in the aggregate (over a 12-week period—two weeks of paid sick leave followed by up to 10 weeks of paid expanded family and medical leave). This new FMLA leave only applies to private employers with fewer than 500 employees and most public employers.

The FFCRA also provides that employees of private employers with fewer than 500 employees and most public employers may be entitled to up to 80 hours of paid sick leave if the employee is unable to work or telework because the employee has to care for a son or daughter whose school or place of child care is closed to COVID-19 related reasons.

In addition, many of the states and local jurisdictions that require employers to provide paid sick leave cover absences related to school closures ordered by health officials. Check your state and local laws for details. In the absence of a specific requirement, employers should consider offering paid and/or unpaid leave to these employees.

Q: Do I have to allow employees to work from home?

A: In general, employers are not required to allow employees to work from home. However, telecommuting can help prevent the spread of the illness by allowing employees to work without exposing themselves or others to the virus. Therefore, you should consider telecommuting as an option for jobs that can be performed remotely.

***Note:** Telecommuting may be considered a reasonable accommodation if a worker's condition qualifies as a disability under the ADA and/or similar state laws.

Q: I would like to offer telework to employees to help prevent the spread of COVID-19. What can I do to help maintain the productivity of remote workers? [Added June 9, 2020]

Always Designing for People™

A: Set clear, measurable goals for remote workers and make sure they are realistic since employees may be juggling childcare and family responsibilities or experiencing other challenges during the pandemic. Be sure to communicate that while working from home, the employee is still expected to complete their work assignments, be available during regular business hours (understanding potential limitations due to the pandemic), and communicate with their supervisor and others as needed. Additionally, retain discretion for changing the telecommuting arrangement at any time. If you anticipate having employees working from home for an extended period, have employees sign and acknowledge a simple agreement outlining the arrangement.

When working remotely, interactions with colleagues and supervisors may be less frequent than they are in the traditional workplace setting. This can lead to a bottleneck of important information and may result in feelings of isolation among remote workers. To address these challenges, schedule regular virtual meetings between remote workers and their co-workers, encourage video conferencing, and highlight and acknowledge their work to colleagues. Conduct regular check-ins with employees to see how they are adapting to working from home and to provide feedback on their work.

WAGE & HOURS

Q: Must employers pay employees who are denied access to the workplace?

A: Absent a contractual commitment to pay, including an applicable collective bargaining agreement, no federal law requires employers to pay non-exempt employees for time they do not actually work. Federal or state wage hour laws may require exempt employees to be paid their regular salary if they are directed not to report to work. For example, under federal law, if an exempt employee works any part of a workweek and is then out sick for the remainder of the week (or quarantined), he should be paid for the entire week, though the employer may require him to use PTO for that paid time. Some state or local laws may impose additional pay obligations for certain occupations, especially if employers provide little or no advance notice that employees are not to report to work as scheduled.

As of April 1, 2020, the federal Families First Coronavirus Response Act requires private employers with fewer than 500 employees (and most public employers) to provide up to 80 hours of paid sick leave for employees who, among other things, have been diagnosed with COVID-19, are experiencing symptoms of it, or are caring for an individual who is quarantined because of it. As a result, if an employee is denied access to the workplace for those reasons, they would be entitled to sick leave pay. The amount of pay due to the employee depends on the reason for the leave.

Q: If my business is forced to close, do I have to pay non-exempt employees?

A: Non-exempt employees (those entitled to minimum wage and overtime) are paid only for "hours worked." Therefore, if non-exempt employees miss an entire day's work because you're closed and you didn't require them to report to work, you're generally under no obligation to pay them, unless you've promised otherwise. You can give employees the option of using any accrued paid time off for the time missed.

Q: What about exempt employees? Would I have to pay them their full salary if we close?

A: Exempt employees must generally receive their full salary in any workweek in which they perform work, regardless of the number of hours worked. If your company closes for less than a full workweek due to the virus, you must generally pay an exempt employee their full salary, as long as the employee worked any part of the workweek.

Q: What if my company is forced to close early because of the virus? Do I have to pay non-exempt employees for the time they missed that day?

A: If the company closes early, federal law doesn't require you to pay non-exempt employees for the missed time, unless you promised otherwise. However, you must pay these employees for any time they actually worked and for the time they stayed at work while you were deciding to close. Note that some state laws require employers to pay employees for a minimum number of hours when they report to work but are sent home before the end of their scheduled shift. Check your applicable law for pay requirements when employees are required to report to work but are sent home early.

Q: What if an employee is on a quarantine and cannot telecommute? Do I have to pay them during the quarantine?

A: Also, as of April 1st, the federal Families First Act requires employers with fewer than 500 employees (and most public employers) to provide up to 80 hours of paid sick leave for employees who, among other things, have been diagnosed with COVID-19, are experiencing symptoms of it, or are caring for an individual who is quarantined because of it. As a result, if an employee is quarantined and cannot telecommute, they would be entitled to sick leave pay. The amount of pay due to the employee depends on the reason for the leave.

Employers also should check applicable policies, collective bargaining agreements, and state and local paid leave laws to determine if pay is required. For example, federal or state wage and hour laws may require exempt employees to be paid their regular salary if they are directed not to

report to work, unless it is in increments of a full workweek. Some state and local laws may impose additional pay obligations for certain occupations, especially if employers provide little or no advance notice that employees are not to report to work as scheduled. State and local paid leave laws may also require pay. Even in the absence of a requirement, some employers are electing to pay employees who are placed in quarantine and cannot telecommute.

PAYROLL

Q: How do we run payroll if everyone is remote?

A: You can submit payroll from anywhere. Simply log on to the portal from your phone or computer, or use the ADP Mobile App to submit or make modifications to your payroll. Your Payroll Advisor can help evaluate payroll options for your company and provide you with support, such as:

- Reviewing your scheduled payroll changes.
- Redirecting your payroll delivery in advance to avoid a delay.
- Helping to identify members of your team who do not have direct deposit.
- Facilitating the set-up of direct deposit, Wisely Pay Card and iReports, as/if needed.
- Help reschedule your payroll, if you need.

Payroll - If your employees do not have a full electronic payment, we offer two ways to ensure they are paid regardless of any kind of delivery delay. We can expedite this set up for direct deposit and/or the Wisely Pay Card.

Payroll Reports - Presented as PDFs, iReports allow you to quickly and easily analyze your data without printing.

Q: We have employees teleworking in different states from their normal worksite(s). Can we continue to withhold and report income based on the employee's normal worksite, or do we need to start withholding and reporting based on the new worksite (e.g., the employee's home)?

A: State income tax is primarily based on the state in which an employee is providing services and the employee's state of residence. State laws differ as to how long an employee can be working in a state temporarily before withholding and reporting are required. Several states, such as New Jersey (https://www.state.nj.us/treasury/taxation/covid19-payroll.shtml) and Ohio (https://legiscan.com/OH/text/HB197/2019), have issued special guidance on how to treat employees temporarily working at home in a differ state than the one in which they typically

work. Employers should consult with their tax advisors for advice on how to correctly report the income of their teleworkers.

FORM I-9

Q: I am working from home and need to hire an employee remotely. Can I review scanned copies of I-9 Section 2 documents and use video to complete the "in-person" verification process? [Updated June 17, 2020]

A: Under temporary guidelines issued by the Department of Homeland Security (DHS) on March 20, 2020, the general answer is yes, with some important exceptions. Until July 18, 2020, or until 3 business days after the termination of the National Emergency, whichever comes first, DHS will permit remote verification of the employee's identity and employment authorization documents, for purposes for purposes of completing Section 2. This means employers may inspect Section 2 documents remotely via video link, fax, e-mail, or other similar means. Remote verification is not permitted at locations where employees are physically reporting to work. However, if newly hired employees or existing employers are subject to a COVID-19 quarantine or lockdown protocols, DHS may accept an employer's use of remote verification, but only after a case-by-case evaluation. Employers must continue to follow all other standard I-9 procedures, including all normal deadlines for completing Sections 1, 2, and 3. Documents must by physically inspected within 3 business days after normal operations resume. Employers should enter "COVID-19" as the reason for the physical inspection delay, adding "documents physically examined" with the date of inspection to the Section 2 additional information field (or Section 3 for reverifications).

For employers not eligible to use Section 2 remote verification:

1. Have the new hire complete section 1 of the I-9 form remotely and designate a third party as an employer's authorized agent to verify the documents and complete section 2 of the I-9. The most recent I-9 instructions make clear that an employer can now designate anyone as an authorized representative to complete Section 2. Specifically, the instructions for the new version of Form I-9 (edition date of 10/21/2019) clarify that "[a]n authorized representative can be any person you designate to complete and sign Form I-9 on your behalf." Therefore, a notary, a family member, neighbor, or even a physician of the employee could be considered as an "authorized representative" of the employer if the employer authorized him or her during the COVID-19 pandemic, thus reducing the need for travel to a specific company worksite, etc., or allowing for an employee to work from home if quarantined.

Note that the employer will remain liable for any violations in connection with the I-9 or the verification process, including any violations committed by the person designated to act on behalf of the employer. Therefore, companies may face liability if they authorize a representative, such as a family member or friend, to verify an I-9 and that person is not knowledgeable on the Form I-9 rules and/or supporting materials. Please click here for a sample form which provides instructions to the authorized representative. The form is not required but is recommended. If used, the form should be retained with the I-9 form.

2. Have the new hire complete section 1 of the I-9 remotely and then complete section 2 of the I-9 as soon as section 2 can be completed by the employer in person with the employee. **Note however that this is not a cure for a late I-9 for which a penalty would normally apply**. In addition, while ICE **has not authorized this option** for delays due to COVID-19, in the context of natural disasters like Hurricane Katrina, the government previously advised that employers whose Form I-9s are missing and/or destroyed as a result of a natural disaster should complete a new I-9 as soon as possible and attach a memo stating the reasons why it was redone or completed late. Completing this memo would help demonstrate a good faith effort to comply with the law and may help mitigate any penalty.

Q. How do I handle a scenario where an employee or employer is not using a fully electronic I-9 solution and does not have access to a printer and therefore cannot affix a "wet" signature to the I-9 form?

A: There is no government guidance on how to handle signatures where the employee or employer does not have access to a printer or an e-signature solution in the context of Covid-19. Therefore, while the guidance presented here is not without risk to employers, the guidance represents what we believe to be best practical solutions at this time which might help reduce but may not eliminate all risk.

- If the employee is unable to physically sign an I-9 (e.g. due to lack of print capability) but the employer is able to sign the I-9 then the employer can complete section one as the "preparer" and sign as the "preparer" (but should not sign on the employee signature line). If possible, consistent with DHS' remote I-9 protocols, an employer should have this portion done while in video conference to have a record of the process that could be provided to ICE if necessary.

- If video conferencing is not possible, at a minimum, employers should create a brief memo to keep with the I-9 or include a brief explanation in the "Other Information" field in Section 2 explaining the reason why the employee could not complete complete/sign

section one. When operations onsite resume, the employee would update section 1 (e.g. sign/date section one) to show they personally verified the information.

- If the employer is also unable to print and sign or access an e-sign compliant solution then the employer should sign using a solution that allows for some form of electronic signature (ex. Word ® or Adobe ®) but must also affix a wet signature and date (without back dating) when operations resume. If the employer does not have access to some form of electronic signature, then a wet signature should be affixed when operations resume.

TAX FORMS

FORM 941

Q: Will the IRS be publishing a new Form 941 to report tax credits and deferrals permitted under the CARES Act and FFCRA? [added May 15, 2020]

A: Yes. The IRS has proposed substantial changes to the Form 941 to report the tax credits and deferral of the employer Social Security taxes permitted under the CARES Act and FFCRA. A draft Form 941 was released on April 20, 2020, with draft instructions released on May 1. The new Form 941 will be effective for the second quarter of 2020.

The draft Form 941 has at least fifteen new lines and reporting elements related to the CARES Act and FFCRA: qualified sick leave wages; qualified family leave wages; nonrefundable portion of credit for qualified sick and family leave wages from Worksheet 1; nonrefundable portion of employee retention credit from Worksheet 1; deferred amount of the employer share of Social Security tax; refundable portion of credit for qualified sick and family leave wages from Worksheet 1; refundable portion of employee retention credit from Worksheet 1; total advances received from filing Form(s) 7200 for the quarter; qualified health plan expenses allocable to qualified sick leave; qualified health plan expenses allocable to qualified family leave wages; qualified wages for the employee retention credit; qualified health plan expenses allocable to wages reported on Line 21; credit from Form 5884-C, Line 11, for this quarter; qualified wages paid March 13 through March 31, 2020, for the employee retention credit (second quarter 2020 only); and qualified health plan expenses allocable to wages reported on line 24 (second quarter 2020 only).

Always Designing for People™

FORM 7200

Q: How will an employer know if it should consider requesting an advance of any credits it is eligible for?

A: Employers that estimate that they may have credits that exceed the amount of their estimated employment tax liabilities over the subsequent weeks may want to consider requesting an advance payment of such credits in excess of the employment tax liabilities they expect to have. Submitting a Form 7200 to the IRS to claim that excess amount could provide needed funds to the employer sooner than had the employer applied the credits to their ongoing tax liability.

Q: What if the employer doesn't know yet whether it will qualify for any of the credits?

A: In this instance, it's probably best to avoid requesting an advance payment of the credit. Instead, simply code qualifying FFRCA paid sick and family leave and Employee Retention Credit wages as instructed by ADP. This will automatically result in application of tax credits to current tax liabilities, which will reduce the employers deposit liability for in an amount equal to the tax credits applied on a per-payroll basis.

Q: How will any advances an employer requests via Form 7200 be reconciled against the credits that it earns during the quarter?

A: Clients will need to advise ADP of any Forms 7200 that they submit to the IRS. Clients need to be sure to submit through ADP SmartCompliance® the amount of any Form 7200 advance received from the IRS. If clients do not have access to ADP SmartCompliance, they must notify their ADP service team of the amount on line 8 on the Form 7200 as soon as payment is received from the IRS **This is critical: Failure to do so would result in an IRS advance payment AND application of the same credit by ADP. Employment taxes would be underpaid, potentially causing significant IRS penalties and interest.**

Please exercise caution when determining whether to submit a Form 7200 for an advance or to net remaining credits against future liabilities. If at the end of quarter you have received more in advances than remaining available credits, you will need to repay the balance of those excess advancesp

NOTE: All credits and Form 7200 advance payment requests will be reported on Form 941 at quarter end.

Q: What if an employer requests more in advances than it ultimately has in qualifying credits to offset?

A: If an employer over-estimates the value of credits it may qualify for during the quarter, and receives advances from the IRS for those amounts, the employer will owe a balance to the IRS at the end of the quarter. Employers should exercise caution when making estimates, to avoid an unexpected balance due to IRS at the end of the quarter.

Q: Will clients need to advise ADP about any advances they request from the IRS?

A: Yes. ADP needs this information to prepare IRS Form 941 (or comparable return). Clients need to be sure to submit through ADP SmartCompliance® the amount of any Form 7200 advance received from the IRS. If clients do not have access to ADP SmartCompliance, they must notify their ADP service team of the amount on line 8 on the Form 7200 as soon as payment is received from the IRS.

Q: Can an employer request more than one advance during the quarter?

A: Yes. There is no limit on the number of advances that an employer can request. Clients should be reminded that they will need to advise ADP of all of these advances, and the total amount of the advances must be reconciled on the Form 941 at the end of the quarter.

Q: What if an employer submits a Form 7200 for a quarter, but the IRS does not process the advance in time for the quarter requested and the employer receives the advance in the following quarter?

A: IRS draft instructions to the Form 941 released on May 1, 2020, note that "If you filed a Form 7200 before the end of the quarter but you haven't received the advance before filing Form 941, don't include that amount." Advance payments received need to be reconciled against the credits for which the employer qualified each quarter.

If the Form 7200 is rejected for any reason and/or no payment is ever received, it is important that ADP clients advise ADP of this no later than the last day of the quarter. Any applicable credit could be applied to outstanding or subsequent liabilities, and/or any overpayment would be reported on the 941, to be refunded by the IRS.

Q: Are employers required to first use available credits to offset existing liabilities before claiming an advance from the IRS?

A: No. Employers that determine that advance payments are necessary are able to request them based on their determination of the credit amount to which they will be entitled.

It is also possible to apply tax credits to current employment tax liabilities and also request an advance payment for any portion of the estimated tax credit that an employer believes will not be absorbed by current quarter liabilities. This will need to be carefully coordinated. As noted above, it will be critical to advise ADP of any Forms 7200 submitted to the IRS, and also to code qualifying wages appropriately.

Failure to do both could result in underpaid employment taxes and significant IRS penalties and interest.

Q: Will ADP be filing the Form 7200 on behalf of its clients?

A: No. After an evaluation of the process, we determined it would be more efficient for the client to process and submit directly to the IRS the Form 7200. ADP's involvement in this particular process could slow down receipt of the advance payment from the IRS.

As a reminder, clients need to be sure to notify their ADP service team of any Forms 7200 submitted to the IRS on the same day that any such form is submitted to the IRS.

Q: Does a client require ADP's name and EIN to complete the third-party payer information requested following the client's name and address information on the Form 7200?

A: No. The third-party payer information only applies to Certified Professional Employer Organizations (CPEOs), Professional Employer Organizations (PEOs) and agents covered under IRC Section 3504. Details on this can be found in the instructions for the Form 7200.

Q: What if an employer owes other amounts to the IRS? What will happen to any advances requested?

A: If an employer requests an advance payment from the IRS on Form 7200, the IRS will first use that advance to satisfy any outstanding tax obligations the employer might have with IRS under the same EIN. This will not be limited to employment tax liabilities, and could include other taxes such as corporate or excise taxes, or penalties or interest. Any balance of the advance remaining after the other tax obligations are satisfied will be issued to the employer in the form of an IRS

refund check. It is anticipated that IRS will issue a notice to advise employers of this situation, and any revised balance of the advance payment being issued.

Amounts applied to other tax obligations are still considered an advance, and must be reported on the Form 941, and reconciled against any credits for which the client is eligible.

Further, any amounts shown as an overpayment on an employment tax return at end of the quarter (whether related to any credit, or any other source of overpayment) are also subject to offset against outstanding liabilities.

In contrast, tax credits under FFCRA or the CARES Act that are NOT requested as an advance payment via Form 7200 are automatically applied to current quarter tax liabilities and will not be used to offset other liabilities unless there is a remaining credit (overpayment) amount showing on the Form 941.

Q: How can I find out more about the IRS offset program?

A: The Treasury Offset Program (TOP) is a federal program that seeks to recover unpaid liabilities from individuals and businesses by means of the tax refund process.

Additional information about potential IRS offsets overpayments and/or advance payments can be found on the following links:

https://fiscal.treasury.gov/files/top/TOP-rules-reqs-fact-sheet.pdf

https://fiscal.treasury.gov/top/faqs-for-the-public.html

WORKERS' COMPENSATION

Q: If employees claim COVID-19 infections arose out of work-related contacts, are such claims covered by workers' compensation benefits? [Update June 9, 2020]

A: Workers compensation coverage may be available in connection with provable workplace exposures that lead to infection and COVID-19 disease, but will depend on state law. This may provide some protection for employers concerned about potential liability and damages. However, where there is wide-spread community spread of the virus, it may be difficult if not impossible to prove that the exposure that lead to infection occurred at work.

Certain states, such as California, have begun to pass legislation that would create a presumption that an employee who tests positive for or is diagnosed with COVID-19 contracted the virus while at work for purposes of receiving workers' compensation benefits if certain conditions are met.

Q: Does my workers' compensation policy cover employees working from home?

A: In general, an employee injury or illness is compensable under workers' compensation if it arises out of and in the course of employment, regardless of the location the injury occurs. Employees typically have the burden of proving that the injury is work-related. "Arising out of" refers to what the employee was doing at the time of the injury, and "in the course of" refers to when the injury happened. To successfully claim workers' compensation benefits, the employee must show that he or she was acting in the interest of the employer at the time the injury occurred. Workers' compensation laws vary by state, and employers are encouraged to work with their workers' compensation carriers as well as their legal counsel to determine strategies to manage workers' compensation risks for their telecommuters.

Q: I have an associate showing potential symptoms of COVID-19, should I report this as a workers' compensation claim?

A: If you feel that the sickness could be considered work related, please report through your normal workers' compensation claims reporting procedures. Your carrier will investigate the claim and determine compensability. Workers compensation coverage may be available in connection with provable workplace exposures that lead to infection and COVID-19, but will depend on state law. This may provide some protection for employers concerned about potential liability and damages. However, where there is wide-spread community spread of the virus, it may be difficult if not impossible to prove that the exposure that lead to infection occurred at work.

Q: I have an associate that has tested positive for COVID-19, should I report this as a workers' compensation claim?

A: If you feel that the sickness could be considered work related, please report through your normal workers' compensation claims reporting procedures. Your carrier will investigate the claim and determine compensability. Workers compensation coverage may be available in connection with provable workplace exposures that lead to infection and COVID-19 disease, but will depend on state law. This may provide some protection for employers concerned about potential liability and damages. However, where there is wide-spread community spread of the

virus, it may be difficult if not impossible to prove that the exposure that lead to infection occurred at work.

Q: Is an employee who is out on workers' compensation leave entitled to take paid sick leave or paid family under the Families First Coronavirus Response Act (FFCRA)? [Added April 21, 2020]

A: Generally no, unless the employee was able to return to work on a light-duty basis. If an employee was taking leave because they were totally unable to work, they would not be entitled to take leave under FFCRA.

EMPLOYEE LEAVE

Q: Does the federal Family and Medical Leave Act of 1993 (the "FMLA") cover employees who are directed to work remotely?

A: No, if employees are working remotely, there is no basis to classify them as on leave, under the FMLA or otherwise.

Q: Does federal FMLA cover employees who are directed to remain out of work but are unable to work remotely?

A: No, the federal FMLA would not cover this situation, however, some state or local leave laws provide leave in cases of public health emergencies.

As of April 1, 2020, the Families First Coronavirus Response Act (FFCRA) expands the FMLA to allow an employee who has been employed at least 30 days and who is unable to work (or telework) to take up to 12 weeks of leave to care for the employee's son or daughter (under 18 years of age) if the child's elementary or secondary school or place of care has been closed, or the childcare provider is unavailable, due to COVID-19. Employees taking leave shall be paid at 2/3 their regular rate or 2/3 the applicable minimum wage, whichever is higher, up to $200 per day and $2,000 in the aggregate (over a 12-week period—two weeks of paid sick leave followed by up to 10 weeks of paid expanded family and medical leave). This expansion to the FMLA applies only to private employers with fewer than 500 employees and most public employers and only for the period of April 1, 2020 through December 31, 2020.

Q: What benefits may be available to employees who are unable to work due to illness during a pandemic?

A: If eligible, federal FMLA likely would cover these absences. In addition, from April 1, 2020 through December 31, 2020, employees are entitled to up to 80 hours of paid sick leave under the Families First Act (applicable to employers with fewer than 500 employees). State or local leave laws, company paid time and leave policies also might cover these absences. It is unclear whether the ADA or analogous state or local disability discrimination laws would provide protections in these instances. Please remember to check guidance for California employees.

WARN ACT / MASS LAYOFFS

Q: What is the WARN Act? [added May 15, 2020]

A: The Worker Adjustment and Retraining Notification (WARN) Act is a federal law that requires that certain employers must provide at least 60 calendar days advance written notice of a worksite closing affecting 50 or more employees, or a mass layoff affecting at least 50 employees and 1/3 of the worksite's total workforce or 500 or more employees at the single site of employment during any 90-day period. Exceptions apply.

Notice must be provided to affected employees and to each representative of the affected employees, if the employees are represented. Notice also must be served on the State dislocated worker unit and the chief elected official of the unit of local government within which a closing or layoff is to occur.

Please note that these FAQs apply to the federal WARN Act. There may be additional notice requirements if employees work in a state that have "mini-WARN" laws, including emergency legislation that may have been passed recently due to COVID-19.

Q: Which employers are covered by the WARN Act? [added May 15, 2020]

A: The WARN Act applies to employers with 100 or more full-time employees (not counting workers who have fewer than 6 months on the job).

Q: When do employers need to provide advance to workers under the WARN Act? [added May 15, 2020]

A: Employers must provide notification to employees for furloughs or layoffs that last longer than 6 months. A furlough or temporary layoff without notice that was originally believed to be brief but later is extended beyond six months, may violate the act unless:

- The extension is due to business circumstances not reasonably foreseeable at the time of the initial layoff and

- Notice is provided when it becomes reasonably foreseeable that the extension is required.

Q: If an employer needs to lay off workers permanently due to COVID-19, do I need to provide notice under the WARN Act, or is this situation an exception? [added May 15, 2020]

A: The DOL advises that employers in this situation review the "unforeseeable business circumstances" exception to the 60-day notice requirement (contained in the WARN Act at § 3(b)(2)(A), and the WARN regulations at 20 CFR 639.9): The "unforeseeable business circumstances" exception... applies to plant closings and mass layoffs caused by business circumstances that were not reasonably foreseeable at the time that 60-day notice would have been required.

In any case, employers must still:

1. Give as much notice as is practicable; and

2. Include a brief statement of the reason for giving less than 60-days' notice along with the other required elements of a WARN notice.

Q: Can I provide WARN notices via email, or do they have to be provided in hard copy? [added May 15, 2020]

A: WARN notices to employees, State dislocated worker unit and chief elected officials of the unit of local government may be provided via email, as long as the content of the notice complies with 20 C.F.R. § 639.7. The DOL recommends employers check with state agencies to determine their preferred method of delivery.

Q: Because business is declining due to the COVID-19, I don't have enough work for all my employees anymore. What alternatives do I have to layoffs?

A: Many states have adopted shared-work programs to provide employers with an alternative to layoffs. Under these programs, the employer temporarily reduces the hours of a group of employees, and the affected employees collect partial unemployment benefits. Another option is offering unpaid time off to employees in the form of a furlough.

Always Designing for People™

FURLOUGHS

Q: Is there a furlough law? [Updated April 13, 2020]

A: No. There is no federal or state "furlough" law. Instead, the term "furlough" is loosely used by employers to refer, most often, to a reduction in the number of days or weeks that an employee works. The Families First Act does not address furloughs. As discussed below, the lack of a specific furlough law does not excuse an employer from complying with a host of other laws that may be implicated. The Department of Labor has a Fact Sheet that answers some commonly asked questions related to the applicable of federal wage and hour law on furloughs. You can access this document here.

Q: Are there other laws that may be triggered by furloughing employees?

A: Yes. The federal Worker Adjustment and Retraining Notification Act ("WARN") is one of the more common laws that may be triggered. Federal WARN requires that certain written notification be provided to employees and others who are affected by plant closings and mass layoffs. However, WARN notifications would not be required if (i) a furlough is temporary and the intent is for the employees to return to their jobs on a definite date; and (ii) the furlough does not extend beyond 6 months. If WARN notice is required, federal WARN also permits delayed notice in the case of unforeseeable business circumstances and natural disasters such as COVID-19.

However, employers must also review state law because some states have mini-WARN laws, which may be more onerous than federal WARN. For example, there is no "unforeseen business circumstances" exception in California's mini-WARN law, but there is an exception for a "physical calamity." There is no definition of "physical calamity" under California law. Some states are also temporary modifying their mini-WARN laws in light of COVID-19.

Q: Will reducing hours instead of furloughing employees trigger the WARN Act?

A: Maybe. An employee suffers an employment loss under the federal WARN Act if he suffers a reduction in hours of more than 50% in each month of a consecutive 6-month period. Again, employers should also check state mini-WARN laws.

Q: Are there any wage hour issues to be aware of when reducing hours, days or weeks?

A. Yes. There are requirements relating to non-exempt and exempt employees pursuant to the Fair Labor Standards Act ("FLSA"). Employers should check state and local requirements for any additional obligations. Federal obligations are summarized as follows:

Non-Exempt Employees – The FLSA provides that non-exempt employees must be paid for all hours worked, plus overtime when working more than 40 hours in a work week. Conversely, they do not have to be paid for any non-worked hours *even if the absences were required by the employer due to a business slowdown or customer site closing*. If an employee wants to work but either elects not to come to work or is prohibited from doing so by the employer, due to quarantine, a furlough, a reduction in hours or a closure the employee does not have to be paid for hours that were not worked.

Salaried Exempt Employees - The FLSA rules are different for salaried exempt employees.

Closures and Furloughs

- In circumstances involving a company closing or furlough, 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 during a closure or furlough. Therefore, an employer may direct exempt staff to take vacation or debit their leave bank account in the case of an office closure or furlough 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 form overtime.

- In jurisdictions with statutory paid sick leave employers generally cannot require the employee to use paid sick leave where the absence is not caused by an actual illness.

- If the employee performs any work during a furlough or closure, the full salary must be paid for the week in which the work was performed.

- Exempt salaried employees are not required to be paid their salary in weeks in which they perform no work, even if they were ready willing and able to work but the employer ordered the employee not to work due to a closure, quarantine or furlough.

- Some states may have additional laws for the pay of exempt employees.

Reductions in Pay to Reduce Labor Costs

- To the extent there will be any reduction in the rate of pay for salaried exempt employees, the employer should provide specific advance written notice.

- Pursuant to DOL guidance, an employer is not prohibited from prospectively reducing the salary of exempt employees during a business or economic slowdown, "provided the change is bona fide and not used as a device to evade the salary basis requirements."

- Deductions from predetermined pay occasioned by day-to-day or week- to-week determinations of the operating requirements of the business constitute impermissible deductions from the predetermined salary and would result in loss of the exemption.

- The difference is that the first instance involves a prospective reduction in the predetermined pay to reflect the long-term business needs, rather than a short-term, day-to-day or week-to-week deduction from the fixed salary for absences or reductions in scheduled work occasioned by the employer or its business operations.

- Neither the DOL nor the courts have established a specific time period that is considered "long term business needs." The issue is whether the employer is making changes based on short term fluctuations in business or based on an unknown, indefinite change in business circumstances.

Workers on Visas

There are different rules for foreign nationals employed pursuant to temporary non-immigrant visas. There may be restrictions on working remotely, changes in location, changes in pay and changes in hours.

Q: Are there requirements to give employees advance notice?

A: Yes. Under the FLSA, notice of any changes in pay should be provided in advance of the pay period in which the change will occur. Additionally, employers should check state and local requirements regarding advance notice of employee schedules and any changes in pay.

Q: Are there other pay requirements to consider? If I am forced to close temporarily, does that trigger my state's final pay requirements?

A. Yes. Some states have final paycheck laws that may be implicated. Final pay rules differ from state to state, so check the law in the state where your employees work. Generally, though, short-term furloughs with a definite return date (that is clearly communicated to employees) do not trigger final pay requirements. Thus, any pay owed to the employee would due be on their next regular payday. However, some states may have stricter rules. For example, in California, a furlough longer than 10 days or a pay period not longer than 14 days should be considered a layoff. If it is a layoff (i.e., no work for longer than a pay period) all accrued but unused vacation and PTO must be paid out. If accrued but unused vacation and PTO is not paid out, the employer may owe waiting time penalties.

Q: Do the Families First Act's Expanded FMLA provisions and paid sick leave benefits apply to furloughed employees? [Updated 04/09/2020]

A. No. The DOL has explained that if an employee is furloughed because it does not have enough work, the employee is not entitled to then take paid sick leave or expanded family and medical leave. See DOL Guidance at https://www.dol.gov/agencies/whd/pandemic/ffcra-questionsEmployees who are furloughed may be eligible for unemployment insurance (Question 26).

Q: Are there benefits issues to consider?

A. Yes. Employer must review their benefits and other policies to determine what, if any, impact furloughs will have and what they need to do if they are going to "bridge the gap." Employees who will have benefits discontinued will likely need to receive COBRA notice.

Q: Could a furloughed employee be entitled to unemployment benefits?

A. Maybe. Unemployment benefits are determined at the state level. Plus, some states have enacted special rules in light of COVID-19.

Always Designing for People™

UNEMPLOYMENT INSURANCE

Individual state law, within broad federal requirements, will ultimately determine eligibility for unemployment insurance benefits. The federal government, through guidance (*Unemployment Insurance Program Letters 10-20, 13-20, and 14-20*) and legislation (*Emergency Unemployment Insurance Stabilization and Access Act 0f 2020*), and the *Coronavirus Aid, Relief, and Economic Security Act (CARES Act)* is covering more workers and providing states with greater flexibility to determine if individuals affected by the COVID-19 virus eligible for unemployment insurance benefits.

Q: Is an employee eligible for unemployment insurance (UI) if they cannot work due to office closure or if they can't come to work due to illness or quarantine?

A: Individuals are generally eligible to receive unemployment insurance benefits if they are out of work through no fault of their own, available for work, and actively seeking work. Additionally, the U.S. Department of Labor issued Unemployment Insurance Program Letter 10-20 on March 12, 2020 - *Unemployment Compensation (UC) for Individuals Affected by the Coronavirus Disease 2019 (COVID-19)*.

In response to a question on individuals under quarantine, it says in part: "Federal law would permit a state to treat the separation for the period of the quarantine as a temporary layoff." So, if individuals meet all of the other eligibility requirements the state would be permitted to determine the individuals eligible for UI benefits.

Q: Can hourly employees, not being paid during closures, apply for unemployment benefits? [Updated 04/09/2020]

A: Anyone can apply for unemployment benefits. Individuals with sufficient prior wages who are out of work through no fault of their own, available for work, and actively seeking work are generally eligible to receive benefits. Whether the individuals were compensated on an hourly or salary basis does not matter. Also, workers that were independent contractors, including "gig economy" workers, are for the first time temporarily eligible to receive benefits under the unemployment insurance program. The gig workers were included in Section 2102 of the CARES Act. If they are out of work for reasons attributable to COVID-19 and meets the state's eligibility requirements, gig workers will generally be eligible to receive UI benefits from January 27, 2020 to December 31, 2020.

Q: For those employees that we reduce hours to 20 hours a week, can they apply for unemployment or other aid to make up the other 20 hours?

A: The U.S. Department of Labor issued Unemployment Insurance Program Letter 10-20 on March 12, 2020 - *Unemployment Compensation (UC) for Individuals Affected by the Coronavirus Disease 2019 (COVID-19)*. It states in part that "the Short-Time Compensation (STC) program, also known as work-sharing, helps employers avert layoffs.
The program allows employers with a state-approved STC plan to reduce the hours of the employees in lieu of layoffs, while permitting these employees to receive payment for partial unemployment." Additionally, the *Emergency Unemployment Insurance Stabilization and Access Act Of* 2020 directs the Secretary of Labor to assist states in establishing, implementing, and improving the employer awareness of STC programs. There are currently 28 states who have enacted or amended STC laws.

Here is a link to the U.S. Department of Labor website that lists the states with STC programs: https://stc.workforcegps.org/resources/2016/03/15/00/54/STC State Websites.

Employers need to contact the applicable state to implement a STC plan.

Q: Can employees of a non-profit organization receive unemployment benefits? [Updated 04/09/2020]

A: The tax filing status of the employer is not a relevant factor in determining an individual's eligibility for unemployment insurance benefits. Employees that meet the state's requirements for monetary eligibility and are out of work through no fault of their own, available for work, and actively seeking work are generally eligible to receive benefits. Non-profit employers that elect the reimbursement method of payment do not pay a quarterly tax, but rather reimburse the state for any unemployment benefits paid to former laid-off workers that are attributable to the employer.

Q: If a business closes temporarily, can the employees file for unemployment? If so, what is the period of time that the business needs to be closed?

A: Yes, temporary business closures are a typical situation for unemployment insurance to step in and provide benefits to eligible individuals. States generally determine eligibility to individuals on a weekly basis and any wages paid during that week would reduce benefit eligibility.

Q: Is an employee eligible for unemployment insurance if they have a disability?

A: Assuming the individual was previously employed while having the disability, it would generally not be a factor in determining unemployment eligibility. Under existing state eligibility

requirements, individuals must be available for suitable work, which would refer to the work previously performed by the individual.

THE FAMILIES FIRST CORONAVIRUS RESPONSE ACT

Q: What does the Families First Coronavirus Response Act ("Families First Act" or "FFCRA") cover?

A: The Families First Act, which was enacted on March 18, 2020, guarantees free coronavirus testing, establishes paid family and medical leave and corresponding tax credits, enhances unemployment insurance, expands food security initiatives, and increases federal Medicaid funding. It is divided into the following sections:

A. Appropriations,
B. Nutrition Waivers, to allow students who receive free or reduced priced meals through schools to continue to receive them
C. Emergency Family and Medical Leave Act Expansion
D. Emergency Unemployment Insurance Stabilization and Access Act of 2020
E. Emergency Paid Sick Leave Act
F. Health Provisions, to help expand COVID-19 diagnostic testing and required tests to be performed at no cost to consumers
G. Tax Credits for Paid Sick and Paid Family and Medical Leave
H. Employee Rights notice
I. Budgetary Effects

This FAQ document addresses Sections C, E, F, G and H.

Guidance Applicable to Emergency Family and Medical Leave Expansion and Emergency Paid Sick Leave Provisions

Q: How will the Emergency Family Medical Leave Expansion and Emergency Paid Sick Leave Provisions of the Families First Act impact my workplace?

A: These provisions of the Families First Act will impact private employers with fewer than 500 employees and most public employers (Covered Employers). Covered Employers will be required to provide a certain amount of emergency paid sick leave (EPSL) and emergency paid family leave (EPFL) to employees affected by COVID-19 and will receive corresponding employment tax

credits. In addition, the Families First Act temporarily expands the reasons for which employees working for Covered Employers may take leave under the FMLA.

Q: When do the Emergency Family Medical Leave Expansion and Emergency Paid Sick Leave Provisions of the Families First Act take effect?

A: These provisions of the Families First Act take effect on **April 1, 2020.**

Q: Does the Families First Act apply retroactively to leave taken before April 1?

A: No. Leave taken before April 1 is not covered by the Families First Act and employers will not be eligible for any tax credits for any paid leave provided prior to that date.

Q: Which employers are impacted by the Families First Act?

A: The EPSL and EFML components impact most public employers and private employers with fewer than 500 employees. Some provisions may not apply to private employers with fewer than 50 employees, as discussed below. Also, employers may elect not to provide EPSL or EFML to health care providers or emergency responders.

Q: Which employees should be included for purposes of the fewer than 500-employee threshold of the Families First Act?

A: The DOL has issued guidance clarifying that you should include the following employees in your total:

- Full-time and part-time employees within the United States, including any State of the United States, the District of Columbia, or any Territory or possession of the United States.
- 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).

Independent contractors and employees who have been laid off or furloughed (and have not subsequently been reemployed) should not be included for purposes of the fewer than 500 employee threshold.

Q: My company has multiple divisions and subsidiaries. Which ones should be included when determining whether I have fewer than 500 employees? [Updated April 21, 2020]

A: Typically, a corporation (including its separate establishments or divisions) is considered to be a single employer and its employees must each be counted towards the fewer than 500-employee threshold. Where a corporation has an ownership interest in another corporation, the two corporations are separate employers unless they are joint employers under the FLSA with respect to certain employees. If two entities are found to be joint employers, all of their common employees must be counted in determining whether EPSL or EFML must be provided under the Families First Act. Thus, both entities that provide or refer employees to other employers such as staffing companies, and the employers to whom those individuals are referred or provided may each be considered their employer for purposes of determining the number of employees for purposes of FFCRA.

Q: What about separate but related companies? How should we count our employees?

A: The DOL has adopted the integrated employer test under the FMLA. Generally, this test requires an evaluation of a number of factors to determine whether two entities should be considered an integrated employer for purposes of aggregating the total number of employees they have. These factors include: common management, interrelation between operations, centralized control of labor relations; and the degree of common ownership/financial control. If the totality of the circumstances weighs in favor of the entities being considered an integrated employer, then the combined entity should count of their employees toward determining whether the entity has fewer than 500 employees.

Q: When should I count my employees for purposes of determining whether I have fewer than 500?

A: According to the Department of Labor, employers need to count their employees as of the date the leave is to begin. This means that if one employee's leave begins on Monday, when the employer has 503 employees, that employee would not be entitled to leave under FFCRA. If another employee's leave begins on Friday and the company's headcount has dipped to 499, the second employee would be entitled to leave under FFCRA.

Q: How do I determine if I am eligible for the exemption for employers with fewer than 50 employees?

A: According to the DOL, employers with fewer than 50 employees may claim an exemption from providing leave under FFCRA when the imposition of the need to offer leave would jeopardize the viability of the business as a going concern. This possible exemption applies *only for leaves taken for school closures or lack of childcare*, i.e. for EFML and for reason 5 for taking EPSL. For the other 5 possible reasons for EPSL, the small business exemption is not available.

To be eligible for this exemption, an authorized officer of the business must have determined that:

(i) The leave would result in the small business's expenses and financial obligations exceeding available business revenues and cause the small business to cease operating at a minimal capacity;

(ii) The absence of the employee(s) would pose a substantial risk to the financial health or operational capabilities of the business because of their specialized skills, knowledge of the business, or responsibilities; or

(iii) There are not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services provided by the employee(s) requesting leave.

Employers wishing to take advantage of this exemption should not send any materials or documentation to the Department of Labor, but rather should maintain the records themselves.

Q: I have fewer than 500 employees, but I have some temporary employees from an agency. The agency has more than 500 employees. Do I have to provide Families First leave to the temporary employees from this agency? [Updated May 15, 2020]

A: The agency does not need to provide Families First leave to these employees, since it has more than 500 employees, but you might need to do so, if you are a joint employer with the temporary agency of these employees. Determination of whether you are a joint employer depends upon fact-specific analysis of a number of factors. DOL has issued guidance on joint employer relationships here.

Q: How do I calculate the regular rate of pay for purposes of Families First Act leave? [Updated April 21, 2020]

A: For both Families First Emergency FMLA leave and paid sick leave, the DOL has explained that the regular rate of pay for FFCRA is the average of the employee's regular rate over a period of up to six months prior to the date on which the employee takes leave. If the employee has not worked for employers for six months, the regular rate used to calculate their paid leave is the average of their regular rate of pay for each week they have worked for employers. Commissions, tips, or piece rates are incorporated into the above calculation to the extent that they are included in the regular rate calculation as prescribed under the FLSA and 29 CFR Parts 531.60 and 778.

If during the past six months, the employee was paid exclusively through a fixed hourly wage or a salary equivalent, the average regular rate would simply equal the hourly wage or the hourly-equivalent of their salary. If the employee's rate of pay varied or of they were paid on commission, on a piece rate basis or earned tips, then the employee's average regular rate of pay for purposes of FFCRA is equal to the total of all of their compensation that is included under the FLSA during a six-month period, divided by all of the hours actually worked over the same period. Unlike for purposes of calculating average hours, payments made for taking leave and hours taken as leave should NOT be included in the calculation for average regular rate of pay.
If your employee is paid a fixed salary each workweek, their average regular rate depends upon whether this compensation is understood to be compensation for a specific number of hours, or whether the amount is understood to compensate the employee regardless of the number of hours worked. In the former case, the employee's average regular rate is the hourly equivalent of the weekly salary divided by the number of hours the employee is expected to work. If the salary is intended to compensate the employee regardless of the number of hours they work, an employer should add up the salary paid to the employee over all full workweeks in the past six months and divide that sum by the total number of hours worked in those workweeks. Employers lacking records for the number of hours the employee actually worked should use a reasonable estimate.

Q: Have any federal agencies provided guidance on how the Families First Act will be interpreted?

A: Yes, the DOL has provided guidance with an FAQ here and guidance on paid leave here. The DOL's temporary regulations for the FFCRA are here. The IRS also has published guidance here .

Q: Do the Family First Act's FMLA and paid sick leave benefits apply to furloughed employees? [Updated 04/09/2020]

A. No. The DOL has explained that if an employee is furloughed because it does not have enough work, the employee is not entitled to then take paid sick leave or expanded family and medical leave. See DOL Guidance at https://www.dol.gov/agencies/whd/pandemic/ffcra-questions (Question 26). Employees who are furloughed may be eligible for unemployment insurance.

Q: Do employees have to provide documentation of their need for utilize the Families First Act paid sick leave or Emergency FMLA leave?

A: Yes. The DOL clarified that if an employer intends to claim a tax credit for FFCRA paid sick or emergency FMLA leave, employers will need to retain "appropriate documentation" in their records.

For paid sick leave, employees must provide documentation showing:

- The employee's name;
- Qualifying reason for requesting leave;
- A statement that the employee is unable to work, including telework, for that reason;
- The date(s) for which leave is requested; and
- Documentation of the reason for the leave, such as the source of any quarantine or isolation order, or the name of the health care provider who has advised self-quarantine.

For employees seeking EPSL or EFML due to school closures or lack of childcare, employees will be required to provide similar documentation supporting the need for leave, as well as:

- the name of the son or daughter being cared for;
- the name of the school, place of care, or child care provider that has closed or become unavailable; and
- a representation that no other suitable person will be caring for the son or daughter during the period for which the employee is taking EPFL or EPSL.

The DOL advises that employers "should consult Internal Revenue Service (IRS) applicable forms, instructions, and information for the procedures that must be followed to claim a tax credit, including any needed substantiation to be retained to support the credit." It adds that employers are not required to provide leave if materials sufficient to support the tax credit are not provided. See question on what documentation is required to substantiate eligibility for Families First Act tax credits below.

Q: What information does an employer need to obtain from an employee in order to claim a tax credit under the Families First Act?

A: According to guidance from the IRS, if the employer wishes to claim a tax credit for paid leave, in addition to the information above, employers will also need to create and maintain records of the following information:

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

- Documentation to show how the employer determined the amount of qualified health plan expenses that the employer allocated to wages.
- Copies of any completed Forms 7200, Advance of Employer Credits Due To COVID-19, that the employer submitted to the IRS.
- Copies of the completed Forms 941, Employer's Quarterly Federal Tax Return, that the employer submitted to the IRS (or, for employers that use third party payers to meet their employment tax obligations, records of information provided to the third-party payer regarding the employer's entitlement to the credit claimed on Form 941).

Q: What details does the employee need to provide to the employer if the employee is taking leave for their own quarantine order, or a quarantine order of a family member? Is this information required for employers to claim a tax credit?

A: For an employer to be entitled to take a tax credit for employee leave based on a quarantine order or self-quarantine advice, the employer will need to obtain from the employee a statement including:

1. the name of the governmental entity ordering quarantine or the name of the health care professional advising self-quarantine, and;

2. if the person subject to quarantine or advised to self-quarantine is not the employee, that person's name and relation to the employee.

Q: What details does the employee need to provide to the employer if the employee is taking leave to seek a medical diagnosis, after exhibiting symptoms of COVID-19? [Added May 15, 2020]

A: Employers may require the employee to identify their symptoms and a date for a test or doctor's appointment. They may not, however, require the employee to provide further documentation or similar certification that they sought a diagnosis or treatment from a health care provider in order for the employee to use paid sick leave for COVID-19 related symptoms. The minimal documentation required to take this leave is intentional so that employees with COVID-19 symptoms may take leave and slow the spread of COVID-19.

Please note, however, that if an employee were to take unpaid leave under the FMLA, the FMLA's documentation requirements are different and apply. Further, if the employee is concurrently taking another type of paid leave, any documentation requirements relevant to that leave still apply.

Q: What details does the employee need to provide to the employer if the employee is taking leave due to a school closure or lack of child care? Are there special considerations for children above a certain age? Is this information required for employers to claim a tax credit?

A: For an employer to be entitled to take a tax credit for an employee leave based on a school closing or child care 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.

Employers should note that the IRS has drawn a distinction in situations involving school closings or unavailability of child care for children over age fourteen (14). In situations involving an employee's inability to work or telework because of a need to provide care for a child older than fourteen during daylight hours, the employee must also provide a statement that special circumstances exist requiring the employee to provide care.

Q: My employee took leave to help their child with distance learning during the school year. School has now ended for the term. Can the employee take Families First leave to care for a child whose school is closed for the summer? [Added May 15, 2020]

A: No. Families First leave is not available for this reason if the school or child care provider is closed for summer vacation, or any other reason that is not related to COVID-19. However, the employee may be able to take leave if their child's care provider during the summer—a camp or other programs in which the employee's child is enrolled—is closed or unavailable for a COVID-19 related reason.

Q: For how long must employers retain documentation needed to substantiate FFCRA tax credits?

A: Four years. Employers wishing to claim a tax credit must retain all of the information described above for four (4) years after the date the tax becomes due or is paid, whichever comes later.

Q: Can employees take intermittent leave under the Families First Act?

A: For some types of leave, yes. EPSL and EFML may be taken intermittently only if the employer and the employee agree. The agreement may but is not required to be in writing. For

employees who are teleworking, the employer and the employee may agree to intermittent leave for EFML or any of the reasons for EPSL.

If the employee's job requires them to report to the employer's worksite, then intermittent leave is only permitted for reasons related to school closures or lack of child care, and then only if the employer and the employee consent. The rationale is that allowing intermittent leave for employees who must interact with others and who need leave for any of the other EPSL reason might present a risk of spreading illness to co-workers or the public.

Q: How do employer-provided paid leave offerings interact with leave under the Families First Act? [Updated April 21, 2020]

A: The employer may not require an employee to use employer-provided paid leave for the 80 hours, or 2 weeks of EPSL.

The first 2 weeks, or ten days of EFML, however, may be unpaid under FFCRA. During this time, if the employee does not elect to use or has already exhausted their EPSL allotment, the employee may elect – or the employer may require the employee – to use their accrued employer-provided leave, which will run concurrently with the unpaid EFML time.

After the first two weeks of EFML, an employer may require an employee taking EFML to simultaneously use paid leave available to the employee under an employer-provided paid leave program, such as vacation time or PTO, so that this time will run concurrently with EFML. If an employer requires employer-paid time to run concurrently with EFML, the employer must pay the employee their full pay during the leave until the employee has exhausted available paid leave under the employer's plan. However, the employer is only entitled to tax credits for wages paid at 2/3 of the employee's regular rate of pay, up to the daily and aggregate limits in for EFML ($200 per day or $10,000 in total). If the employee exhausts available paid leave under the employer's plan, but has more EFMLA available, the employee will receive any remaining EFML in the amounts and subject to the daily and aggregate limits in the FFCRA.

Additionally, after the first two weeks or ten days of EFML, when an employee is entitled to be paid at two-thirds of their regular rate of pay up to $200 per day, the employer and employer may agree to have employer-provided leave supplement paid EFML, so that the employee will be paid the full amount of their normal pay. For instance, the employer and employee may agree that the employee will use one-third of an hour of accrued employer-provided paid leave for each hour of EFML taken.

Q: How does leave taken under the Families First Act interact with paid leave available to employees under state and local paid leave laws?

A: The DOL clarified that any leave under the Families First Act *is in addition to* leave available to employees under state or local paid leave laws.

Q: Can an employee take both EPSL and EFML under the Families First Act? What would the employee's total leave entitlement be?

A: The DOL has clarified that "[p]aid sick leave [under the Families First Act] is not a form of FMLA leave and therefore does not count toward" an employee's 12-week FMLA allotment. It is therefore possible that an individual employee could take *up to 14 total weeks* of leave under the Families First Act, 2 weeks (or 80 hours) of paid sick leave, followed by 12 weeks of EFML. For example, if an employee were to take 80 hours of EPSL for reasons other than school closures or lack of child care, e.g., for the employee's own illness, and the employee had not previously taken any FMLA leave, then the employee would still be entitled to an additional 12 weeks of EFML for "a qualifying need related to a public health emergency," *i.e.*, if the employee is unable to work or telework due to school closures or lack of child care resulting from the public health emergency.

Similarly, an employee could elect to take 12 weeks EFML, of which the first 2 weeks are permitted to be unpaid under the Families First Act. The employee could utilize employer-provided leave benefits to cover those first two weeks, so the employee would be paid for that time. The employee then would be entitled to take an additional 80 hours of EPSL under the Families First Act.

If the employee does not have or does not want to use employer-provided paid leave to cover the first two weeks of EFML which the Families First Act allows to be unpaid, the employee has the option to use the 80-hour EPSL entitlement to run concurrently with the employee's EFML. In such a case, the employee would be entitled to only a 12-week total period of leave under the Families First Act.

Q: What kind of notice of the need for leave must employees provide?

A: Employers are not permitted to require notice in advance of the first workday on which the employee takes EPSL or EFML. After that, the employer may require the employee to provide notice of the need for leave as soon as practicable. Generally, it will be reasonable for the employer to require the employee to comply with the employer's usual and customary notice requirements for requesting leave.

Q: What if I change my health plan or benefits while an employee is out of EPSL or EFML?

A: The employee is entitled to the new or changed plan/benefits to the same extent as if they were not on leave. An employee can choose to not maintain coverage while on EPSL or EFML, but when they return from leave, they must be reinstated with no additional qualifying period.

Families First: Emergency FMLA Expansion

Q: Which employees are eligible to take EFML under the Families First Act?

A: Employees who have been employed for at least 30 calendar days are eligible, except employers may exclude health care providers and emergency responders from being considered eligible employees. Employees are considered to have been employed for at least 30 calendar days if they were on the employer's payroll for the thirty calendar days immediately prior to the day that the leave would begin; or if the employee was laid off or otherwise terminated by the employer on or after March 1, 2020, and rehired or otherwise reemployed on or before December 31, 2020, provided that the employee had been on the employer's payroll for thirty or more of the sixty calendar days prior to the date the employee was laid off or otherwise terminated. Days the employee worked at a temporary agency for the employer if they are subsequently hired by the employer are included.

Q: Are there any exceptions for health care providers and emergency responders?

A: Yes. An employer of an employee who is a health care provider or an emergency responder may elect not to provide EFML to such employees.

Q: Which employees are considered health care providers for purposes of the Families First Act?

A: The DOL put forth a very broad interpretation of which employees are considered health care providers:

- Any individual employed at any doctor's office, hospital, health care center, clinic, post-secondary educational institution offering health care instruction, medical school, local health department or agency, nursing facility, retirement facility, nursing home, home health care provider, any facility that performs laboratory or medical testing, pharmacy, or any similar institution, employer, or entity.

- This includes any permanent or temporary institution, facility, location, or site where medical services are provided that are similar to such institutions.

- Any individual employed by an entity that contracts with any of the above institutions, employers, or entities to provide services or to maintain the operation of the facility.

- Any individual employed by any entity that provides medical services, produces medical products, or is otherwise involved in the making of COVID-19 related medical equipment, tests, drugs, vaccines, diagnostic vehicles, or treatments.

- Any individual that the highest official of a state or territory, including the District of Columbia, determines is a health care provider necessary for that state's or territory's response to COVID-19.

Q: Which employees are considered emergency responders for purposes of the Families First Act?

A: The DOL's definition of emergency responder is also very broad. The DOL states that an emergency responder is an employee who is necessary for the provision of transport, care, health care, comfort, and nutrition of such patients, or whose services are otherwise needed to limit the spread of COVID-19. This includes but is not limited to military or national guard, law enforcement officers, correctional institution personnel, fire fighters, emergency medical services personnel, physicians, nurses, public health personnel, emergency medical technicians, paramedics, emergency management personnel, 911 operators, public works personnel, and persons with skills or training in operating specialized equipment or other skills needed to provide aid in a declared emergency as well as individuals who work for such facilities employing these individuals and whose work is necessary to maintain the operation of the facility. This also includes any individual that the highest official of a state or territory, including the District of Columbia, determines is an emergency responder necessary for that state's or territory's response to COVID-19.

Q: How much EFML are eligible employees entitled to take? [Updated April 21, 2020]

A: Eligible employees are entitled to take up to 12 weeks of job-protected EFML. The number of hours of EFML to which an employee is entitled depends upon the number of hours the employee is scheduled to work. For employees with a regular schedule, they are entitled to pay for their normally scheduled hours. For employees who have weekly working hours that fluctuate, the employer is allowed to take an average over a six-month period. This is a workday average, not a calendar day. If the employee did not work over a full six months, the reasonable expectation of

the employee at the time of hiring. For seasonal employees, employers should exclude from the calculation any off-season periods in which the employee did not work.

As an alternative, the amount of pay for EFML may be computed in hourly increments instead of full days. For each hour taken after the first two weeks, employers must pay two-thirds of the employee's average regular rate of pay.

Q: Do I include hours during which the employee took leave in determining how much EFML my employee is entitled to take? [Added April 21, 2020]

A: Yes. In its FAQs, the DOL provides the following examples:

> *Consider the examples below involving two employees with irregular schedules who take leave on April 13, 2020. For both employees, the six-month period would consist of 183 calendar days from October 14, 2019, to April 13, 2020.*
>
> *The first employee worked 1,150 hours over 130 workdays, and took a total of 50 hours of personal and medical leave. The total number of hours the employee was scheduled to work (including all leave taken) was 1,200 hours. The number of hours per workday is computed by dividing 1,200 hours by the 130 workdays, which is 9.2 hours per workday. You must therefore pay the first employee for 9.2 hours per workday times 2/3 his or her regular rate for each day of expanded family and medical leave taken, subject to a $200 per day cap and $10,000 maximum ....*
>
> *The second employee, in contrast, worked 550 hours over 100 workdays, and took a total of 100 hours of personal and medical leave. The total number of hours the employee was scheduled to work, including all leave taken, was 650 hours. The number of hours per workday is computed by dividing 650 hours by the 100 workdays, which is 6.5 hours per workday. You must therefore pay the second employee for 6.5 hours per workday times 2/3 his or her regular rate for each day of expanded family and medical leave taken, subject to a $200 per day cap and $10,000 maximum ...*

Q: Are employees entitled to an additional 12 weeks of leave under the Families First Act's Emergency FMLA provisions, or is the total leave for all FMLA reasons limited to 12 weeks?

A: Total leave under the FMLA, including EFML and leave for previously existing FMLA-qualifying situations, is limited to 12 weeks. One nuance to note is that employees are limited to a total of 12 weeks of EFML during the period of April 1 – December 31, 2020 regardless of whether the employee's 12-week leave spans the employer's designated FMLA period. This might be relevant for employers who utilize the rolling methods of determining FMLA leave availability, or periods other than the calendar year.

Q: Are there any exceptions to the requirement that the leave be job-protected?

A: Employers with fewer than 25 employees are not required to provide job-protected leave for an employee taking leave if the employee's position no longer exists following leave due to operational changes occasioned by a public health emergency provided that: (1) the employer makes reasonable efforts to restore the employee to an equivalent position; and (2) the employer makes reasonable attempts to contact the employee for a period of one-year following a certain period if an equivalent position becomes available.

Q: What are the reasons an employee can take EFML?

A: Eligible employees may take EFML to care for a son or daughter whose school or place of care is closed, or child care provider is unavailable, due to COVID-19 related reasons. For an employee to take EFML, there must be a need for the employee to care for an individual, and the employee needs to be unable to perform work either at their normal workplace or by telework. EFML is not available in cases where an employer does not have work for the employee.

Q: Can an employee take EFML to care for a child based on the closure of a summer camp, summer enrichment program, or other summer program that the child would have attended? [Added July 2, 2020]

A: Yes, but leave for this reason is subject to the same documentation requirements as for leave for school or day care closures. The employee should provide the name of the specific summer camp or program that would have been the place of care for the child had it not closed. 29 C.F.R. § 826.100(e)(2). This requirement to name a specific summer camp or program may be satisfied if the child, for example, applied to or was enrolled in the summer camp or program before it closed, or if the child attended the camp or program in prior summers and was eligible to attend again. There may be other circumstances that show an employee's child's enrollment or planned enrollment in a camp or program. The expectation that employees take FFCRA leave based on planned summer enrollments is not different from the closing of other places of care, such as a day care center. An employee generally could not take FFCRA leave to care for his or her child based on the closing of a day care center that the child has never attended, unless there were

some indication that the child would have attended had the day care center not closed in response to COVID-19.

Q: Must leave under this provision be paid?

A: The first 10 days of the leave can be unpaid. An employee may elect to use accrued vacation, personal or medical or sick leave for those days.

The remainder of the leave must be paid at two-thirds the employee's regular rate of pay for each hour of EFML taken subject to a maximum of $200 per day and $10,000 total per employee.

Q: Can I take a credit for the amount I pay my employees in EFML?

A: Yes. See Section Tax Credits for Paid Sick and Paid Family and Medical Leave below.

Q: How long will the Families First Act's EFML provisions be in effect?

A: The Families First Act's EFML provisions are effective between April 1, 2020 and December 31, 2020. They do not apply to leave taken prior to April 1, 2020.

Families First: Emergency Paid Sick Leave

Q: Which employees are eligible to take EPSL under the Families First Act?

A: All employees of covered employers are eligible to take EPSL under the Families First Act regardless of how long they have been employed by the employer, except that employers may decline to provide EPSL to emergency responders and health care providers as those terms are defined above. Employers with fewer than 50 employees may seek an exemption from the need to provide EPSL to employees seeking leave due to reason 5 below.

Q: How much EPSL may eligible employees take?

A: Full-time employees are entitled to take up to 80 hours paid sick leave. Part-time employees are entitled to a pro-rated amount. If the part-time employee has been employed for at least six months, they are entitled to fourteen times the average number of hours that the employee was scheduled to work each calendar day over the immediately prior six-month period, including any hours for which the employee took leave of any type. If the part-time employee has been employed for less than six months, they are entitled to fourteen times the number of hours the employee and the employer agreed to at the time of hiring that the employee would work, on

average, each calendar day. If there is no such agreement, the employee is entitled fourteen times the average number of hours per calendar day that they were scheduled to work over the entire period of employment, including hours for which they took leave of any type.

Q: How do I calculate EPSL entitlement for an employee with an irregular schedule that makes it impossible to determine how many hours they would work during a two-week period? [Added April 21, 2020]

A: In this case, an employer must estimate hours based on the average number of hours the employee was scheduled to work per calendar day (not workday) over the six-month period ending on the first day of paid sick leave. This average must include all scheduled hours, including both hours actually worked and hours for which the employee took leave.

In its FAQ document, the DOL provides the following examples:

> *Consider the examples below involving two employees with irregular schedules who take leave on April 13, 2020. For both employees, the six-month period used for estimating average hours consists of 183 calendar days from October 14, 2019, to April 13, 2020.*
>
> *During that six-month period, the first employee worked 1,150 hours over 130 workdays, and took a total of 50 hours of personal and medical leave. The total number of hours the employee was scheduled to work, including all leave taken, was 1,200 hours. The number of hours per calendar day is computed by dividing 1,200 hours by the 183 calendar days, which results in 6.557 hours per calendar day. The two-week average is computed by multiplying the per calendar day average by 14, which results in 91.8 hours. Since this is greater than the statutory maximum of 80 hours, the first employee, who works full-time, is therefore entitled to 80 hours of paid sick leave.*
>
> *The second employee, in contrast, worked 550 hours over 100 workdays, and took a total of 100 hours of personal and medical leave. The total number of hours the employee was scheduled to work, including all leave taken, was 650 hours. The number of hours per calendar day is computed by dividing 650 hours by the 183 calendar days, which is 3.55 hours per calendar day. The two-week average is computed by multiplying the per calendar day average by 14, which results in 49.7 hours. The second employee, who works part-time, is therefore entitled to 49.7 hours of paid sick leave.*

Q: How much EPSL is a seasonal employee entitled to take? [Added April 21, 2020]

A: If the employee is a seasonal employee who works an irregular schedule, they are entitled to fourteen times the average number of hours each day that they were scheduled to work over the period of employment, up to the last six months, excluding any off-season periods during which the employee did not work. Please note, however, that if your seasonal employee is not scheduled to work, for example, because it is the off-season, then you do not have to provide EPSL.

Q: What is the maximum amount of EPSL an employee is entitled to take? [Added April 21, 2020]

A: Any individual employee is entitled to a maximum of 80 hours of EPSL, even if they change employers. An employee who has taken some, but fewer than 80 hours of EPSL, and then changes employers is entitled only to the remaining portion of EPSL from the new employer, and only if the new employer is covered by EPSLA.

Q: For what reasons are employees entitled to take paid sick leave?

A: Employees who are unable to work or telework due to any one or more of the following conditions:

1. They are subject to a Federal, State, or local quarantine or isolation order ("isolation order") related to COVID-19;
2. They have been advised by a health care provider to self-quarantine due to concerns related to COVID-19 ("quarantined employee");
3. They are experiencing symptoms of COVID-19 and seeking a medical diagnosis;
4. They are caring for an individual who is subject to an isolation order or is a quarantined employee;
5. They are caring for a son or daughter if the school or place of care of the son or daughter has been closed, or the child care provider of such son or daughter is unavailable, due to COVID-19 precautions; or
6. They are experiencing any other substantially similar condition as specified by the Secretary of Health and Human Services.

Q: When is an employee eligible for EPSL because the employee is "subject to a Federal, State or local quarantine or isolation order?" [Updated April 21, 2020]

A: The DOL has clarified that this includes "quarantine, isolation, containment, shelter-in-place, or stay-at-home orders" to the extent that these orders cause the employee to be unable to work,

even though the employer has work for them. The key is that work must be available to perform. For example, if the employee works as a server in a restaurant that has been ordered to close, there is no work for the employee, and they are not eligible for EPSL. In contrast, if the employee would have been able to perform available work but for having been ordered to be quarantined, or shelter in place, etc., the employee is entitled to EPSL. According to the DOL's FAQs:

> ***[I]****f you are prohibited from leaving a containment zone and your employer remains open outside the containment zone and has work you cannot perform because you cannot leave the containment zone, you may take paid leave under the FFCRA. Similarly, if you are ordered to stay at home by a government official for fourteen days because you were on a cruise ship where other passengers tested positive for COVID-19, and your employer has work for you to do, you are also entitled to paid sick leave if you cannot work (or telework) because of the order. If, however, your employer closed one or more locations because of a quarantine or isolation order and, as a result of that closure, there was no work for you to perform, you are not entitled to leave under the FFCRA and should seek unemployment compensation through your State Unemployment Insurance Office.*

Q: When is an employee eligible for EPSL because the employee has "been advised by a health care provider to self-quarantine due to concerns related to COVID-19?"

A: This applies if the employee is unable to work or telework, and a health care provider must advise the employee to self-quarantine on a belief that the employee has, may have, or is particularly vulnerable to COVID-19.

Q: Is an employee who decides to self-quarantine without the advice of a health care provider eligible for EPSL?

A: Generally no. If an employee becomes ill with COVID-19 symptoms, they may take EPSL only to seek a medical diagnosis or if a health care provider otherwise advises them to self-quarantine. They may not take EPSL if they unilaterally decide to self-quarantine for an illness without medical advice, even if they have COVID-19 symptoms.

Q: When is an employee eligible for EPSL because they are experiencing symptoms of COVID-19 and seeking a medical diagnosis?

A: EPSL for this reason is only available during the time that the employee is unable to work because the employee is taking affirmative steps to obtain a medical diagnosis, such as making, waiting for, or attending an appointment for a test for COVID-19.

Q: When is an employee eligible for EPSL because the employee is caring for an individual who is subject to an isolation order or is a quarantined employee?

A: EPSL for this reason is limited to situations where the employee cannot work because they are required to care for an "immediate family member, a person who regularly resides in the Employee's home, or a similar person with whom the Employee has a relationship that creates an expectation that the Employee would care for the person" who is subject to quarantine or self-quarantine.

Q: When is an employee eligible for EPSL because the employee is caring for a son or daughter if the school or place of care of the son or daughter has been closed, or the child care provider of such son or daughter is unavailable, due to COVID-19 precautions?

A: EPSL for this reason is limited to situations where the employee would have been able to perform available work, but for their need to care for a son or daughter, as those terms are defined in the FMLA.

Q: Is a school or place of care considered "closed" for purposes of the Families First Act if it has moved to online instruction or to another model in which children are expected or required to complete assignments at home. Is it "closed"?

A: Yes. If the physical location where the employee's child received instruction or care is now closed, the school or place of care is "closed" for purposes of EPSL and EFML. This is true even if some or all instruction is being provided online or whether, through another format such as "distance learning," the child is still expected or required to complete assignments.

Q: Can an employee take EPSL to care for a child based on the closure of a summer camp, summer enrichment program, or other summer program that the child would have attended? [Added July 2, 2020]

A: Yes, but leave for this reason is subject to the same documentation requirements as for leave for school or day care closures. The employee should provide the name of the specific summer camp or program that would have been the place of care for the child had it not closed. 29 C.F.R. § 826.100(e)(2). This requirement to name a specific summer camp or program may be satisfied if the child, for example, applied to or was enrolled in the summer camp or program before it closed,

or if the child attended the camp or program in prior summers and was eligible to attend again. There may be other circumstances that show an employee's child's enrollment or planned enrollment in a camp or program. The expectation that employees take FFCRA leave based on planned summer enrollments is not different from the closing of other places of care, such as a day care center. An employee generally could not take FFCRA leave to care for his or her child based on the closing of a day care center that the child has never attended, unless there were some indication that the child would have attended had the day care center not closed in response to COVID-19.

Q: How much are eligible employees entitled to be paid for EPSL?

A: Pay for each hour of EPSL should paid at the highest of the employee's average regular rate of pay, the federal minimum wage or state or local applicable minimum wage. EPSL payments are is capped at a maximum 100% of wages up to $511 per day (and a total of $5,110) per employee for employees in categories 1-3 above, and two-thirds of wages up to $200 per day (and a total of $2,000) per employee for employees in categories 4-6 above.

Q: What impact does this have on my existing sick leave policy?

A: EPSL is in addition to any existing sick leave provided by the employer (including subject to state or local requirements). An employer may not require an employee to use other paid leave provided by the employer to the employee before the employee uses the paid sick time under the Families First Act. Nothing expressly prohibits employers from changing their leave programs after the law is enacted, however the employee relations impact of doing so should be carefully considered.

Q: When will the Department of Labor begin enforcing the Families First Act's emergency paid sick leave provisions?

A. The DOL will not bring enforcement actions against any public or private employer for violations of the Act occurring within 30 days of the enactment of the FFCRA, i.e., March 18 through April 17, 2020, provided that the employer has made reasonable, good faith efforts to comply with the Act.

Q: What should I do an employee who voluntarily chooses to travel (e.g. for a planned vacation) to a state with high COVID-19 positive rate that are referenced in the orders issued in NY, NJ and CT, and upon return to NY, NJ or CT, must then quarantine. Is the employee then eligible for Federal Emergency Paid Sick leave given the order / need to quarantine? [Added July 2, 2020]

A: The employee would be eligible if the employee is unable to work **or telework** due to the need to quarantine under the order. We stress the telework portion of this answer because under many circumstances telework might be an option even if the employee did not historically work from home."

Families First Act: Health Provisions

Q: What new requirements have been imposed on group health plans?

A. A group health plan (GHP) is required to cover without any cost or cost sharing (including deductibles, copayments, and co-insurance) on COVID-19 testing and testing-related services. In addition, a GHP cannot require prior authorization or other medical management related requirements in the event a covered individual must be tested for COVID-19. These requirements apply regardless of whether a GHP is fully-insured or self-insured.

Q: What testing-related services are covered by this requirement?

A: To the extent the services are necessary to determine whether COVID-19 testing is necessary, testing-related services would include:

- In person and telemedicine visits
- Urgent care visits
- Emergency room visits

Q: When is this requirement effective?

A: March 18, 2020.

Families First Act Tax Credits

Paid Sick Leave Tax Credits

Q: Will I be entitled to take a credit for the amounts that I pay in paid sick leave under the Families First Act? [Updated 04/09/2020]

A: Yes. All employers, except for government employers, required to pay paid sick leave under the Families First Act will be entitled to take a tax credit for the amount paid. These non-government

employers will be entitled to a refundable federal employment tax credit for the entire amount that they pay in paid sick leave (subject to the caps set forth below).

Q: Are government employers eligible for a tax credit for paid sick leave?

A: No. The credit does not apply to the government of the United States, the government of any State or political subdivision or any agency or instrumentality of such government.

Q: Are there limits to the tax credit I can receive for paid sick leave? [Updated 04/09/2020]

A: Yes. Credits may not exceed amounts paid for emergency paid sick leave up to the amounts described above, *i.e.*, maximum 100% of wages up to $511 per day (and a total of $5,110) per employee for employees in categories 1-3, and two-thirds of wages up to $200 per day (and a total of $2,000) per employee for employees in categories 4-6. Because the credit is fully refundable, employers will receive reimbursement of the amount paid, subject to the caps, even if their tax liability is less than the amount paid out in emergency paid sick leave.

Q: Am I entitled to a credit for the cost of maintaining health insurance coverage while my employee is out on leave?

A: Yes. Eligible employers are entitled to an additional tax credit based on the cost of maintaining health insurance coverage for the eligible employee during the leave period.

Q: How will this tax credit be made available?

A: On March 20, 2020, the Department of Labor, Treasury and the Internal Revenue Service issued a joint news release providing examples of how the tax credit works. The Departments noted that for businesses to take immediate advantage of the paid leave credits, businesses can retain and access funds that they would otherwise pay to the Internal Revenue Service (IRS) in payroll taxes.

If those amounts are not sufficient to cover the cost of paid leave, employers can seek an expedited advance from the IRS. Go to https://www.irs.gov/newsroom/covid-19-related-tax-credits-for-required-paid-leave-provided-by-small-and-midsize-businesses-faqs for further information.

Paid Family Leave Tax Credits

Q: Will I be entitled to take a credit for the amounts that I pay in paid family leave under the Families First Act? [Updated 04/09/2020]

A: Yes, all employers except for government employers, are entitled to a refundable federal employment tax credit for the entire amount that they pay to eligible employees, subject to the applicable limits set forth below. Because the credit is fully refundable, employers will receive full reimbursement of the amount paid regardless of their actual tax liability.

Q: Are government employers eligible for a tax credit for paid family leave?

A: No. The credit does not apply to the government of the United States, the government of any State or political subdivision or any agency or instrumentality of such government.

Q: Are there limits to the tax credit I can receive for paid family leave?

A: Yes. Credits may not exceed amounts paid for an individual with respect to family medical leave, i.e., $200 per day, and an aggregate of $10,000 with respect to all calendar quarters.

Q: Am I entitled to a tax credit for the cost of maintaining health insurance coverage while my employee is out on leave?

A: Yes. Eligible employers are entitled to an additional tax credit based on the cost of maintaining health insurance coverage for the eligible employee during the leave period.

Q: How long will the Families First Act credits be available?

A: Like the paid sick and paid family leave provisions, the tax credits created by the Families First Act will sunset effective December 31, 2020.

Q: How will this tax credit be made available?

A: On March 20, 2020, the Department of Labor, Treasury and the Internal Revenue Service issued a joint news release providing examples of how the tax credit works. The Departments noted that for businesses to take immediate advantage of the paid leave credits, businesses can retain and access funds that they would otherwise pay to the Internal Revenue Service (IRS) in payroll taxes. If those amounts are not sufficient to cover the cost of paid leave, employers can seek an expedited advance from the IRS. Go to https://www.irs.gov/newsroom/covid-19-related-

tax-credits-for-required-paid-leave-provided-by-small-and-midsize-businesses-faqs for further information.

Families First Act Reporting Requirements

Q: Must employers report to the IRS and/or to the employee any amounts paid under the FFCRA leave provisions? [Added July 10, 2020]

A: Yes, on July 8, 2020, the IRS issued Notice 2020-54, which requires employers to separately report Qualified Sick Leave Wages and Qualified Family Leave Wages Paid under the Families First Coronavirus Response Act (FFCRA) on 2020 Forms W-2, Box 14, or on a separate statement. This reporting is intended to provide employees who are also self-employed with information necessary to properly claim any FFCRA sick or family leave credits. There are three types of paid sick or family leave wages that should be separately reported (if applicable) in Box 14:

  - Sick leave wages subject to the $511 per day limit because of care the employee required;
  - Sick leave wages subject to the $200 per day limit because of care the employee provided to others; and
  - Emergency family leave wages up to $200 per day and $10,000 in the aggregate.
- For further information, refer to ADP's Eye on Washington, or see IRS Notice 2020-54.

Families First Act Employee Rights Notice

Q: Is there a required poster or notice to employees?

A: Yes. All employers covered by the paid sick leave or expanded family and medical leave provisions of the Families First Act are required to post the Department of Labor notice listing employee rights. The DOL poster is available at https://www.dol.gov/agencies/whd/pandemic.

Note that the DOL has provided one poster for use by private employers covered by the Families First Act and another poster for use by federal employers.

Q: My employees are teleworking. Where should I post the required notice?

A: The Department of Labor requires each covered employer to post the Families First employee rights notice in a "conspicuous place on its premises." An employer can satisfy this requirement by emailing or direct mailing the notice to current employees or by posting the notice on an internal or external employee information website.

Q: Do I have to provide the notice to employees that were recently laid off?

A: No. The Department of Labor has stated that the employee rights notice only applies to current employees.

Q: Do I have to provide the notice to new hires?

A: Yes. As with current employees, employers must provide a copy of the employee rights notice to new hires either by posting the notice in a conspicuous place on the employer's premises, or by email, direct mail, or by posting on an internal or external employee information website.

Q: Do I have to post the notice in multiple languages?

A: No, at this time employers are only required to post the notice in English. However, the Department of Labor is translating the notice into other languages, which will be made available on the Department of Labor Wage and Hour Division's website.

Q: If my state provides greater protections than the Families First Act, do I still have to post this notice?

A: Yes. The Department of Labor has advised that all employers covered by the Families First Act must post the notice regardless of whether their state offers greater protections to employees. Employers must comply with both federal and applicable state law.

Q: Is an employee confirmed with COVID-19 reportable to OSHA?

A: The only way a COVID-19 case would be **reportable** to OSHA would be if the employee passes away or is hospitalized as an in-patient (outpatient hospitalizations are not reportable to OSHA) as a result of COVID-19 contracted from performing work-related duties. The normal criteria for reporting serve injuries applies even to COVID-19 cases. Employers must report any worker fatality within 8 hours and any amputation, loss of an eye, or hospitalization of a worker within 24 hours. It should be noted that even employers who are exempt from recordkeeping must report a severe injury if it meets these criteria.

Benefits

(ADP TotalSource clients should contact their HR Business Partner for specific guidance.)

Q: Are employers waiving benefit co-pays or deductibles that are related to COVID-19?

A: Each employer's approach may be different, however on March 11, 2020, the IRS issued guidance via Notice 2020-15 that eliminates barriers for testing and treatment of COVID-19 (coronavirus) for health savings account (HSA) participants under a high deductible health plan (HDHP) due to the current public health emergency. Notice 2020-15 states that individuals covered by an HDHP that provides testing and treatment of COVID-19 prior to the satisfaction of the applicable minimum deductible will not fail HDHP requirements. Additionally, individuals covered by a plan offering COVID-19 testing and treatment regardless of deductible requirements will remain HSA eligible individuals. Note that it is still up to employers on whether to provide this relief under their HDHP group health plans.

Q: Are employees eligible for continuation of health insurance if there is a furlough or a layoff?

A: Generally, a furlough is not a COBRA qualifying event, unless it results in a loss of group health coverage. If the furlough results in a loss of health coverage, the employer must issue COBRA notices and allow affected individuals to elect COBRA continuation coverage.

Q: If employees voluntarily reduce their work hours at the employer's request due to the pandemic, will the employees still be eligible for health insurance based on their hours worked?

A: Whether an employee is eligible for group health benefits is determined under the eligibility terms of the plan. However, if an employee were to become ineligible for group health benefits due to a reduction in hours, that would constitute a qualifying event that would trigger continuation of group health benefits under COBRA. Note that for employers who tie eligibility for group health benefits to an employee's full-time status under the ACA definition of full-time employee and use the look back measurement method to determine eligibility, whether or not the employee is in a stability period should be taken into consideration before discontinuing benefits due to a reduction in hours.

Q: If an employee waived health care coverage during open enrollment and wants to elect it now, must the employer allow the enrollment? Is it a qualifying event? (Updated May 13, 2020)

A: Pursuant to IRS Notice 2020-29, a cafeteria plan may be amended to allow for certain mid-year election changes that would otherwise not be permitted under the current mid-year election rules. Specifically, an employee who originally declined to elect employer-sponsored health coverage may be allowed to make a prospective election. As with other mid-year election changes, the plan must adopt this rule in order for such an employee to make such an election.

ADP recommends that employers consult with experienced benefit counsel to review whether to amend their plans to permit elections as permitted under Notice 2020-29.

Q: Can an employee make changes to their election mid-year without experiencing a qualifying status change during the COVID-19 pandemic. (Updated May 13, 2020)

A: Pursuant to IRS Notice 2020-29, a cafeteria plan may be amended to allow for certain mid-year election changes that would otherwise not be permitted under the current mid-year election rules. Specifically, a cafeteria plan can be amended to allow benefits eligible employees to:

i. Revoke an existing election and make a new election to enroll in different employer-sponsored health coverage sponsored by the same employer;

ii. Revoke an existing election provided the employee attests in writing that the employee has or will immediately enroll in other health coverage;

iii. With respect to health care and dependent care flexible spending accounts, revoke an election, make a new election, or increase or decrease an existing election. Note: Employers are permitted to limit mid-year elections to amounts no less than amounts already reimbursed.

All elections must be prospective. As with other mid-year election changes, the plan must adopt this rule in order for such an employee to make such an election. ADP recommends that employers consult with experienced benefit counsel to review whether to amend their plans to permit elections as permitted under Notice 2020-29.

Q: If an employee experiences a special enrollment right, such as the birth of a child, when must the employee report that event in order to be able to make changes to health care coverage? (Updated May 13, 2020)

A: Generally, a special enrollment period gives an employee (and their family) an opportunity to enroll in a plan for which the employee is otherwise eligible outside of the normal open enrollment period. Typically, the event giving rise to the special enrollment period must be reported not later than 30 days following that event. However, Final Regulations issued on April 29, 2020, by the Employee Benefit Security Administration (EBSA) of the Department of Labor and Internal Revenue Service (IRS) of the Department of Treasury directs group health plans to disregard the period beginning March 1, 2020 and ending 60 days after the end declared COVID-19 National

Always Designing for People™

Emergency. This provides employees with an extended period of time during which to report such an event and obtain or drop coverage, subject to the appropriate contributions. The Final Regulations only act to extend the timeframe during which a plan must be notified, all other requirements continue to apply.

Q. I am placing employees on furlough. Do I need to/can I offer them COBRA?

A. Generally, a furlough is not considered to be a qualifying event under COBRA unless it results in a loss of coverage. Employers should refer to their plan documents to determine whether employees placed on furlough are entitled to benefits continuation as if they are an actively at work employee. If the plan document is not clear, employees on furlough can be treated the same as employees who have a reduction in hours (even if hours are reduced to zero). If as a result of being placed on furlough the employee would then loss coverage, and the employer is subject to COBRA, it must send out COBRA election packets and offer continuation coverage for its COBRA-eligible plans.

Q: I am placing employees on furlough. Can I continue to keep them on our benefit plan? If so, can I increase their share of the premium? [Updated May 13, 2020]

A: ADP recommends that employers consult with experienced benefit counsel to review the eligibility terms of its benefit plans and any carrier contracts before making any changes to their group health plans. Note that an increase to the share of premium charged to an employee as the result of a furlough may constitute a "loss of coverage" requiring the offer of COBRA.

Q: Generally, what are best benefits practices for furloughed employees?

A: There is no one size-fits-all best practice for placing employees on a furlough. ADP recommends that our clients consult with experienced benefit counsel to review.

Q: Can I allow my terminated employees to stay enrolled in medical benefits but terminate dental and vision?

A: Employers who sponsor group health plans must follow the eligibility terms of their plan. We recommend that clients consult with experienced benefits counsel to review their plan provisions before making decisions regarding continuation of benefits for termed employees. Termination (for reasons other than gross misconduct) whether voluntary or involuntary, is still considered a qualifying event under COBRA. Employers may choose to subsidize COBRA premiums for qualified beneficiaries but should ensure that any subsidy is applied in a non-discriminatory manner.

Clients with fully-insured plans should consult their contract with their benefit carriers before making decisions with respect to continuation of coverage for terminated employees. And clients with self-insured plans should consult with any applicable stop-loss coverage carriers as well.

Q: Do the same rules apply under COBRA for employees who are laid off as a result of COVID-19?

A: If an employer is subject to COBRA and an employee experiences a loss of coverage due to a COBRA qualifying event, such as termination (other than for gross misconduct) or reduction in hours (even if hours are reduced to zero), then the employer has an obligation to offer continuation coverage to the former employee and any other qualifying beneficiaries on the same terms and conditions as a similarly situation non-COBRA participant.

The Families First Coronavirus Response Act of 2020 did not affect these COBRA obligations.

Q: What are the rules with respect to continuing benefits for employees who are on FMLA leave?

A: While it does not amend COBRA, the FMLA contains its own continuation coverage rules. These rules require a covered employer to maintain group health plan benefits for an employee on FMLA leave on the same terms and conditions as if the employee had continued to work. This means, for example, that if an employer pays a portion of the group health plan premiums for active employees, then the employer must pay the same portion of the premiums for employees on FMLA leave. Generally, employees on FMLA leave must continue to pay their share (if any) of the group health plan premiums in order to retain coverage during the FMLA leave.

Q: Can I terminate benefits and offer COBRA to my employees who are moving from Full-Time to Part-Time?

A: A reduction in hours resulting in a loss of coverage is a Qualifying Event under COBRA. An employer should review the plan document to determine whether such a reduction in hours would result in a COBRA Qualifying Event.

Q: Is there any other relief available as a result of the COVID-19 outbreak with respect to COBRA continuation coverage? [Added May 15, 2020]

A: The Department of Labor (the DOL) in conjunction with the Treasury Department and the IRS published Final Regulations that call for an extension for a number of deadlines so plan

participants, beneficiaries, and employers have additional time to make critical health coverage and other decisions affecting benefits during the COVID-19 outbreak. For group health plans, subject to ERISA or the Internal Revenue Code, the relief provides additional time to comply with certain deadlines affecting COBRA continuation coverage, special enrollment periods, claims for benefits, appeals of denied claims, and external review of certain claims. With regard to disability, retirement, and other plans, the joint notice provides additional time for participants and beneficiaries to make claims for benefits and appeal denied claims. Without the extension, individuals might miss key deadlines during the COVID-19 outbreak that could result in the loss or lapse of group health coverage or the denial of a valid claim for benefits.

Under the regulation, all group health plans, disability and other employee welfare benefits plans, and employee pension benefits plans subject to ERISA, are required to disregard the period beginning March 1, 2020, and ending 60 days after the announcement of the end of the COVID-19 National Emergency Declaration for purposes of determining the mandatory periods and dates with respect to:

- Special enrollments under the Health Insurance Portability and Accountability Act;
- COBRA continuation coverage elections;
- COBRA continuation premium payments;
- Individual notification of a plan of a COBRA-qualifying event or determination of disability;
- Filing deadline for an individual to file a benefits claim;
- Deadline to file an appeal of an adverse benefits determination; and
- Deadline for requesting an external review after receipt of an adverse benefits determination.

The regulation provides helpful examples for each of the areas for which an extension is granted to illustrate how the extension of time frames would work in practice. Below is a sample illustration:

The following example illustrates the timeframe for extensions required by this document. An assumed end date for the National Emergency was needed to make the examples clear and

understandable. Accordingly, the Examples assume that the National Emergency ends on April 30, 2020, with the Outbreak Period ending on June 29, 2020 (the 60th day after the end of the National Emergency).

> *Example 1* (Electing COBRA). (i) Facts. Individual A works for Employer X and participates in X's group health plan. Due to the National Emergency, Individual A experiences a qualifying event for COBRA purposes as a result of a reduction of hours below the hours necessary to meet the group health plan's eligibility requirements and has no other coverage. Individual A is provided a COBRA election notice on April 1, 2020. What is the deadline for A to elect COBRA?
>
> *Conclusion.* In Example 1, Individual A is eligible to elect COBRA coverage under Employer X's plan. The Outbreak Period is disregarded for purposes of determining Individual A's COBRA election period. The last day of Individual A's COBRA election period is 60 days after June 29, 2020, which is August 28, 2020.We also recommend that clients review the Final Regulations to determine how the extended time frames affect COBRA notification, elections and payments, and well as other group health plan related timing requirements.

Q: Can I terminate benefits for employees in a Stability Period under the Look Back Measurement Method under the ACA?

A: Employers who tie eligibility for medical benefits to an employee's full-time status under the ACA using the Lookback Measurement method need to consider the following regarding when and whether to terminate benefits and offer COBRA. Under the look-back measurement method, full-time employee status in a stability period is based on the hours of service in the prior applicable measurement period, regardless of whether the employee experiences a change in employment status either during the measurement period or during the stability period. If eligibility under the plan rules is tied to an employee's full-time status under the ACA, the employee should continue to be eligible for benefits through the end of the stability period regardless of a reduction in hours. Employers may be subject to penalties for terminating benefits for full-time employees while they are in a stability period.

> NOTE: There is a special rule that allows employers to apply the monthly measurement method to such an employee within three months of the change if the employee actually averages less than 30 hours of service per week for each of the three months following the change in employment status and if the employer has offered the employee continues

coverage that provides Minimum Value from at least the fourth month of the employee's employment.

For employers who determine the affordability of their plans using the W-2 safe harbor calculation method, additional considerations should be made as employers cannot include income the employee would have earned had it not been for a reduction in hours/leave of absence.

Q: I have newly hired employees who have contracted COVID-19 in the workplace, and I want to waive the new hire waiting period to make them eligible for medical benefits effective immediately. Can I do this?

A: ADP recommends that our clients consult with experienced benefits counsel with respect to how to amend their plan terms.

Q: Our medical coverage currently ends as of the date of termination and we would like to change our plan rules so that coverage will extend through the end of the month of termination. Are we allowed to do that?

A: ADP recommends that our clients consult with experienced benefits counsel with respect to how to amend their plan terms. Generally, changes to group health plans must be made on a prospective basis. In addition, clients should discuss the change with their carriers to ensure a change in coverage termination rules would be permitted by the carrier.

Q: Due to a lack of access to medical service providers, employees are unable to use the balance in their health care flexible spending account, can we extend the time during which employees can use those balances?

A: A plan may extend the time during which unused amounts remaining in a health care FSA at the end of a "grace period" or plan year ending in 2020 may be permitted to use those unused amounts to pay or reimburse medical expenses incurred through December 31, 2020. Currently, employers can adopt either a grace period or carryover rule, but not both, with respect to their health care FSA. A grace period is an additional time (up to 2 and ½ months) following a plan year that a plan may allow a participant to utilize unused amounts to incur and be reimbursed for eligible expenses. The carryover rule allows for an employee to carryover unused amounts (up to a limit, currently $550) into the next plan year to use for expenses incurred in the next plan year.

Always Designing for People™

The Coronavirus Aid, Relief, and Economic Security Act ("CARES Act") General Questions

Q: What is the CARES Act?

A: The CARES Act was enacted on March 27, 2020 and is the third major legislative initiative to address public health concerns and economic distress associated with COVID-19. The CARES Act is the largest economic stimulus bill in American history and provides relief to individuals and businesses across the United States.

Q: What does the CARES Act cover in general?

A: The CARES Act provides direct financial aid to Americans in the form of $1,200 checks for individuals earning less than $75,000 ($2,400 for married households earning less than $150,000) with an additional $500 per child. The CARES Act additionally provides expanded unemployment insurance, distribution options from certain retirement plans, financial support for state and local governments, a loan program for small businesses and not-for-profits, tax credits and a payroll tax deferral for employers, and financial assistance to certain industries.

It is divided into the following sections:

A. Division A - Keeping Workers Paid and Employed, Health Care System Enhancements, and Economic Stabilization
    a. Title I - Keeping American Workers Paid and Employed Act, which includes paycheck protections and a loan forgiveness program.
    b. Title II - Assistance for American Workers, Families, and Businesses, which includes enhanced unemployment benefits, grants for short-term compensation programs, and a delay of employer payroll taxes.
    c. Title III - Supporting America's Health Care System in the Fight Against the Coronavirus, which includes several health care initiatives, temporary relief for federal student loan borrowers, and expanded paid leave provisions.
    d. Title IV - Economic Stabilization and Assistance to Severely Distressed Sectors of the United States Economy, which includes mortgage and eviction relief, an increase to materials necessary for national security, and relief to aviation workers.
    e. Title V - Coronavirus Relief Funds
    f. Title VI - Miscellaneous Provisions
B. Division B - Emergency Appropriations for Coronavirus Health Response and Agency Operations

Always Designing for People™

This FAQ document addresses some of the health, leave, and retirement provisions of the CARES Act.

Employee Retention Credit (ERC)

The Coronavirus Aid, Relief, and Economic Security (CARES) Act, which was signed into law on March 27, 2020, contains over $2 trillion for economic stimulus, including cash payments to individuals, expanded unemployment benefits, retirement distributions, payroll tax deferrals and tax credits, corporate relief, and economic support for the healthcare industry in order to combat the COVID-19 crisis. Included in the Act is an employee retention credit for employers impacted by the COVID-19 crisis.

Q: What Is the Employee Retention Credit included in the CARES Act?

A: Section 2301 of the CARES Act provides that an eligible employer can claim a credit against applicable employment taxes for employees retained during the COVID-19 crisis.

Q: How much is the credit?

A: The credit is 50% of qualified wages paid during the calendar quarter. The total amount of qualified wages (including allocable qualified health plan expenses) for all calendar quarters is limited to $10,000, with a maximum credit value of up to $5,000 per employee.

Q: What is the effective date of the credit?

A: The credit applies to wages paid after March 12, 2020, and before January 1, 2021.

Q: What are "applicable employment taxes"?

A: In short, "applicable employment taxes" is the employer's share of Social Security taxes on wages paid to an employee, determined without regard to the contribution and benefit base.

Q: What if the credit exceeds the amount of applicable employment taxes?

A: The excess tax credits are refundable. The CARES Act states that if the amount of the employee retention credit for a calendar quarter exceeds the amount of "applicable employment

taxes" for that quarter, the excess shall be treated as an overpayment of taxes that is refundable to the employer.

Q: Who is an eligible employer?

A: An eligible employer is an employer who has been carrying on a trade or business during 2020 that meets one of the following two criteria:

- The employer's trade or business is fully or partially suspended during a calendar quarter due to orders from an appropriate government authority limiting commerce, travel, or group meetings (for commercial, social, religious, or other purposes) as a result of COVID-19; or
- The employer experiences a significant decline in gross receipts. (See below for more details)

Q: What constitutes "fully or partially suspended"?

A: The term is not defined by the CARES Act, so the determination will likely require a facts and circumstances test for each employer. The CARES Act gives examples of limits on commerce, travel, and group meetings as examples of suspended operations.

The IRS FAQs give examples of actions which, in the IRS's interpretation, will or will not constitute full or partial suspension of operations. Within these examples, the IRS makes a distinction between "essential businesses" and "non-essential businesses."

The IRS FAQs also provide that if an employer closes its workplace but continues operations comparable to its operations prior to closure by requiring employees to telework, the employer doesn't have a partial suspension of operations. The FAQs do not address what would be considered "comparable" with respect to remote operations.

Q: What constitutes "orders from an appropriate government authority"?

A: An "appropriate government authority" isn't defined in the CARES Act but would likely include orders from a president, governor, mayor, sheriff, county commission, police department, fire department, or public health official.

Pursuant to the IRS FAQs, the following are included in government orders:

- An order from the city's mayor stating that all non-essential businesses must close for a specified period;
- A state's emergency proclamation that residents must shelter in place for a specified period, other than residents who are employed by an essential business and may travel to and work at the workplace location; and
- An order from a local official imposing a curfew on residents that impacts the operating hours of a trade or business for a specified period.

The IRS FAQs state that comments from a government official in a press conference or a media interview do not rise to the level of a government order. Additionally, the declaration of a state of emergency by a government authority also does not constitute a government order.

Q: What is an "essential business?"

A: The term "essential business" is not defined in the CARES Act. It first appears in a FAQ published by the Joint Committee on Taxation, and later appears in the IRS FAQs. An essential business is generally identified as such by a specific government order which allows the business to continue operations within the government's jurisdiction. What constitutes an "essential business" will vary from state to state.

Q: Is it possible for an essential business to qualify for the CARES Act employee retention credit?

A: The IRS FAQs generally provide that an essential business that is exempted from the appropriate government order does not have a full or partial suspension of operations. The FAQs, however, do provide some pathways whereby employers with locations that are deemed "essential businesses" may still qualify for the credit:

- If a government order causes suppliers to an essential business to suspend operations, the essential business may be considered to have a partial suspension of operations.
- If a government order allows an essential business to continue operations, but at reduced hours, the essential business may be considered to have a partial suspension of operations.
- If an employer has locations comprised of both essential businesses and non-essential businesses, and the non-essential businesses have a partial suspension of operations, then the employer is an eligible employer for purposes of the credit. All of the employer's locations are considered a single employer under the CARES Act employee retention credit aggregation rules.

- An essential business may still qualify for the CARES Act employee retention credit if it has a significant decline in gross receipts.

Q: What is a "significant decline in gross receipts"?

A: A "significant decline in gross receipts" is a period of time that:

- Begins with the first calendar quarter in 2020 for which gross receipts are 50 percent less than the gross receipts for the same calendar quarter in the previous year, and

Ends with the earlier of January 1, 2021, or the calendar quarter following the first calendar quarter beginning after the calendar quarter described above, for which gross receipts are greater than 80 percent of the gross receipts for the same calendar quarter in the previous year.

As an example, an employer's gross receipts drop below 50 percent of prior year in 2020 Quarter 2 and return to over 80 percent of prior year gross receipts in 2020 Quarter 3. The employer's period for "significant decline in gross receipts" is April 1, 2020 through September 30, 2020.

Q: How are gross receipts defined for purposes of the "significant decline" test?

A: Regulations referenced by this section state that the term "gross receipts" includes, but is not limited to, total sales (net of returns and allowances), all amounts received for services, interest income, dividends, rents, royalties, annuities, and sales of property (net of basis in the asset sold).

Q: Is the "significant decline" test applied on a location-by-location test?

A: No. The "significant decline" test is done at the employer level, so all locations which are included under the same employer identification number would be aggregated for purposes of the 50 percent and 80 percent tests. See also below for aggregation rules for consolidated groups and related entities.

Q: In a consolidated group (parent and subsidiary companies), is the determination of an eligible employer done on a separate entity test?

A: No. Corporations that are related under common control (a parent entity) are treated as a single entity for purposes of the CARES Act employee retention credit.

Q: Are tax-exempt organizations and public agencies eligible for the credit?

A: Yes. An organization that is exempt from income tax under Section 501(a) of the Code is eligible for the credit. However, the credit does not apply to the federal government, any state or local government, or any agency or instrumentality of such governments.

Q: Who is an eligible employee for purposes of the credit?

A: All full and part-time employees of an eligible employer are potentially eligible for the credit. See below for limitations regarding "related party" employees and employees on whom the Work Opportunity Tax Credit, the Employer Credit for Paid Family and Medical Leave, or the Families First Coronavirus Response Act Emergency Sick Leave or Emergency Family Leave Credits have been claimed.

Q: What is included in the definition of qualified wages?

A: Qualified wages are wages paid by an eligible employer with respect to which an employee is not providing services (see below for definition) due to either a full or partial suspension of operations, or a significant decline in gross receipts. A special rule for employers with 100 or fewer full-time employees is discussed below.

"Wages" are broadly defined as generally including all remuneration for employment, including cash value of all remuneration (including benefits) paid in any medium other than cash.

Q: To what extent can health plan expenses be included in qualified wages?

A: The CARES Act states that "qualified wages" shall include so much of the eligible employer's qualified health plan expenses as are properly allocable to such wages. "Qualified health plan expenses" are the amount paid by the employer to provide and maintain a group health plan, but only to the extent that the amounts are excluded from gross income of the employees.

Qualified health plan expenses are treated as properly allocable to qualified wages if made on the basis of being pro rata among employees and pro rata on the basis of periods of coverage.

The IRS FAQs clarify that the definition of "qualified health plan expenses" includes both the portion of cost paid by the employer and the portion of the cost paid by the employee, provided that the employee's costs are paid with pre-tax dollars.

With respect to furloughed employees on whom the employer continues to pay health plan expenses, the Secretary of the Treasury has indicated in a letter to Congress that the FAQs will be revised to reflect Congressional intent, and will allow health plan expenses attributable to furloughed employees to be included in qualified wages.

Q: What constitutes "not providing services" for purposes of the determination of qualified wages?

A: The CARES Act does not define "not providing services," so it is likely a facts and circumstances determination for each employer.

The IRS FAQs provide examples of circumstances where both exempt and non-exempt employees may be considered as "not providing services." Some of the statements in the FAQs include:

- If a non-exempt employee does not have a fixed schedule of work, the hours for which the employee is not providing services may be determined using any reasonable method.
- An employer may use any reasonable method to determine the number of hours that a salaried employee is not providing services, but for which the employee receives wages either at the employee's normal wage rate or at a reduced wage rate.
- Using the criteria for an employee entitled to intermittent leave under the paid sick leave or paid family leave provisions under the Families First Coronavirus Response Act is considered a reasonable method.
- The IRS FAQs provide that it is not reasonable for an employer to treat an employee's hours as having been reduced based on an assessment of the employee's productivity levels during the hours in which the employee is working.

Q: Are vacation pay, sick leave, other personal leave or severance pay considered to be qualified wages for purposes of the employee retention credit?

A: The IRS FAQs provide that vacation pay, sick leave, and other personal leave is excluded from the definition of qualified wages to the extent that the leave was accrued in a period prior to the period in which the employee received wages and was not providing services. This interpretation doesn't exclude any leave accrued concurrent with the employee retention credit

The IRS FAQs provide that amounts paid to an employee following termination of employment does not constitute qualified wages for purposes of the employee retention credit.

Q: What is the special rule for employers with 100 or fewer full-time employees?

A: In the case of an employer with 100 or fewer full-time employees, "qualified wages" include all wages paid to an employee during the eligibility period, regardless of whether or not the employee is not providing services.

For purposes of the credit, "full-time employee" is defined by Section 4980H of the Code as an employee who works 30 or more hours per week.

Q: Can an employer claim the CARES Act employee retention credit on the same wages on which it qualifies for the Families First Coronavirus Response Act (FFCRA) emergency sick pay or family leave credits?

A: No. Any wages used for purposes of the Paid Sick Leave Credit (Section 7001 of the FFCRA) or the Paid Family Leave Credit (Section 7003 of the FFCRA) cannot be treated as qualified wages for purposes of the CARES Act employee retention credit. The FFCRA credits are limited to employers with fewer than 500 employees.

Q: If the employer is eligible for the Employer Credit for Paid Family and Medical Leave on an employee, can the employer also claim the CARES Act employee retention credit on the employee on the same wages?

A: No. Any wages used for purposes of the Employer Credit for Paid Family and Medical Leave cannot be treated as qualified wages for purposes of the CARES Act employee retention credit.

Q: Does the employer still have to add the amount of credit back to its wage deduction?

A: Yes. The CARES Act requires the employer to reduce its wage deduction by the amount of the CARES Act employer retention credit under Section 280C of the Code.

Q: If a company files for the payroll tax deferral, can they also file for the advance refund claim on Form 7200?

A: Yes. An employer can request an advance payment on the refundable amounts of the retention credit (as well as the qualified sick and family leave credits under the FFCRA) after first reducing their current employment taxes to account for the credits. Any amount of credit that exceeds the reduced deposits can be requested in advance on a Form 7200. If an employer receives an advance payment, it will require a reconciliation on its employment tax return.

Q: If an employee also owns an interest in the employer, can the employer still claim the credit?

A: The applicable attribution rules state that no wages will be taken into account with respect to the following individuals:

- An individual who owns 50 percent or more of the value of the stock of employer (if the employer is a corporation),
- An individual who owns 50 percent or more of the capital and profits interest of the employer (if the employer is another entity),
- A grantor, beneficiary, or fiduciary of the employer (if the employer is an estate or trust),
- A family relative of the employer (if the employer is an individual). Family relatives include children, siblings, step- siblings, parents, step-parents, nieces, nephews, aunts, uncles, and in-laws.

Q: If the employer has claimed the Work Opportunity Tax Credit (WOTC) on the employee, can the employer also claim the CARES Act employee retention credit on the employee?

A: Yes, with some limitations. The CARES Act states that an employee cannot be included in the employee retention credit if the employer has also claimed WOTC on that employee in the same period.

Q: If the employer has claimed disaster area employee retention credits on the employee for 2017-2019 disasters, can the employer also claim the CARES Act employee retention credit on the employee?

A: Yes. There are no restrictions in the CARES Act that would prohibit an employer from claiming the employee retention credit on an employee if the employer previously claimed disaster-related employee retention credits in 2017 through 2019.

Q: Can the employer claim the CARES Act employee retention credit on an employee if the employer is also claiming the Federal Empowerment Zone Employment Credit or the Indian Employment Credit on the same employee?

A: There are no restrictions in the CARES Act that would prohibit an employer from claiming the employee retention credit on an employee if the employer also claimed the Federal Empowerment Zone Employment Credit or the Indian Employment Credit.

Q: If the employer has outsourced its employment functions to a certified professional employer organization, is it still eligible for the CARES Act employee retention credit?

A: Yes. The CARES Act states that the employee retention credit is a credit described in Section 3511 (d)(2) of the Code. As such, credit with respect to a work site employee performing services for the customer applies to the customer, and not the certified professional employer organization.

Q: If the employer is pursuing a Paycheck Protection Program (PPP) loan as provided by the CARES Act, is it still eligible for the CARES Act employee retention credit?

A: No. The CARES Act prohibits an employer from claiming the employee retention credit if the employer also receives a covered loan under Section 1102 of the CARES Act ("Paycheck Protection Program"). The Secretary of the Treasury is also authorized to issue guidance regarding recapture provisions if the employer receives a covered loan after initially claiming the employee retention credit.

Q: If a business repays its PPP loan by safe harbor deadline of May 18, 2020, is the business eligible for the employee retention credit? [Added May 15, 2020]

A: Yes. An employer that applied for a PPP loan, received payment, and repays the loan by May 18, 2020 will be treated as though the employer had not received a covered loan under the PPP for purposes of the Employee Retention Credit. Therefore, the employer will be eligible for the credit if the employer is otherwise an Eligible Employer.

Q: Will the credit be available for advance payment if the company will have a refund?

A: Yes. The IRS has issued Form 7200 on which an employer can claim an advance payment of the employee retention credit that would be due for the quarter. Form 7200 may be filed at any time prior to the due date of Form 941 for the applicable quarter and may be able to be filed multiple times during the course of the quarter. Form 7200 advance payments will be available for the 2nd through 4th quarters of 2020.

Q: The CARES Act also allows an employer to defer the payment of the employer portion of Social Security taxes to 2021 and 2022. How does this affect the credit?

A: The CARES Act employee retention credit is a permanent reduction in the amount of employer Social Security taxes. The delay of the payment of the employer portion of Social Security taxes is strictly a deferral. If the employer plans to take advantage of the deferral, the retention credit reduces the amount of employer Social Security taxes ultimately due.

Q: What government forms and interpretations have been published with respect to the CARES Act employee retention credit?

A: The IRS has released two new forms with respect to the credit:

- Form 7200 – Advance Payment of Employer Credits Due to COVID-19
- Revised Form 941 – Employer's Quarterly Federal Tax Return (still in draft form)

Additionally, interpretations in the form of Frequently Asked Questions have been published by the following:

- Internal Revenue Service (https://www.irs.gov/newsroom/faqs-employee-retention-credit-under-the-cares-act)
- Senate Finance Committee (https://www.finance.senate.gov/chairmans-news/cares-act-employee-retention-credit-faq)
- Joint Committee on Taxation (https://www.jct.gov/publications.html?func=startdown&id=5256)

Q: What types of information should an employer be gathering to properly calculate the CARES Act employee retention credit?

A: Examples of items needed to calculate the credit include payroll information and documentation of how COVID-19 has impacted your workforce at each of your locations. ADP can assist you with the credit calculation with mapping tools showing general areas of government-mandated restrictions, survey methodologies for capturing employee-level information, and best practices across the country.

Always Designing for People™

Health Provisions

Q: What impact does the CARES Act have on cost sharing for COVID-19 testing?

A: The Families First Coronavirus Response Act ("FFCRA"), which was enacted on March 18, 2020, requires group health plans and health insurance issuers of group and individual health insurance coverage to cover FDA-approved diagnostic tests for COVID-19 without cost-sharing. See here. The CARES Act expands the type of tests that need to be covered to include certain tests that have not yet been approved by the FDA.

Q: Does the CARES Act address pricing for COVID-19 tests?

A: Yes. As stated above, FFCRA requires group health plans and health insurance issuers to cover COVID-19 testing and certain items and services without cost-sharing. Under the CARES Act, health plans and health insurance issuers must reimburse health providers that administer COVID-19 tests at the same rate as previously negotiated before the emergency declaration by HHS for the duration of the declared emergency. If a plan or issuer did not have an existing, negotiated rate with a provider before the emergency declaration, the plan or issuer must pay the provider's cash price for the test as listed by the provider on a public website or may negotiate a lower rate.

Q: Will health plans be required to cover vaccines and other preventive measures once they are available?

A: Yes. The CARES Act requires group health plans and health insurance issuers to cover without cost-sharing COVID-19 preventive services. Preventive services that must be covered are COVID-19 related items, services, or immunizations that have a rating of "A" or "B" in the recommendation of the United States Preventive Services Task Force ("USPSTF") or that are recommended by the Centers for Disease Control and Prevention. This requirement takes effect 15 business days after the date the recommendation is made. This 15-day period is significantly shorter period than under the Affordable Care Act ("ACA") preventive services requirement, which generally makes preventive services recommendations effective beginning the year following the year in which the recommendation was made.

Q: Can individuals with high deductible health plans ("HDHPs") receive coverage for telehealth services before meeting their annual deductible?

A: Yes. Though HDHPs generally cannot provide any benefits in a given plan year until the deductible for that year is satisfied, the CARES Act creates a safe harbor that allows HDHPs to

cover "telehealth and remote care services" before the minimum deductible is satisfied. This provision is effective on March 27, 2020 for plan years beginning on or before December 31, 2021.

Q: Can individuals use health spending and reimbursement accounts, such as Flexible Spending Accounts ("FSAs"), Health Savings Accounts ("HSAs"), and Health Reimbursement Accounts ("HRAs"), to pay for over-the-counter medical expenses without a prescription?

A: Yes. The CARES Act allows individuals to use HSA, FSA, HRA, and Archer Medical Savings Account dollars on over-the-counter drugs without a prescription and on menstrual care products. Under the ACA, drugs are not treated as "qualified medical expenses" unless they are prescribed or insulin. The CARES Act permanently reverses that rule for all expenses incurred after December 31, 2019.

Q: How does the CARES Act affect existing health information privacy protections?

A: The CARES Act conforms privacy rules that only apply to substance use disorder ("SUD") with the more widely applicable HIPAA privacy rules. The SUD rules apply to certain health care providers who treat substance use disorders and require a provider to obtain a patient's consent to disclose SUD information, including the fact that a patient was treated, even to another health care provider or health plan or insurer. Since the SUD rules are stricter than the HIPAA privacy rules, a health plan or health care provider that receives SUD information has to track this information separately and apply two sets of privacy rules.

The CARES Act:

- allows a SUD provider to obtain a single consent for future disclosures for treatment, payment, or health care operations, until revoked by the patient;
- allows a HIPAA covered entity or business associate to further disclose SUD information as otherwise permitted by HIPAA;
- adopts HIPAA's definitions for treatment, payment, and health care operations; and
- adds a number of HIPAA provisions to the SUD rules, including the HIPAA breach rules, the notice of privacy practices, and HIPAA's civil and criminal penalties.

These changes take effect for uses and disclosures 12 months after the date of enactment. The CARES Act also provides that the Secretary of Health and Human Services ("HHS") must issue

guidance regarding the sharing of patients' protected health information during the COVID-19 public health emergency.

Paid Leave Provisions

Q: How does the CARES Act change the paid leave provisions under the Families First Act?

A: The Families First Act mandates that employers with less than 500 employees provide Emergency Paid Sick Leave and Expanded Family and Medical Act Leave. The CARES Act clarifies that an employer's requirement to provide Emergency Paid Sick Leave does not exceed (a) $511 per employee per day and $5,110 per employee in the aggregate for an employee to care for himself or herself or (b) $200 per employee per day and $2,000 per employee in the aggregate for leave related to caring for other individuals. It also clarifies that an employer's requirement to provide paid leave under the Expanded FMLA Leave provision does not exceed $200 per employee per day for leave related to the employee and $10,000 per employee in the aggregate. These limitations were contained in the Families First Act, but the CARES Act clarifies that the aggregate limits apply on a per employee basis.

Q: Do the new paid leave provisions help employees who were temporarily laid off and then rehired?

A: Under the Families First Act, employees who have been employed by the employer for at least 30 calendar days are eligible for Expanded FMLA Leave. The CARES Act amends this rule to extend paid leave to employees who (1) were laid off on or after March 1, 2020, (2) had worked for the employer for at least 30 of the last 60 days prior to their layoff, and (3) were rehired by the employer.

Q: In what ways does the CARES Act expand the payroll credit provisions under Families First Act?

A: The Families First Act allows an employer to claim a refundable tax credit for Emergency Paid Sick Leave and Expanded FMLA Leave that the employer is required to provide. The CARES Act expands those provisions by:

- providing for an advance of the payroll tax credit, subject to the limits imposed by Families First and calculated through the end of the most recent payroll period in the quarter;
- requiring the Secretary of the Treasury to prescribe forms and instructions necessary to permit the advancement of the credit; and

- requiring the Secretary of the Treasury to waive penalties associated with the failure to deposit certain employment taxes if the failure was due to an employer's anticipation of the credit.

Retirement and Compensation Provisions

Q: Does the CARES Act allow individuals to take increased loans or temporary withdrawals from retirement plans?

A: Yes. The CARES Act allows participants to take increased loans and temporary withdrawals from their retirement accounts to assist with financial distress related to COVID-19. The CARES Act calls these "coronavirus-related distributions."

Q: What qualifies as a "coronavirus-related distribution"?

A: A coronavirus-related distribution is made to an individual:

(1) who was diagnosed with SARS-CoV-2 or COVID-19 by a test approved by the CDC;
(2) whose spouse or dependent is so diagnosed; or
(3) who experienced adverse financial consequences as a result of being quarantined, furloughed, laid off, subject to reduced hours due to the virus (this also applies to individuals whose business was closed or subject to a reduced hours schedule due to the virus), unable to work because of a lack of child care due to the virus, or other factors determined by the Secretary of the Treasury.

Coronavirus-related distributions are permitted between January 1 and December 31, 2020.

Q: How can plan administrators verify that the request qualifies as a "coronavirus-related distribution"?

A: Plan administrators can rely on the employee's 'self-certification' that they meet any of the requirements outlined above.

Q: Is there a dollar limit on temporary withdrawals under the CARES Act?

A: Under the CARES Act, participants can take a coronavirus-related distribution of up to $100,000 from their retirement accounts without incurring a 10% early distribution tax. Coronavirus-related distributions can be taxed over three years with an ability to be repaid within

three years. Such distributions are also exempt from standard tax withholding and notice requirements.

Q: What are the rules under the CARES Act for taking loans from qualified retirement accounts? [Updated May 15, 2020]

A: The CARES Act allows qualified individuals (those who would qualify for a coronavirus-related distribution as outlined above) to borrow an increased amount up to the lesser of $100,000 or 100% of their account balance. Participants can normally only borrow the lesser of $50,000 or 50% of their account balance. The increased loans are permitted through September 22, 2020. The CARES Act also provides an optional delay on any repayments coming due now through the end of 2020.

Q: Do plan sponsors have to adopt these provisions?

A: These provisions are optional but would require a plan amendment no earlier than the end of the 2022 plan year.

Q: Does the CARES Act waive 2020 required minimum distributions ("RMDs")?

A: To address concerns regarding market volatility, the CARES Act provides a waiver of 2020 RMDs for defined contribution retirement plans and IRAs. This includes 2020 RMD payments for individuals who are already receiving them (i.e., attained 70 ½ before 2019) and individuals who have a required beginning date in 2020.

Q: How does the CARES Act change the Department of Labor's authority to postpone certain ERISA-imposed deadlines?

A: The Act amends Section 518 of ERISA by adding "a public health emergency" declared by the HHS Secretary to permit the Labor Secretary to provide an extension of up to one year for actions required or permitted to be completed under ERISA.

Q. How does the CARES Act affect single-employer pension plan contributions for 2020?

A: The CARES Act provides that single-employer pension plan contributions that would otherwise be due during calendar year 2020 are instead due on January 1, 2021. This provision applies to both quarterly contributions and the final contribution necessary to satisfy the annual minimum funding requirements if the contribution is due to be paid in 2020.

For a calendar plan year, the following revised contribution schedule applies:

Contribution	Prior Deadline	New Deadline
First Quarterly Contribution for 2020 Plan Year	April 15, 2020	January 1, 2021
Second Quarterly Contribution for 2020 Plan Year	July 15, 2020	January 1, 2021
Final Contribution for 2019 Plan Year	September 15, 2020	January 1, 2021
Third Quarterly Contribution for 2020 Plan Year	October 15, 2020	January 1, 2021

Although the contributions will not be due until January 1, 2021, they will still accrue interest starting on the prior deadline. The interest charged would be at the plan's effective rate of interest, which is generally calculated each year by the actuary based on the interest rates used to determine the plan's liabilities.

Additionally, for plan years that include any portion of 2020, the plan sponsor is permitted to elect to treat the plan's adjusted funding target attainment percentage as being equal to the percentage from the last plan year ending before January 1, 2020.

Tax Provisions

Q: Does the CARES Act provide a tax-advantaged way for employers to pay amounts toward employee student loans? [Updated 04/09/2020]

A: The CARES Act expands Code Section 127 to allow employers to make tax-free contributions up to $5,250 annually toward employees' "qualified education loans." The provision allows the employer to make such payment either to the employee or to the lender. The provision is only effective for employer payments made after March 27, 2020 through December 31, 2020.

Q: Does the CARES Act provide any type of deferral for employer payroll taxes?

A: Yes. The CARES Act permits employers to defer payment of the employer share of the Social Security Tax, beginning after the effective date of the Cares Act through December 31, 2020. The deferred tax amounts would be paid over two years, in equal amounts due on December 31, 2021 and December 31, 2022.

Q: Does the CARES Act provide any type of tax credit for business closures due to COVID-19?

A: Yes. Private-sector employers are allowed a refundable tax credit against employer Social Security tax equal to 50 percent of wages paid by employers to employees during the COVID-19 crisis, up to $10,000 per employee. The credit is available to employers whose operation is fully or partially suspended due to orders from a governmental authority limiting commerce, travel, or meetings due to COVID-19, or who experienced a 50 percent decline in gross receipts when compared to the same quarter of the prior year. The credit may be increased by the proportionate share of the employer's health costs related to such wages.

- For employers with more than 100 full-time employees (as defined under the Affordable Care Act Section 4980H), this credit is available for wages paid to employees that provided no services during the shutdown.
- For employers with less than 100 full-time employees, all wages qualify for the credit, without regard to whether the employer was in operation.

Aggregation rules will apply in determining the number of employees of the employer. Wages paid may not exceed the amount such employee would have been paid for working an equivalent duration during the 30 days immediately preceding such period. Wages also do not include paid family and/or sick leave under the Families First Coronavirus Response Act for which a credit is taken. This section applies to wages paid after March 12, 2020, and before January 1, 2021.

Unemployment Insurance Provisions

Q: Does the CARES Act makes any changes to individuals who are eligible for unemployment assistance?

A: Yes. The Pandemic Unemployment Assistance Programs provides that individuals who are not otherwise eligible for unemployment benefits under state or federal laws (such as self-employed worked, part-time workers and those with limited work histories) who are unable to work as a direct result of COVID-19 are eligible for temporary unemployment benefit assistance during their period of unemployment ending on or before December 31, 2020.

Q: Does the CARES Act enhance unemployment assistance for eligible individuals?

A: Yes. The CARES Act enhances unemployment assistance for all eligible individuals including: (1) $600 per week (in addition to their regular state unemployment benefits); (2) an additional 13 weeks of federally-funded unemployment benefits (extending the 26 weeks available under

most state unemployment laws) to individuals who have exhausted all rights to unemployment benefits under state and federal law for that benefit year, are not otherwise receiving unemployment compensation under any state, federal, or Canadian law and able to, and actively seeking, work; and (3) the elimination of the usual one-week waiting period.

Paycheck Protection Program (PPP)

Set forth below are FAQs regarding the SBA's Paycheck Protection Program, which was authorized under the CARES Act. In addition, the SBA has provided a Paycheck Protection Program Fact Sheet for borrowers that provides important and helpful information about the loan program and process. The Fact Sheet is available at:

https://home.treasury.gov/system/files/136/PPP%20Borrower%20Information%20Fact%20Sheet.pdf

Eligibility under PPP

Q: Do I qualify for a Paycheck Protection Program loan?

A: In general, if you are a business concern, including a nonprofit, veterans' organization, and Tribal business concern, that has 500 or fewer employees, or otherwise meet applicable size limits for specific industries as identified in the U.S. Small Business Administration NAICS codes, you may qualify for an SBA loan under the CARES Act.

Q: What if I have more than 500 employees?

A: You may still qualify for a loan, depending on your industry and other financial information. Please consult the U.S. Small Business Administration regulations to ascertain whether you may qualify at the following link: https://www.sba.gov/sites/default/files/2019-08/SBA%20Table%20of%20Size%20Standards Effective%20Aug%2019%2C%202019 Rev.pdf

Q: If I am a franchisee, how do figure out if I qualify for a loan?

A: You should talk to your franchisor and/or discuss potential eligibility with your legal and accounting professionals. Please contact your ADP client service professional for any information and data that ADP can provide to assist you in this process.

Q: I am an independent contractor—can I apply for an SBA loan?

A: Yes, sole-proprietors, independent contractors, and other self-employed individuals are eligible to apply.

Q: I am a sole proprietor—can I apply for an SBA loan?

A: Yes, sole-proprietors, independent contractors, and other self-employed individuals are eligible to apply.

Q: I am self-employed—can I apply for an SBA loan?

A: Yes, sole-proprietors, independent contractors, and other self-employed individuals are eligible to apply.

Q: Who qualifies as an employee?

A: Any individual employed on a full-time, part-time or other basis. This includes employees obtained from a temporary employee agency or leasing concern and employees co-employed by a professional employer organization.

Q: Can independent contractors be taken into account in determining the number of employees for eligibility?

A: No.

Q: If employees are on furlough, do they count for purposes of determining the number of employees for eligibility?

A: No, employees on furlough do not count for purposes of determining the number of employees for eligibility.

Q: If an employee is on leave, do they count for purposes of determining the number of employees for eligibility?

A: Yes, with one exception. Employees out on leave for a qualified sick and family leave for which a credit is allowed under sections 7001 and 7003 of the *Families First Coronavirus Response Act* are not counted for purposes of determining the number of employees for eligibility purposes.

Calculating Payroll Costs for Determining Amount of PPP Loan

Q: What period is used to determine payroll costs?

A: If you are not a seasonal employer (as reported to the IRS on Form 941 by you) and were in business from February 15, 2019 to June 30, 2019, then the period is the 1-year period prior to the date of the loan.

Q: What if I'm a seasonal employer?

A: If you are a seasonal employer (as reported to the IRS on Form 941 by you), then the period is the 12 weeks beginning on February 15, 2019 or March 1, 2019, at your election.

Q: What if I wasn't in business from February 15, 2019 to June 30, 2019?

A: If you were not in business at that time, then the period used to calculate your payroll costs is January 1, 2020 to February 29, 2020.

Q: Do payroll costs include amounts paid to independent contractors?

A: No.

Q: Do payroll costs include workers compensation insurance?

A: No.

Q: Do payroll costs include stock awards?

A: No.

Loan Terms

Q: When do I have to repay the loan? [Updated July 2, 2020]

A: The Payroll Protection Program Flexibility Act (PPPFA) provides that loan recipients can defer repayment of principal and interest of their PPP loan until the time when the SBA compensates their lender for forgiven amounts of the loan. (Prior to the enactment of the PPPFA, principal and interest payments were deferred only for 6 months from the date of loan origination.) The PPPFA also provides that borrowers who do not apply for forgiveness within 10 months of the end of their applicable Covered Period or Alternative Payroll Covered Period must begin repaying their loan.

Loans issued on or after June 5, 2020, have a maturity date of 5 years. If a PPP loan received an SBA loan number before June 5, 2020, the loan has a two-year maturity, unless the borrower and lender mutually agree to extend the term of the loan to five years. The promissory note for the PPP loan will state the term of the loan. Interest accrues from the origination date.

Q: What is the interest rate on the loan?

A: Loans under this the Paycheck Protection Program will have an interest rate of 1%.

PPP Loan Forgiveness:

Q: Are PPP loans forgivable? How much of the PPP loan is forgivable?

A: Yes. Loans under the PPP are up to 100% forgivable. However, there are conditions associated with this forgiveness, including requirements that the loan proceeds be spent, or qualifying costs incurred, within the applicable covered period following your receipt of the loan proceeds (Covered Period)* and that at least 60% of the loan proceeds be spent on payroll costs (and no more than 40% be spent on certain specified non-payroll costs including mortgage interest, rent, utility payments or interest on debt incurred prior to February 15, 2020). In addition, loan forgiveness may be impacted by reductions in the number of your employees and reductions in employee wages. The Department of Treasury has issued the PPP Loan Forgiveness Application form, available here.

* Loan proceeds must be spent during the 24-week period immediately following disbursement of the loan or by December 31, 2020, whichever is earlier (the Covered Period). If you received your loan prior to June 5, 2020, you may choose the 8-week period following disbursement of your loan as your Covered Period. Also, if you pay your employees on a biweekly or more frequent schedule, you may choose to begin the covered period on the first day of the first pay period following disbursement of the loan ("Alternative Payroll Covered Period") for qualifying payroll costs only.

Q: The amount of forgiveness of a PPP loan depends on the borrower's payroll costs over an eight-week or 24-week period; when does that eight-week or 24-week period begin? [Added July 2, 2020]

A: The eight-week or 24-week period starts on the date your lender makes a disbursement of the PPP loan to the borrower. The lender must disburse the loan no later than 10 calendar days from the date of loan approval. The Paycheck Protection Program Flexibility Act of 2020, which became law on June 5, 2020, extended the covered period for loan forgiveness from eight weeks after the date of loan disbursement to 24 weeks after the date of loan disbursement, providing substantially greater flexibility for borrowers to qualify for loan forgiveness. The 24-week period applies to all borrowers, but borrowers that received an SBA loan number before June 5, 2020, have the option to use an eight-week period.

Q: Do all payroll costs need to be paid within the Covered Period or Alternative Payroll Covered Period?

A: No. The latest guidance from the government indicates that borrowers are eligible for forgiveness for payroll costs paid and payroll costs incurred, but not yet paid, during the applicable Covered Period or Alternative Payroll Covered Period. Payroll costs are considered paid on the date of distribution of paychecks or origination of an ACH credit transaction. Payroll costs

are considered incurred on the day that the employee's pay is earned. Payroll costs incurred but not paid within the Covered Period or Alternative Payroll Covered Period must be paid by the next regular payroll date to be counted for forgiveness purposes.

Q: Can I spend all of the PPP loan proceeds on payroll costs?

A: Yes, you can use all of the loan proceeds for "payroll costs," as defined in the PPP. Payroll costs mean:

- Employee gross pay, including salary, wages, commissions, bonuses and tips, capped at the annualized value of $100,000 for the length of the applicable Covered Period or Alternative Payroll Covered Period (for the 24-week Covered Period, this cap is $46,154; for companies that obtained loans prior to June 5, 2020, and choose an 8-week Covered Period, the cap is $15,385)
- All employer state and local taxes paid on employee gross pay, such as state unemployment insurance and employer-paid state disability insurance (in applicable states)
- Employer health care benefits, including insurance premiums
- Employer-paid retirement benefits, including defined-benefit or defined-contribution retirement plans and employer 401(k) contributions
- NOTE: Loan proceeds may *not* be used to pay employer Social Security / Medicare or Federal Unemployment taxes. The definition of payroll costs also excludes workers compensation premiums, payments to independent contractors, and payments to employees for leave covered under the Families First Coronavirus Response Act.

Q: Does the annualized cap ($46,154 for 24-week Covered Periods; $15,385 for 8-week Covered Periods) apply to all categories of "payroll costs"?

A: No, the annualized $100,000 cap applies only to employee gross pay. Employer-paid state and local taxes, health care benefits and retirement benefits are uncapped.

Q: Is paid sick leave covered in "payroll costs"?

A: Yes, covered "payroll costs" include paid sick, family, vacation and medical leaves, except for payments to employees for leave covered under the Families First Coronavirus Response Act.

Q: Can I spend all of the PPP loan proceeds on non-payroll costs?

A: Although loan proceeds under the PPP can be used for certain specified non-payroll costs including mortgage interest, rent, utility payments or interest on debt incurred prior to February

15, 2020, this amount is capped at 40% of the forgiveness amount. This means that if you spend more than 40% on such non-payroll costs, the amount of your loan forgiveness will be impacted. (Prior to the passage of the Payroll Protection Program Flexibility Act (PPPFA) on June 5, 2020, the maximum amount a borrower could spend on non-payroll costs was 25% of the forgiveness amount. The PPPFA raised this limit to 40%.)

Q: What do the percentages of 60% and 40% mean for purposes of PPP loan forgiveness?

A: Loan proceeds under the PPP may be used for certain specified non-payroll costs, including mortgage interest, rent, utility payments or interest on debt, if the respective obligations were incurred prior to February 15, 2020. However, at least 60% of the forgiveness amount must be for covered payroll costs. Accordingly, the maximum amount that can be spent on such specified non-payroll costs is 40% of the forgiveness amount. For example, if during the period used to determine loan forgiveness, your payroll costs are $300,000, the maximum loan forgiveness amount you could receive is $500,000. ($300,000 is 60% of $500,000). Therefore, your maximum forgivable non-payroll costs are $200,000. (Prior to the passage of the Payroll Protection Program Flexibility Act (PPPFA) on June 5, 2020, the maximum amount a borrower could spend on non-payroll costs was 25% of the forgiveness amount. The PPPFA raised this limit to 40%.)

Q: What happens if I use less than 60 percent of the PPP loan on payroll costs?

A: The Paycheck Protection Program Flexibility Act provides that at least 60% of the covered loan amount must be used for payroll costs. The Treasury Department has indicated that a borrower may "be eligible for partial loan forgiveness, subject to at least 60 percent of the loan forgiveness amount having been used for payroll costs."

Q: I received my PPP loan. Do I have to enter anything differently or in a special way for payroll going forward?

A: No. You can continue to run your payroll in the ordinary course. However, when running Forgiveness Payroll Cost Reports at the end of your applicable Covered Period or Alternative Covered Period, you may need to run separate reports for days at the end of the period during which you have incurred but not yet paid wages. See the question "What dates should I use for the Covered Period when running my reports?" below for more information.

Q: What happens if I reduce my staff? Do I have to repay my PPP loan?

A: If you reduce the number of employees, the amount of loan forgiveness may be decreased. Loan forgiveness will be reduced based on the failure to maintain the average number of full-time-equivalent employees (FTEEs) during the Covered Period or Alternative Payroll Covered Period compared to either the period from February 15, 2019, to June 30, 2019, or the period from January through February 2020. Seasonal employers may compare the average FTEEs employed during the Covered Period or Alternative Payroll Covered Period to either of these two periods or to any consecutive 12-week period between May 1 and September 15, 2019.

However, your forgiveness amount will not be reduced by a failure to maintain staffing levels during the Covered Period or Alternative Payroll Covered Period if (a) your average FTEEs between February 15 and April 26, 2020 is lower than your FTEEs as of February 15, 2020, and (b) you restored the level of FTEEs by December 31, 2020, to be equal or higher to the FTEE levels as of February 15, 2020. Your forgiveness amount may not be reduced for employees who decline offers of rehire, voluntarily resign or reduce their hours, or are terminated for cause or for employees who you cannot rehire due to restrictions imposed by certain government agencies related to COVID-19. See the question "My company previously laid off an employee, but later offered to rehire the employee. If the employee declined the rehire offer, will my PPP loan forgiveness amount still be reduced?" below for more information.

Q: What happens if I reduce pay amounts over the Covered Period or Alternative Payroll Covered Period?

A: If you reduce the amount you pay to your employees (excluding those earning more than $100,000 on an annualized basis in any single pay period in 2019), the amount of loan forgiveness may be decreased. Specifically, if you reduce the average annual salary (for salaried employees) or average hourly rate (for hourly employees) of one or more employees (other than those who earned on an annualized basis more than $100,000 in any single pay period in 2019) by more than 25 percent, measured against the period of January 1 through March 31, 2020, a proportionate amount of your loan may need to be repaid.

However, if (a) a given employee's wage levels (annual salary level for salaried employees and hourly wages for hourly employees) between February 15 and April 26, 2020, are lower than as of February 15, 2020, and (b) you restore the wage levels by December 31, 2020, to be the same or higher than as of February 15, 2020, there will be no reduction in forgiveness based on that employee's wage levels.

Q: What happens if I maintain my employee levels for the full covered period, but then need to reduce headcount after that?

A: This is not addressed in the CARES Act; however, we expect further guidance on this question from the Treasury Department/Small Business Administration. Further information will be provided when available.

Q: My company previously laid off an employee, but later offered to rehire the employee. If the employee declined the rehire offer, will my PPP loan forgiveness amount still be reduced?

A: Loan forgiveness will not be reduced based on an inability to rehire employees if the employer can document (1) written offers to rehire individuals who were employees of the organization on February 15, 2020; or (2) an inability to hire similarly qualified employees for unfilled positions by December 31, 2020.

Additionally, forgiveness will not be reduced for failure to maintain employment levels if the organization is able to document an inability to return to the same level of business activity as existed prior to February 15, 2020, due to compliance with COVID-19-related guidance for sanitation, social distancing, or worker or customer safety requirements from the Health and Human Services (HHS), the Centers for Disease Control and Prevention (CDC), or the Occupational Safety and Health Administration (OSHA) between March 1 and December 31, 2020.

The SBA has suggested that the documentation required above would be satisfied if an employer made a good faith, written offer of rehire at the same salary/wages and for the same number of hours, the employee rejected the offer of rehire, and the employer notified the applicable state unemployment insurance office of the employee's rejection of rehire within 30 days. Employees who are terminated for cause, voluntarily resign, or voluntarily request and receive a reduction of hours may also be excluded from the FTEE reduction calculations.

Q: Can I use loan money to pay FFCRA Sick or Family Leave without affecting my PPP loan forgiveness?

A: No, you are not allowed to use PPP loan proceeds to pay for any COVID-19 related leaves required to be paid under the Families First Coronavirus Relief Act (FFCRA). Instead, your FFCRA leave payments should be covered by the tax credits that you can receive under the FFCRA.

Always Designing for People™

Further, FFCRA sick/family leave payments for which you received FFCRA credits cannot be included in payroll costs for loan forgiveness.

Q: How do I know what to pay tipped employees with money from the PPP loan?

A: Payments of cash tips are included in payroll costs for which you can use your PPP loan and seek forgiveness. In addition to cash tips, employers can pay employees equivalent amounts to account for lost tips based upon records of past tips or, in the absence of such records, a reasonable, good-faith estimate of the tip amount.

Q: I deferred my employer Social Security tax deposits. How does this affect my PPP loan forgiveness? [Updated June 19, 2020]

A: Employers that defer employer Social Security taxes under the CARES Act are still eligible for PPP loans and for forgiveness of their PPP loan. If an employer takes advantage of the employer Social Security tax deferral, it may continue that deferral until December 31, 2020. Amounts deferred are due in the two specified installments (12/31/2021 and 12/31/2022). (Note that prior to the passage of the Payroll Protection Program Flexibility Act (PPPFA) on June 5, 2020, borrowers were required to cease Social Security tax deferrals once any portion of the borrower's loan was forgiven. The PPPFA eliminates this requirement.)

Q: My bank would like ADP to sign an attestation confirming that all calculations in the PPP Payroll Cost Report are correct. Will ADP sign an attestation for me?

A: Unfortunately, ADP will not be able to sign an attestation for your bank. ADP is not aware of any requirement that lenders secure an attestation from the payroll provider. In fact, SBA guidance provides that lenders need only conduct "minimal review of calculations based on a payroll report by a recognized third-party payroll processor."

Q: **When can I apply for PPP loan forgiveness?**

A: The government enacted the Payroll Protection Program Flexibility Act (PPPFA) on June 5, 2020, which makes important changes to the PPP loan forgiveness process. Among the changes made by the PPPFA is an extension of the Covered Period or Alternative Payroll Covered Period from 8 to 24 weeks, though borrowers that obtained their PPP loan prior to June 5, 2020, may elect to use the original 8-week Covered Period or Alternative Payroll Covered Period. The Department of Treasury has issued updated loan forgiveness applications and interim final rules, which are available here. We anticipate that borrowers may apply for forgiveness as soon as

their Covered Period expires. However, if you have experienced wage or FTEE reductions, it may be advantageous to wait to apply for forgiveness if you intend to try to restore your wage/FTEE reductions on or before December 31, 2020. Lenders have 60 days to make a decision on loan forgiveness.

Q: Is there a deadline for my company to apply for PPP loan forgiveness?

A: There is not a fixed deadline for borrowers to apply for forgiveness. However, the Payroll Protection Program Flexibility Act (PPPFA) provides that loan recipients can defer repayment of principal and interest of their PPP loan until the time when the SBA compensates their lender for forgiven amounts of the loan. (Prior to the enactment of the PPPFA, principal and interest payments were deferred only for 6 months from the date of loan origination.) The PPPFA also provides that borrowers who do not apply for forgiveness within 10 months of the end of their applicable Covered Period or Alternative Payroll Covered Period must begin repaying their loan. PPP loans have an interest rate of 1 percent. Loans issued on or after June 5, 2020, have a maturity date of 5 years. Interest accrues from the origination date.

Q: Can the payroll cost and headcount/employee detail reports used for the loan application be used for purposes of PPP loan forgiveness?

A: No, the loan application reports cannot be used for loan forgiveness purposes. As examples of important differences in the forgiveness calculations, there is a specific employee retention (headcount) measure for the loan forgiveness that is different than the count for the loan application purposes, and specific dates and timeframes needed to calculate payroll costs for forgiveness purposes.

Other Available Programs

Q: Are there any other programs I should consider in addition to the Paycheck Protection Program?

A: There are a few other programs you can consider, including:

- The payroll tax deferral, which permits employers to defer paying their portion of the Social Security payroll tax (6.2%) otherwise due. Please see our FAQs under "Other Available Programs for Which You may be Eligible," for a discussion of the limitations on payroll tax deferral if you receive a loan under the Paycheck Protection Program.
- The Main Street Lending Program. The Federal Reserve has announced that it is establishing a Main Street Lending Program (Program) to support lending to small and medium-sized businesses that were in sound financial condition before the onset of the

COVID-19 pandemic. The Program will operate through three facilities: the Main Street New Loan Facility (MSNLF), the Main Street Priority Loan Facility (MSPLF), and the Main Street Expanded Loan Facility (MSELF). For information, visit this website: https://www.federalreserve.gov/monetarypolicy/mainstreetlending.htm

The Application Process

Q: When can I apply for a loan?

A: Starting April 3, 2020, small businesses and sole proprietors can apply for and receive loans through existing SBA lenders. Starting April 10, 2020, independent contractors and self-employed individuals can apply for and receive loans through existing SBA lenders.

Other regulated lenders will be available to make these loans as soon as they are approved by the SBA and enrolled in the program.

Q: By when do I need to apply for a loan?

A: August 8, 2020 is the last day to get a PPP loan approved, so if you want a PPP loan, you need to apply before then. We strongly encourage you to apply as soon as possible because there is a funding cap on the program, and we expect that it will be heavily subscribed. Also, remember that your lender will need time to process your loan.

Q: Where can I apply?

A: You can apply through any existing SBA lender, federally insured depository institution, federally insured credit union, or Farm Credit System institution that is participating. Other regulated lenders will be available to make these loans once they are approved by the SBA and enrolled in the program. You should consult with your bank as to whether it is a participating lender, or visit www.sba.gov for a list of SBA lenders.

Q: When will I receive the loan?

A: You should discuss the timing of loan disbursement with your lender.

Q: What forms do I need and how do I submit an application?

A: You will need to complete your lender's PPP loan application and submit the application with your payroll documentation. Each lender will have its own form of application. For your reference, the form of application provided by the SBA is available at:

https://home.treasury.gov/system/files/136/Paycheck-Protection-Program-Application-3-30-2020-v3.pdf; each lender's form is likely to be similar.

Q: What payroll documentation or information will I need to include with my application?

A: The SBA has indicated that you will need to submit such documentation to the lender as is necessary to establish eligibility, such as payroll processor records or payroll tax filings. For borrowers that do not have any such documentation, the borrower must provide other supporting documentation, such as bank records, sufficient to demonstrate the qualifying payroll amount. You should consult with your lender as to what payroll documentation they will require. However, we anticipate you will need the following information:

- Employee headcount information. Eligibility under the PPP is generally based on employee headcount. We are providing clients with a Headcount report to assist them in determining their eligibility under the PPP. For more information on this report, see our FAQs regarding our Headcount reports.
- Certain payroll costs information. The maximum amount of a loan under the PPP is based on certain average monthly "payroll costs" (as defined under the CARES Act) incurred during the applicable period (as determined in accordance with the PPP). We are providing clients with a Monthly Payroll Costs report to assist them in determining the maximum loan amount for which they may be eligible. For more information on this report, see our FAQs regarding our Monthly Payroll Costs report.
- List of all owners of the applicant with greater than 20% ownership stakes.
- Good Standing Certificate from your state of incorporation.
- Loan Application History of other SBA loans you have.
- Recent income tax returns

Q: What should I be doing now so I can apply as fast as possible?

A: Consider the following steps:

1. Get your documents together as listed in the FAQ above.
2. Check www.sba.gov for updates
3. You should contact your lender as to whether it is participating in the PPP, or visit www.sba.gov for a list of SBA lenders. Once you have identified a lender you want to work with, contact them to find out what their process and timing will be for the loan. Each lender will need to perform its "Know Your Customer" procedures on a loan applicant, so it may be efficient to apply with your existing lender, if you have one.

Q: Do I apply to the SBA?

A: No. Applications will need to be processed by SBA lenders. You should contact your bank as to whether it is participating in the PPP, or visit www.sba.gov for a list of SBA lenders.

Q: Do I go to my bank for this loan?

A: You should contact your bank as to whether it is participating in the PPP, or visit www.sba.gov for a list of SBA lenders.

Other Available Programs for Which You may be Eligible

Q: If I get a PPP loan, can I also defer employer social security taxes?

A: Employers that defer employer Social Security taxes under the CARES Act are still eligible for PPP loans and for forgiveness of their PPP loan. If an employer takes advantage of the employer Social Security tax deferral, it may continue that deferral until December 31, 2020. Amounts deferred are due in the two specified installments (12/31/2021 and 12/31/2022). (Note that prior to the passage of the Payroll Protection Program Flexibility Act (PPPFA) on June 5, 2020, borrowers were required to cease Social Security tax deferrals once any portion of the borrower's loan was forgiven. The PPPFA eliminates this requirement.)

Q: If a business repays its PPP loan by safe harbor deadline of May 18, 2020, is the business eligible for the employee retention credit? [Added May 15, 2020]

A: Yes. An employer that applied for a PPP loan, received payment, and repays the loan by May 18, 2020 will be treated as though the employer had not received a covered loan under the PPP for purposes of the Employee Retention Credit. Therefore, the employer will be eligible for the credit if the employer is otherwise an Eligible Employer.

Q: Can I apply for a PPP loan if I already have an existing SBA Economic Injury Disaster Loan?

A: You can, up to $10M so long as both of the following are true:

1. The Economic Injury Disaster Loan is for a purpose other than payroll costs, mortgage interest, rent payments, utility payments, and interest on other debt obligations incurred before February 15, 2020; and
2. You applied for the SBA Economic Injury Disaster Loan before the SBA portal for the Paycheck Protection Plan loans is open.

Q: If a legal entity (Company A) receives a PPP loan, does that prevent Company A's affiliated entity (Company B) from receiving an Employee Retention Credit (ERC) under the CARES Act even if Company B did not apply for or receive its own PPP loan, or vice versa?

A: The answer depends on the affiliate relationship between Company A and Company B. If Company A and Company B are treated as a "single employer" (as defined by Sections 52(a) or (b) or Sections 414(m) or (o) of the Internal Revenue Code) for purposes of the CARES Act, then one company cannot receive a PPP loan and the other receive the ERC. You should consult with your legal, accounting or tax advisor based on your specific circumstances.

Q: If I am going to be applying for a grant or loan, should my employees not apply for unemployment benefits?

A: Employees can only apply for unemployment benefits if they are laid off or furloughed.

Eligibility

Q: Are all nonprofits eligible, or only specific types of nonprofits?

A: 501(c)(3) nonprofits, 501(c)(19) veterans' organizations and Tribal business concerns described in section Section 31(b)(2)(C) of the Small Business Act that have 500 or fewer employees or meet applicable SBA size limits for industry as identified in NAICS codes are eligible.

If you have any questions as to what information or data ADP can provide to you to support you in the loan application process, please contact your ADP client service team. If you have questions regarding eligibility or any other elements of the CARES Act—including eligibility for a loan under the program—you should contact your legal or accounting professional.

Social Security Tax Deferrals [Added April 24, 2020]

Q: Who qualifies to defer the employer share of Social Security taxes? [Added April 24, 2020]

A: All employers who pay wages between March 27, 2020 and December 31, 2020.

Q: How does the deferral work? [Added April 24, 2020]

A: An employer can defer its share of Social Security taxes due on all employee wages, and payment of those deferred amounts become due to the IRS in two equal installments. The first due by December 31, 2021, and the final due by December 31, 2022. The IRS is expected to issue assessment notices for these amounts due. No interest or penalty will be due if paid by the deadline on the IRS notice.

Clients who wish to defer payment of the employer share of Social Security taxes will need to advise ADP that it wishes to do so. Payrolls processed after this election will automatically calculate the deferral amount, which will not be debited or deposited with the IRS.

Q: What about payrolls dated March 27 – March 31,2020, which are also eligible for deferral? [Added April 24, 2020]

A: If employer has already deposited its share of employer Social Security taxes with the IRS for these payrolls, it can still receive a deferral in the form of a credit. Recent IRS guidance advised that any deferral amounts from March 2020 will be credited against 2nd quarter 2020 payroll tax liabilities. Interested clients will need to advise ADP that it seeks to claim deferrals for payrolls dated March 27-31 (i.e., in addition to the general deferral election noted above). Upon request, ADP will process the additional credit at a future date during 2nd quarter processing. Further details will be announced as to how this deferral election will be handled.

Q: Will ADP assist an employer with the payments of the deferred amounts to the IRS? [Added April 24, 2020]

A: ADP will assist its clients with the payments of the deferred amounts to the IRS (i.e., in December of 2021 and 2022), if requested to do so. The IRS is expected to issue guidance on these payments. Once we have this guidance from the IRS, we will provide instructions to our clients on how to request ADP to make the payments of the deferred amounts on its behalf.

Q: Can an employer pay the deferred amounts before they become due in December 2021 and December 2022? [Added April 24, 2020]

A: The IRS is expected to issue guidance on the payment of the deferred amounts. Amounts deferred will be reported on the Form 941, but it is not yet clear how to report payments previously deferred that an employer wishes to pay prior to December 2021. Further guidance will be provided once the IRS provides details. In the meantime, amounts previously deferred should not be paid pending such guidance.

Q: Can an employer take advantage of both the employer Social Security tax deferral and the tax credits under FFCRA and the CARES Act? [Added April 24, 2020]

A: Yes, the tax deferral can be taken in combination with both credits available under the FFCRA and the CARES Act, if the employer meets the individual qualifications for those credits.

Q: What about the Paycheck Protection Program (the SBA loan program)? Are employers still eligible for the tax deferral if they apply for a PPP loan? [Added April 24, 2020]

A: Employers that defer employer Social Security taxes under the CARES Act are still eligible for PPP loans and for forgiveness of their PPP loan. If an employer takes advantage of the employer Social Security tax deferral, it may continue that deferral until December 31, 2020. Amounts deferred are due in the two specified installments (12/31/2021 and 12/31/2022). (Note that prior to the passage of the Payroll Protection Program Flexibility Act (PPPFA) on June 5, 2020, borrowers were required to cease Social Security tax deferrals once any portion of the borrower's loan was forgiven. The PPPFA eliminates this requirement.)

NOTE: If an employer takes advantage of the Paycheck Protection Program loan, it is not eligible for the Employee Retention Credit under the CARES Act.

Q: How will ADP apply any credits and/or deferrals for eligible employers? [Added April 24, 2020]

A: Following the procedures prescribed by the ADP payroll support teams, clients will need to convey their election to defer (if desired) and separately identify any wages eligible for the applicable tax credits within each payroll. This information will cause applicable tax credits and deferral to automatically reduce the payroll tax liabilities before they are invoiced and debited from the client's funding account. ADP will only collect the net liability calculated after all available credits and deferrals have been applied.

NOTE: If a client requests an advanced payment of employer credits under the CARES Act or FFCRA using IRS Form 7200, those amounts must be reported to ADP when requested. Form 7200 advance payment requests will automatically reduce the amount of tax credit to be applied to current tax liabilities. All credits and advance payments received from the IRS must be reported on Form 941.

Q: In what order will ADP apply tax credits to tax liabilities? [Added April 24, 2020]

A: ADP will apply the tax credit amounts to all other federal employment tax liabilities (i.e., employer Medicare, employee Social Security, employee Medicare, Federal Income Tax) before the

employer Social Security tax. Remaining employer Social Security tax amounts after application of these tax credits will be automatically deferred for clients that have elected to defer.

Q: Can an employer choose to have ADP apply the deferral before applying the tax credits? [Added April 24, 2020]

A: No. The Social Security tax deferral will apply after all tax credits are applied. This is designed to maximize the benefit (tax savings) for employers.

Q: What if the total of an employer's tax credits exceeds the liability for a payroll? [Added April 24, 2020]

A: If an employer qualifies for tax credits that exceeds its employment tax liability for a payroll, the balance will carry over from payroll to payroll until the end of the quarter. See the related question below for details.

Q: What if the total of an employer's tax credits exceeds the liability for the quarter? [Added April 24, 2020]

A: If an employer qualifies for tax credits that exceed its employment tax liability for the quarter, the balance of that credit is fully refundable. Normally, ADP reports overpayments to be refunded on the client's IRS Form 941. Clients that prefer to apply credits to the following quarter should contact their service teams to request this. Employers that request this "credit elect" will have the credit applied to the following quarter, which would offset future employment tax liabilities and result in a refund from ADP.