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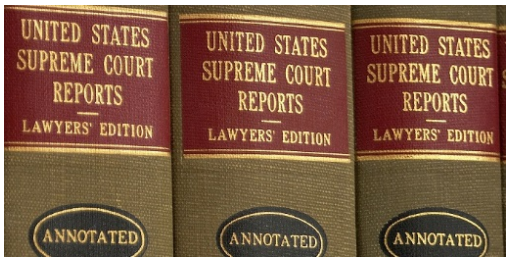

ZOOM PROGRAM

EMERGING LEGAL ISSUES DUE TO COVID-19

FACULTY

Christin Paglan, Esq.
Dr. William Lowe
Glen Seidner
Christopher Venator, Esq.
Jeffrey Naness, Esq.

Program Coordinator: Hon. John J. Leo

September 24, 2020
Suffolk County Bar Association, New York

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EMERGING LEGAL ISSUES DUE TO COVID-19

Thursday, September 24, 2020

5:30 p.m. – 8:15 p.m.

5:30 – 5:35 p.m.	**Welcome and Introduction – Hon. John J. Leo**
5:35 – 6:05 p.m.	**Christin Paglen, Esq. – 30 minutes** **Who Let the Dogs Out?!** • HIPPA, Privacy and the Current Pandemic
6:05 – 6:55 p.m.	**Dr. William Lowe/Glen Seidner– 50 minutes** **Clinical Issues and Insurance** • OSHA/Employee Health • Health Insurance – (Individuals/Employer)
6:55 – 7:25 p.m.	**Christopher Venator, Esq. – 30 minutes** **Public Sector Issues** • Public School District Reopening Challenges
7:25 – 7:35 p.m.	**Break**
7:35 – 8:05 p.m.	**Jeff Naness, Esq. – 30 minutes** **Private Sector Issues** • Employment Law Issues During the COVID-19 Pandemic
8:05 – 8:15 p.m.	**Q&A – 10 minutes**

INGERMAN SMITH LLP

Christopher Venator, Partner
Albany State, B.S., 1982;
University of Miami, J.D., 1985

Mr. Venator has been engaged in the practice of law over thirty-four years. Mr. Venator is a skilled litigator and has been principal trial counsel in numerous employment law and civil rights cases before administrative tribunals, and state and federal courts for our municipal and school district clients. He has tried many special education student matters before administrative tribunals and in the courts, including appearances before federal district courts and the United States Court of Appeals for the Second Circuit, as well as before the New York State Court of Appeals. Additionally, he frequently litigates before teacher tenure and employee discharge tribunals, before the State Division of Human Rights and before the Public Employment Relations Board. He has a substantial practice representing our school district clients in collective bargaining and related arbitration proceedings. Mr. Venator's litigation skills were honed during his service as an Assistant District Attorney when he prosecuted numerous felony trials. Mr. Venator has also worked for prestigious law firms in Manhattan and Nassau County where he concentrated in commercial litigation, product liability and labor law.

Christin Paglen, Esq.

Christin Paglen earned her Juris Doctor (with honors) in 2002 from American University's Washington College of Law where she was a Staff Writer for the *Human Rights Brief.*

Ms. Paglen has served as Vice President for Northwell Health's Hospice Care Network, the largest hospice and palliative care operation in the Long Island/NY metro area. This executive experience, as well as her co-authorship of the NY Academy of Medicine study entitled, *The Aging of Eastern Queens and Nassau County,* has provided Ms. Paglen with deep insight on how increased longevity is impacting the nation's health care systems.

After leaving Northwell in 2016, Ms. Paglen built a boutique practice focused on healthcare regulation and compliance for both clinicians and corporations. Recently, Ms. Paglen has advised clients on the emergency federal COVID-19 waiver, enabling Medicare to reimburse for telehealth visits occurring in a patient's home. Ms. Paglen's practice also includes successful outcomes in wide-ranging commercial litigation for clients from financial institutions to commercial trucking entities. Ms. Paglen is currently of counsel at the firm Messina Perillo Hill LLP in Sayville NY.

Since 2013, Christin has served as an adjunct professor for Stony Brook Medicine where she teaches Health Law, Health Care Economics, and Aging & Society. Since 2016, she has been a faculty member for Touro College's School of Health Science's where she has chaired its undergraduate program and co-directed its Physician's Assistant Master's Completion program.

Ms. Paglen is admitted to practice in New York State. She also co-chairs the Suffolk County Bar Association's Health Law Committee and is a member of the American Health Lawyers Association.

xxx

Glen A. Seidner, CLU

Glen attended Lincoln HS, Kingsburg CC and Brooklyn College. He has an advanced degree from the American College in Bryn Mawr, PA. CLU (Charter Life Underwriter) Oct 1, 1985.

He started in the insurance industry on Oct 1, 1975

He is a Life member of MDRT (Million Dollars Round Table)

Member of NAHU (National Association of Health Underwriters)

He is a Paul Harris Fellow

He has served on

1) St. John Episcopal Hospital Development Board
2) Lawrence County Club Development Board of Governors
3) President of 284-285 Central Ave Co-Op

Proud father of two with one Granddaughter.

Currently a member of Woodside Country Club.

Jeffrey Naness is an attorney with Naness, Chaiet & Naness, LLC. Mr. Naness has over twenty-five years experience representing management in labor relations, employment law, and related litigation. He is a graduate of the University of Virginia School of Law and Wesleyan University, where he graduated, with honors, and was inducted into the Phi Beta Kappa Honor Society. Mr. Naness has represented private sector companies, municipalities and public benefit corporations in all facets of employment and labor law, including collective bargaining, human resource advice, and litigation counsel. Mr. Naness also excels in counseling his clients to avoid exposure to costly employment litigation. He is a former president of the Labor and Employment Relations Association Long Island Chapter, member of the Suffolk Bar Association (past head of the Labor and Employment Law Committee), member of the Nassau County Bar Association, the New York State Bar Association, the Accountants/Attorneys Networking Group (founder and first president), and the Association of Boutique Law Firms (founder and president).

Dr. William Lowe is a 1993 graduate of New York Medical College. Following a clinical internship at Westchester County Medical Center, Doctor Lowe began a tour of duty in the United States Army. He served as the Division-Support-Command Surgeon and Medical Director of the Connor Troop Clinic at the Army's distinguished 10th Mountain Division, Fort Drum, New York. In the fall of 1994 through the winter of 1995, Doctor Lowe deployed to Haiti as a Brigade Surgeon in support of Operation-Up-Hold-Democracy. He received an Honorable Discharge with several notable citations including the National Defense Service Medal and the Army Commendation Medal. Following military service, Dr. Lowe completed an Emergency Medicine residency at SUNY Buffalo, where he served as Chief Resident from 1999-2000. In 2005, Dr. Lowe completed a second residency in Occupational and Environmental Medicine at Mount Sinai School of Medicine. He remains board certified and active in both specialties. Dr. Lowe served as an attending Emergency Physician at Montefiore Medical Center from 2000-2008.From 2005-2011, he specialized in Energy-Sector Occupational Medicine at both the Consolidated Edison Company of New York and Saudi Aramco, in Saudi Arabia. Currently, he is the Medical Director for Employee Health Services at Northwell Health and he is a fellow of the American College of Occupational and Environmental Medicine and an Assistant Professor at The Hofstra School of Medicine. Dr. Lowe's areas of interest are occupational drug testing, fitness for duty determination and infectious disease prevention and treatment in health care and research settings.

WHO LET THE DOGS OUT?: HIPAA, PRIVACY AND THE CURRENT PANDEMIC

CHRISTIN PAGLEN ESQ

Mayor Bill de Blasio

@NYCMayor

We can officially confirm some more information on the second coronavirus case connected to New York City. The individual sought care on February 27 at Lawrence Hospital in Westchester. He works at Lewis and Garbuz, P.C., a law firm in Manhattan.

5:27 PM · 03 Mar 20 · Twitter Web App

Mayor Bill de Blasio

@NYCMayor

The patient has two children with a connection to New York City, a daughter who attends SAR Academy and High School in the Bronx, and a son who attends Yeshiva University in Manhattan. They're currently in isolation at home.

5:27 PM · 03 Mar 20 · Twitter Web App

Mayor Bill de Blasio

@NYCMayor

The Department of Health and Mental Hygiene personnel are on the ground at the law firm, SAR Academy and Yeshiva University. Disease detectives are following up with anyone who had close contact with the patient or his kids to get them tested for coronavirus.

5:27 PM · 03 Mar 20 · Twitter Web App

PUBLIC HEALTH & PRIVATE RIGHTS?

JACOBSON V COMMONWEALTH OF MASSACHUSETTS, 197 U.S. 11 (1905)

- Smallpox and a 115 year old case:
- On the public health side, Massachusetts passed a law stating **"The board of health of a city or town if in its opinion, it is necessary for public health or safety, shall require and enforce the vaccination and revaccination of all inhabitants thereof and shall provide them with the means of free vaccination."**

PUBLIC HEALTH & PRIVATE RIGHTS?

JACOBSON V COMMONWEALTH OF MASSACHUSETTS, 197 U.S. 11 (1905)

- Smallpox and a 115-year-old case:
- **Public Health argument**: “Smallpox had become prevalent…in the City of Cambridge and continued to increase.” Cambridge believed it necessary for “speedy extermination of the disease …that all persons who had not been vaccinated should be required to do so.”

PUBLIC HEALTH & PRIVATE RIGHTS?

JACOBSON V COMMONWEALTH OF MASSACHUSETTS, 197 U.S. 11 (1905)

- Smallpox and a 115 year old case:
- **Private rights argument:** Defendant argued degradation of his rights (secured by the 14th Amendment):
- "No state shall make or enforce any law abridging privileges or immunities of citizens of the United States nor can any person be deprived of life, liberty or property without due process of law."

PUBLIC HEALTH & PRIVATE RIGHTS?

JACOBSON V COMMONWEALTH OF MASSACHUSETTS, 197 U.S. 11 (1905)

- Who won?

PUBLIC HEALTH & PRIVATE RIGHTS?

JACOBSON V COMMONWEALTH OF MASSACHUSETTS, 197 U.S. 11 (1905)

- "The authority of the state to enact this statute is to be referred to as **...the police power**—a power which the state did not surrender when becoming a member of the union under the Constitution."
- The Court in Jacobson recognized, the authority of a state to enact quarantine laws and "**health laws of every description.**"

PUBLIC HEALTH & PRIVATE RIGHTS?

JACOBSON V COMMONWEALTH OF MASSACHUSETTS, 197 U.S. 11 (1905)

- Furthermore the court claimed "…according to settled principals, the police power of a state must be held to embrace at least such reasonable regulations established directly by legislative action… as will protect public health and public safety."

PRIVACY & THE CONSTITUTION

- Constitution does not explicitly provide any definitive right of privacy.
- Supreme Court however have read privacy into clauses of the Constitution
- *Katz v. United States*, 389 U.S. 347 (1967) Justice Stewart wrote for the majority and legal scholars believe this case created “the right of personal privacy.”

PRIVACY & THE CONSTITUTION

- *Katz* found privacy rights in other constitutional amendments– The Fourth Amendment did not alone carry the burden of the right to privacy.
- For example, Justice Stewart wrote that the Fifth Amendment shows “the right of each individual to a private enclave where he may lead a private life.” (Footnote 5)

PRIVACY & THE CONSTITUTION

- In a more recent landmark privacy case, *US v Jones* 565 U.S. 400, 404 (2012) Justice Scalia affirmed *Katz* and wrote, “The Fourth Amendment provides in relevant part that “the right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated.”

HIPAA, PRIVATE HEALTH INSURANCE, THE PRIVACY RULE & THE PANDEMIC:

- New regulations expanded the concept of “privacy” by codifying “patient privacy” through HIPAA
- Congress passed the Healthcare Insurance Portability and Accountability Act (HIPAA) in 1996
- This was a remarkable step towards privacy for employees (who at some point will be “patients”)

HIPAA, PRIVATE HEALTH INSURANCE, THE PRIVACY RULE & THE PANDEMIC:

- Documented pre-HIPAA era stories were that companies received detailed updates about specific employee's health insurance claims
- In the past four years, I know of two employees in the private sector who self-disclosed serious diagnosis (Multiple Sclerosis and Cancer) and were swiftly terminated (job elimination and "cause")

HIPAA, PRIVATE HEALTH INSURANCE, THE PRIVACY RULE & THE PANDEMIC:

- HIPAA covered a very narrow set of entities—(1) health care providers and (2) health plans (including employer-sponsored health plans).
- Employers, acting in their roles as employers, are not subject to HIPAA. Employment records (e.g., Americans with Disabilities Act accommodation requests) are not subject to HIPAA.
- However, when an employer acts on behalf of its health benefit plan (is “self-insured”), or when the employer itself is a health care provider, HIPAA applies.

HIPAA, PRIVATE HEALTH INSURANCE, THE PRIVACY RULE & THE PANDEMIC:

- HIPAA had two explicit purposes:
- (1) Health Insurance Portability: One purpose was to ensure that individuals would be able to maintain their health insurance between jobs
- (2) Accountability: Second purpose was to ensure the security and confidentiality of patient information/data to protect patients' records (related to health insurance)

HIPAA, PRIVATE HEALTH INSURANCE, THE PRIVACY RULE & THE PANDEMIC:

- Within HIPAA is “The Privacy Rule” which mandated and unified privacy regulations for patient PHI
- The HIPAA rule pre-Covid 19 required “when PHI is used or disclosed only the information that is needed for the immediate use or disclosure should be made available by the covered entity.”
- This is known as the minimally necessary standard.

HIPAA, PRIVATE HEALTH INSURANCE, THE PRIVACY RULE & THE PANDEMIC:

- PHI: Individually identifiable health information is explicitly protected including demographic data that relates to the individual's past present or future physical or mental health or condition or *any information used that could identify the person (emphasis mine)* including name, address, birth date, Social Security number.
- **HIPPA's Privacy Rule extremely strict:** Sharing data that could "reasonably identify the patient" is a HIPPA violation.

HIPAA, PRIVATE HEALTH INSURANCE, THE PRIVACY RULE & THE PANDEMIC:

HIPAA minimally necessary standard did not apply to:

- Disclosures/requests by health care providers for treatment;
- Disclosures to patient when requested by the patient;
- Uses and disclosures made with the patient's authorization.

HIPAA, PRIVATE HEALTH INSURANCE, THE PRIVACY RULE & THE PANDEMIC:

- IMPORTANT: The minimum necessary standard required covered entities to evaluate their practices and enhance protections as needed to "limit unnecessary or inappropriate access to PHI."
- Again, under HIPPA's Privacy Rule for covered entities, sharing data that could "reasonably identify the patient" is a HIPPA violation.
- Example: Hospice/Homecare nurses in identifiable Northwell cars or with identifiable Northwell "stickers" on their car;

HIPAA, PRIVATE HEALTH INSURANCE, THE PRIVACY RULE & THE PANDEMIC:

- Prior to COVID 19 under HIPPA covered entities could disclose your PHI:
- (1) to **public health authorities** only when the dissemination was authorized by law for preventing or controlling disease, injury, or disability…and
- (2) to **individuals** who may have contracted or been exposed to a communicable disease when notification was authorized by law.

HIPAA, PRIVATE HEALTH INSURANCE, THE PRIVACY RULE & THE PANDEMIC:

- Legal scholars hypothesizing based on Congress' original intent that the HIPAA regulations passed in 1996 meant the legal release of PHI to public health officials was to be very narrowly tailored—only when "authorized by law" could any PHI be released to public health officials.
- Prior to COVID 19 PHI disclosure to public health authorities was the minimally necessary standard.

HIPAA, PRIVATE HEALTH INSURANCE, THE PRIVACY RULE & THE PANDEMIC:

- Legal scholars say Congress' original intent was clear
- Congress directed the Secretary to promulgate rules and regulations designed to ensure the privacy of patients' medical information.

THE CURRENT PANDEMIC AND THE OFFICE FOR CIVIL RIGHTS (U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES)

- A May 2020 report showed that public health officials in at least 35 states **share the addresses** of those who have tested positive for the coronavirus.
- In 10 of those states, health agencies also **share their names**: Colorado, Iowa, Louisiana, Nevada, New Hampshire, New Jersey, North Dakota, Ohio, South Dakota, and Tennessee.
- Report Concludes: "Sharing specific PHI including names and addresses does not violate HIPAA under guidance issued by the U.S. Department of Health and Human Services," (Associated Press report, May 2020)

THE CURRENT PANDEMIC AND THE OFFICE FOR CIVIL RIGHTS (U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES)—2004 PROVISION TO WAIVE CERTAIN PROVISIONS OF THE PRIVACY RULE

- Under Project Bioshield Act of 2004 (PL 108-276) and Section 1135(b)(7) of the Social Security Act, the HIPAA Privacy rule is not suspended during a public health or other emergency but the Secretary of Health and Human Services may waive certain provisions of the Privacy Rule.
- Intent: Patient information can be shared to "assist in the nationwide public health or other emergency."

THE CURRENT PANDEMIC AND THE OFFICE FOR CIVIL RIGHTS (U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES)

- February 2020 Office for Civil Rights, US Department of Health and Human Services released a bulletin entitled *HIPAA Privacy and Novel Coronavirus* which presented guidelines for how HIPAA will be affected during COVID 19
- There were four primary changes

THE CURRENT PANDEMIC AND THE OFFICE FOR CIVIL RIGHTS (U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES)

- (1) Under the Privacy Rule, covered entities may disclose without a patient's authorization PHI about the patient as necessary to treat the patient or to treat a different patient;
- (2) A covered entity may share PHI with a patient's family, relatives, friends or other persons identified by the patient as involved in the patient's care.

THE CURRENT PANDEMIC AND THE OFFICE FOR CIVIL RIGHTS (U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES)

- (3) A covered entity may share PHI with anyone else responsible for the patient's care;
- (4) A covered entity may rely on representations from the CDC that the PHI requested by the CDC *about all patients exposed to or suspected or confirmed to have COVID 19* meets the minimally necessary standard for public health purposes.

THE CURRENT PANDEMIC AND THE OFFICE FOR CIVIL RIGHTS (U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES)

- Lastly, HHS issued "Notification of Enforcement Discretion under HIPAA to Allow Uses and Disclosures of PHI by for Public Safety and Health."
- **"...effective immediately OCR will exercise its enforcement discretion and will not impose penalties against a business associate or covered entity under the Privacy Rule."**

U.S.C. SECTION 1320B-5 (MARCH 27, 2020)

"AUTHORITY TO WAIVE REQUIREMENTS DURING NATIONAL EMERGENCIES"

- These guidelines have been further codified:
- Under the U.S.C. Section 1320B-5 released March 27, 2020, **"The patient's right to request privacy restrictions; and the patients' right to confidential communications" has been waived."**

U.S.C. SECTION 1320B-5 (MARCH 27, 2020)

"AUTHORITY TO WAIVE REQUIREMENTS DURING NATIONAL EMERGENCIES"

- The waiver became effective March 15, 2020 **and…there are protections**
- When the secretary issues such a waiver it only applies (1) in the emergency area identified in the public health declaration (2) to hospitals that have instituted a disaster protocol and (3) for up to 72 hours from the time the hospital implements its disaster protocol.

U.S.C. SECTION 1320B-5 (MARCH 27, 2020)

"AUTHORITY TO WAIVE REQUIREMENTS DURING NATIONAL EMERGENCIES"

- When the Presidential or Secretarial declaration terminates a hospital must then comply with all the requirements of the Privacy Rule (including for patients still under their care)

U.S.C. SECTION 1320B-5 (MARCH 27, 2020)

"AUTHORITY TO WAIVE REQUIREMENTS DURING NATIONAL EMERGENCIES"

- Under this national health emergency, with a system of private, employer provided health insurance, the key question is "How much PHI should be publicly shared?"
- In 1996, did Congress intend for state governments to **share names, addresses and specific diagnosis** with other states?

U.S.C. SECTION 1320B-5 (MARCH 27, 2020)

"AUTHORITY TO WAIVE REQUIREMENTS DURING NATIONAL EMERGENCIES"

- Prior to this pandemic the HIPAA public health standard was **only the information that was needed**—it was a minimally necessary standard
  - *For example no PHI was transmitted;*
  - *Information was transmitted as "data" or*
  - *Individuals were anonymous or pseudonyms were used*

POST PANDEMIC?

- Prior to COVID 19, HIPAA was a force in US healthcare
- The patient referred to at the beginning of my slide show could rely on HIPAA to protect his PHI (even in death)
- Additionally he could also rely on the reasonable expectation of privacy under our Constitution for people to be secure in their persons (derived from the *Katz* case.)

POST PANDEMIC?

- The Office of Civil Rights is alleging that COVID 19 is such a threat that suspending HIPAA regulations is necessary…
- In 2004 we conceived of a nationwide public health emergency—is COVID 19 what we meant?
- BIG QUESTION: With HIPAA's overlapping roots with Constitutional rights of privacy, is suspending HIPAA constitutional?

POST PANDEMIC?
COVID-19 HIPAA BULLETIN: LIMITED WAIVER OF HIPAA SANCTIONS AND PENALTIES DURING A NATIONWIDE PUBLIC HEALTH EMERGENCY (MARCH 2020)

- SMALLER QUESTION: Is the government's redefinition of "*any information requested by the CDC"* as "minimally necessary" too broad?
- *("A covered entity may rely on representations from the CDC that the PHI requested by the CDC about all patients exposed to or suspected or confirmed to have COVID 19 meets the minimally necessary standard for public health purposes."*)

POST PANDEMIC?

- These very questions are the reason why HIPAA was put into place initially.
- Within our uniquely American health care system of employer-based health insurance, some legal scholars argue HIPAA was the needed amendment to the Constitution to prevent discrimination in based on health status and provided true privacy regarding health care.

POST PANDEMIC?

Post pandemic, where will we stand?

Fundamentals of Group Insurance and COVID - 19

A) To viewed as eligible for health insurance benefits;
   1) In NYS the employer can require a 30-hour work week or reduce the # of hours required to
   2) Under PPACA an employee in an eligible class must be considers who works 30 hours per.

B) Waiting period for new employees

1) Zero to 90 days of employment or
2) first of the month following 0-60 days of employment

3) During Covid what has happened to the above for Furloughed employee's
   What happens if an employee has a 90-day waiting period and completed 45 calendar days of the waiting period? Then EE is furloughed for 3 months. Then returns to work.
   Answer is the employee will be enrolled when they return to work after completing there waiting period. However, many insurance companies are allowing the return to work as a rehire and allowing the employee to be covered if the initial waiting period has expired i.e.90th days from the start of employment.
4) Who will have to pay for the cost sharing of the premium?
   Is the employer responsible for 100% of the premium? If the employee handbook does not address the issue of premium split it is up to the employer to make an agreement with the furloughed employee as to what happens to the premium split i.e. 50%/50% or 40%/60%.
   What are some of the options?
   a) A written agreement with employee as the what happens with their cost share
   b) Employer terminated the employee from the health insurance an offers the employee COBRA.

5) Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA), 18 Months in NYS

6) Then NYS continuance for an Additional 18 months.

7) NYStateofhealth.NY.gov 855 355-5777

Open enrolment is 11/1/20 to 1/1/21

C) FSA and HSA accounts

1) What happens when an employee is Furloughed with an FSA account and rehired?
   a) Under Covid can employee defer $500 of non-used funds without forfeiting additional balances.
   b) There has not be a ruling as to what happens to the additional funds if the employee could not reschedule procedures that were scheduled after the lock down was order by NYS. Will the fund go into the forfeited area of the law?
   c) FSA accounts contributions Max 2,750
   d) HSA $3,550 / $7,100 with catch-up over age 50 $1,000
   e) Currently what options does the employee and ER have.

D) Qualifying events such as birth of a child, lose of coverage.

1) per Covid all additions needed to be made within 30 days of event.
2) During Covid retro-active enrolment is be begging allow by many carriers of 60 Days.
   With back premiums.

E) What is new

1) All Covid Co-pay's, testing for C-19 are waived
2) Tele medicine is covered
3) Mental health hotlines have been open 24/7 to all covered employees without co pays.
4) Overrides of RX. What is an override.
5) The New York Exchange is allowing open enrolment due to Covid

1. The Patient Protection and Affordable Care Act, commonly known as the Affordable Care Act (ACA) or Obamacare, is a United States federal statute enacted by the 111th United States Congress and signed into law by President Barack Obama on March 23, 2010.
   2. Open enrolment for Medicare Supplement is 10/15 to 12/07/20

Medicare & Other Health Benefits:

Your Guide to
Who Pays First

CENTERS FOR MEDICARE & MEDICAID SERVICES

This official government booklet tells you:

- How Medicare works with other types of coverage
- Who should pay your bills first
- Where to get more help

The information in this booklet describes the Medicare Program at the time this booklet was printed. Changes may occur after printing. Visit Medicare.gov, or call 1-800-MEDICARE to get the most current information.

"Medicare & Other Health Benefits: Your Guide to Who Pays First" isn't a legal document. Official Medicare Program legal guidance is contained in the relevant statutes, regulations, and rulings.

Table of contents

Notes

SECTION 1

When you have other health coverage

Coordination of benefits

If you have Medicare and other health coverage, you may have questions about how Medicare works with your other insurance and who pays your bills first. Each type of coverage is called a "payer." When there's more than one payer, "coordination of benefits" rules decide who pays first. The "primary payer" pays what it owes on your bills first, then you or your health care provider sends the rest to the "secondary payer" (supplemental payer) to pay. In some rare cases, there may also be a "third payer."

Whether Medicare pays first depends on a number of things, including the situations listed in the chart on the next 3 pages. However, this chart doesn't cover every situation. Be sure to tell your doctor and other providers if you have health coverage in addition to Medicare. This will help them send your bills to the correct payer to avoid delays.

Where to go with questions

If you have questions about who pays first, or if your coverage changes, call the Benefits Coordination & Recovery Center (BCRC) toll-free at 1-855-798-2627. TTY users can call 1-855-797-2627.

The BCRC is the contractor that acts on behalf of Medicare to collect and manage information on other types of insurance or coverage that a person with Medicare may have, and determines whether the coverage pays before or after Medicare. This contractor also acts on behalf of Medicare to get repayment when Medicare makes a conditional payment, and another payer is determined to be primary.

When you call the BCRC, have your Medicare Number ready—you can find it on your red, white, and blue Medicare card. The BCRC may also ask for information like your Social Security Number (SSN), your address, the date you were first eligible for Medicare, and whether you have Medicare Part A (Hospital Insurance) and/or Medicare Part B (Medical Insurance).

How Medicare works with other coverage–find your situation

Find your situation on pages 6 through 8 to see which payer generally pays first for Medicare-covered items and services, and which page to visit for more details. You can also get this information by visiting Medicare.gov.

I've got Medicaid (page 11)

Medicare pays first, and Medicaid pays second.

I'm 65 or older and have group health plan coverage based on my own current employment status or the current employment status of my spouse (pages 11–13).

- If the employer has 20 or more employees, then the group health plan pays first, and Medicare pays second.
- If the employer has less than 20 employees and isn't part of a multi-employer or multiple employer group health plan (see page 18), then Medicare pays first, and the group health plan pays second. See page 13.

I'm in a Health Maintenance Organization (HMO) Plan or Preferred Provider Organization (PPO) Plan through my employer and get services outside the employer plan's network (page 16)

It's possible that neither the plan nor Medicare will pay if you get care outside your employer plan's network. Before you go outside the network, call your group health plan to find out if it will cover the service.

I'm 65 or older, retired, and have group health plan coverage from my spouse's current employer (page 16)

If your spouse's employer has 20 or more employees, your spouse's plan pays first and Medicare pays second.

I'm under 65, disabled, retired, and have group health plan coverage from my former employer (page 16)

Medicare pays first and your group health plan (retiree) coverage pays second.

I'm under 65, disabled, retired and have group health plan coverage based on my family member's current employer (page 18)

- If the employer has 100 or more employees, then the large group health plan pays first, and Medicare pays second. See page 13.

How Medicare works with other coverage—find your situation (continued)

I'm under 65, disabled, retired and have group health plan coverage based on my family member's current employer (page 18) (continued)

- If the employer has less than 100 employees, and isn't part of a multi-employer or multiple employer group health plan (see page 18), then Medicare pays first, and the group health plan pays second. If the employer is part of a multi-employer or multiple employer group health plan, the group health plan pays first and Medicare pays second.

I have Medicare due to End-Stage Renal Disease (ESRD), and group health plan coverage (including a retirement plan) (page 19)

When you're eligible for or entitled to Medicare due to ESRD, during a coordination period of up to 30 months, the group health plan pays first and Medicare pays second. After the coordination period, Medicare pays first and the group health plan pays second. If you originally got Medicare due to your age or a disability other than ESRD, and your group health plan was your primary payer, then it still pays first when you become eligible because of ESRD.

I have group health plan coverage, I first got Medicare due to turning 65 or because of a disability (other than ESRD), and now I have ESRD. Who pays first? (Page 19)

Whichever coverage paid first due to your age or non-ESRD disability still pays first when you become eligible for Medicare because of ESRD:

- If you originally got Medicare due to your age or a disability (other than ESRD) and Medicare paid first, then Medicare continues to pay first even when you become eligible for Medicare because of ESRD.
- If you originally got Medicare due to your age or a disability (other than ESRD) and your group health plan paid first, then it still continues to pay first when you become eligible because of ESRD.

I have Medicare due to End-Stage Renal Disease (ESRD), and COBRA coverage (page 29)

When you're eligible for or entitled to Medicare due to ESRD, during a coordination period of up to 30 months, COBRA pays first. Medicare pays second, to the extent COBRA coverage overlaps the first 30 months of Medicare eligibility or entitlement based on ESRD.

How Medicare works with other coverage—find your situation (continued)

I get health services from the Indian Health Services (IHS) or an IHS provider (page 19)

- If you have group health plan coverage through an employer who has 20 or more employees, the group health plan pays first, and Medicare pays second.
- If you have group health plan coverage through an employer who has less than 20 employees, Medicare pays first, and the group health plan pays second.
- If you have a group health plan through tribal self-insurance, Medicare pays first and the group health plan pays second.

I've been in an accident where no-fault or liability insurance is involved (pages 19–21)

No-fault insurance or liability insurance pays first and Medicare pays second for services related to the accident or injury.

I'm covered under workers' compensation because of a job related illness or injury involved (pages 22–25)

Workers' compensation pays first for services or items related to the workers' compensation claim. Medicare may make a conditional (a payment that must be repaid to Medicare when a settlement, judgment, award, or other payment is made).

I'm a Veteran and have Veterans' benefits (page 26)

Generally, Medicare and VA can't pay for the same service or items. Medicare pays for Medicare-covered services or items. Veterans' Affairs pays for VA-authorized services or items.

I'm covered under TRICARE (page 27)

- For active-duty military enrolled in Medicare, TRICARE pays first for Medicare-covered services or items, and Medicare pays second.
- For inactive-duty military enrolled in Medicare, Medicare pays first and TRICARE **may** pay second.
- TRICARE pays first for services or items from a military hospital or any other federal provider.
- For active-duty military enrolled in Medicare, TRICARE pays first for Medicare-covered services or items, and Medicare pays second.

How Medicare works with other coverage—find your situation (continued)

I'm covered under TRICARE (page 27) (continued)

- For inactive-duty military enrolled in Medicare, Medicare pays first and TRICARE **may** pay second.
- TRICARE pays first for services or items from a military hospital or any other federal provider.

I have black lung disease and I'm covered under the Federal Black Lung Benefits Program (page 28)

The Federal Black Lung Benefits Program pays for services related to black lung. Medicare pays first for all other health care **not** related to black lung disease.

I have COBRA continuation coverage (page 29)

- If you have Medicare because you're 65 or over or because you have a disability other than End-Stage Renal Disease (ESRD), Medicare pays first.
- If you have Medicare based on ESRD, COBRA pays first. Medicare pays second to the extent COBRA coverage overlaps the first 30 months of Medicare eligibility or entitlement based on ESRD.

How will Medicare know I have other coverage?

Medicare doesn't automatically know if you have other coverage. However, insurers must report to Medicare when they're responsible for paying first on your medical claims. A claim is a request for payment that you submit to Medicare or other health insurance when you get items and services that you think are covered. In some cases your health care provider, employer, or your insurer may ask you questions about your current coverage so they can report that information to Medicare.

You can also report your coverage information by calling the Benefits Coordination & Recovery Center (BCRC) toll-free at 1-855-798-2627. TTY users can call 1-855-797-2627.

Example: Harry recently turned 65 and is eligible to enroll in Medicare. He works for a company with 20 or more employees, and has coverage through his employer's group health plan. Since Harry is still currently working, the insurer will report Harry's group health plan insurance information to Medicare so that Medicare knows to pay Harry's claims second.

What happens if my health coverage changes?

Insurers must report these changes to Medicare, but the changes can take some time to be posted to Medicare's records.

If that happens, call the Benefits Coordination & Recovery Center (BCRC) toll-free at 1-855-798-2627. TTY users can call 1-855-797-2627. You'll have to give this information:

- Your name
- The name and address of your health plan
- Your policy number
- The date coverage was added, changed, or stopped, and why

Tell your doctor and other health care providers about changes in your coverage when you get care. Also, contact your health plan to make sure they reported these changes to Medicare. Medicare uses your answers to help keep your file correct so your claims get paid correctly.

What if I have Medicare and more than one type of coverage?

Check your insurance policy—it may include the rules about who pays first. You can also call the BCRC.

Can I get coverage through the Health Insurance Marketplace if I already have Medicare?

Generally, no. It's against the law for someone who knows that you have Medicare to sell or issue you a Marketplace policy. This is true even if you have only Medicare Part A or only Medicare Part B. Therefore, if you already have Medicare, you shouldn't need to coordinate benefits between Medicare and a Marketplace plan.

On the other hand, if you don't yet have Medicare but have coverage through the Marketplace, you can choose to keep your Marketplace plan after your Medicare coverage starts. But once your Medicare Part A coverage starts and you've been getting premium tax credits or other savings on a Marketplace plan, these savings will end. If you keep your Marketplace plan, you would have to pay full price. For this reason, in most cases you'll want to end your Marketplace coverage once you're eligible for Medicare. If you age into Medicare and decide to keep your Marketplace plan, then Medicare pays first.

SECTION 2

Medicare & other types of health coverage

The situations on pages 6–8 can help you find your type(s) of coverage and situation to see which payer pays first.

This section provides detailed information on how Medicare works with your other health coverage.

Medicare & Medicaid

Medicaid is a joint federal and state program that helps pay medical costs for certain people and families who have limited income and resources and meet other requirements. Medicaid programs vary from state to state, but most health care costs are covered if you qualify for both Medicare and Medicaid. **Medicaid never pays first for services covered by Medicare**. It only pays after Medicare has paid. In rare cases where there's other coverage, Medicaid pays after the other coverage has paid.

Medicare & group health plan coverage when you're still working

Many employers, employee organizations and unions offer group health plan coverage to current employees or retirees. In general, a group health plan gives health coverage to employees and their families. If you have Federal Employees Health Benefits (FEHB) Program coverage, your coverage works the same as it does for all group health plans. You may also get group health plan coverage through the employer of a spouse or family member.

If you have Medicare and you're offered coverage under a group health plan, you can choose to accept or reject the plan. The group health plan may be a fee-for-service plan or a managed care plan, like an HMO or PPO.

Medicare & group health plan coverage (continued)

I'm 65 or older and have group health plan coverage based on my own current employment status or the current employment status of my spouse and the employer has 20 or more employees.

If your or your spouse's employer has 20 or more employees, the group health plan pays first and Medicare pays second.

Generally, your group health plan pays first if **both** of these are true:

1. You're 65 or older and covered by a group health plan through your **current** employer or the **current** employer of a spouse of any age.

   Note: For this situation, "spouse" includes both opposite-sex and same-sex marriages where 1) you're entitled to Medicare as a spouse based on Social Security's rules; and 2) the marriage was legally entered into in a U. S. jurisdiction that recognizes the marriage—including one of the 50 states, the District of Columbia, or a U.S. territory—or a foreign country, so long as that marriage would also be recognized by a U.S. jurisdiction.

   An employer, insurer, third party administrator, group health plan, or other plan sponsor may choose to have a more inclusive definition of spouse than described above. Under these circumstances, the plan **may** pay, but isn't required to pay, first for someone it considers a spouse under its definition. Contact your employer or insurer if you have a question about their definition of "spouse" and how claims will be paid.

2. The employer has 20 or more employees and covers any of the same services as Medicare (this means the group health plan pays first on your hospital and medical bills).

If the group health plan didn't pay all of your bill, the doctor or health care provider should send the bill to Medicare for secondary payment. Medicare may pay on what the group health plan paid, what the group health plan allowed, and what the doctor or health care provider charged on the claim. You may have to pay any costs Medicare or the group health plan doesn't cover.

Employers with 20 or more employees must offer current employees age 65 and older the same health benefits under the same conditions that they offer employees under 65. If the employer offers coverage to spouses, it must offer the same coverage to spouses 65 and older that it offers to spouses under 65.

Medicare & group health plan coverage (continued)

I'm 65 or older and have group health plan coverage based on my own current employment status or the current employment status of my spouse and the employer has less than 20 employees.

Medicare pays first. Medicare may pay second if both of these apply:

- Your employer, which has less than 20 employees, joins with other employers or employee organizations (like unions) to sponsor a group health plan (called a multi-employer plan), and
- At least one or more of the other employers has 20 or more employees.

However, your plan may ask for an "exception" and request not to be part of a multi-employer group health plan. Check with your plan first and ask whether it will pay first or second for your claims.

I'm in a Health Maintenance Organization (HMO) Plan or an employer Preferred Provider Organization (PPO) Plan that pays first. Who pays if I get services outside the employer plan's network?

If you get care outside your employer plan's network, it's possible that neither the plan nor Medicare will pay. Call your group health plan before you go outside the network to find out if the service will be covered.

Medicare & group health plan coverage (continued)

If I don't accept coverage from my employer, how will this affect what Medicare will pay?

Medicare pays its share for any Medicare-covered health care service you get, even if you don't take group health plan coverage from your employer, and you don't have coverage through an employed spouse.

What happens if I drop coverage from my employer?

If you're 65 or older, Medicare pays first unless you have coverage through an employed spouse, and your spouse's employer has at least 20 employees.

Note: If you don't take employer coverage when it's first offered to you, you might not get another chance to sign up. If you take the coverage but drop it later, you may not be able to get it back. Also, you might be denied coverage if your employer or your spouse's employer generally offers retiree coverage, but you weren't in the plan while you or your spouse were still working. Call your employer's benefits administrator for more information before you make a decision.

Medicare & group health plan coverage after you retire

How does my group health plan coverage work after I retire?

It depends on the terms of your specific plan. Your employer or union or your spouse's employer or union might not offer any health coverage after you retire. If you can get group health plan coverage after you retire, it might have different rules and might not work the same way with Medicare.

Can I continue my employer coverage after I retire?

When you have retiree coverage from an employer or union, it manages this coverage. Employers aren't required to provide retiree coverage, and they can change benefits or premiums, or even cancel coverage (a premium is the periodic payment to Medicare, an insurance company, or a health care plan for health or prescription drug coverage).

Medicare & group health plan coverage after you retire (continued)

What are the price and benefits of the retiree coverage, and does it include coverage for my spouse?

Your employer or union may offer retiree coverage that limits how much it will pay. It might only provide "stop loss" coverage, which starts paying your out-of-pocket costs only when you reach a certain maximum amount of coverage.

What happens to my retiree coverage when I'm eligible for Medicare?

If your former employer offers retiree coverage, the coverage might not pay your medical costs during any period in which you were eligible for Medicare but didn't sign up for it. When you become eligible for Medicare, you'll need to join both Medicare Part A (Hospital Insurance) and Medicare Part B (Medical Insurance) to get full benefits from your retiree coverage.

What effect will my continued coverage as a retiree have on both my health coverage and my spouse's health coverage?

If you're not sure how your retiree coverage works with Medicare, get a copy of your plan's benefit materials, or look at the summary plan description provided by your employer or union. You can also call your employer's benefits administrator and ask how the plan pays when you have Medicare.

How does retiree coverage compare with a Medigap policy?

Medigap is optional insurance sold by private insurance companies to fill "gaps" in Original Medicare coverage. Since Medicare pays first after you retire, your retiree coverage is likely to be similar to coverage under a Medigap policy. Sometimes retiree coverage includes extra benefits, like coverage for extra days in the hospital.

Retiree coverage isn't the same thing as a Medigap policy but, like a Medigap policy, it usually offers benefits that fill in some of Medicare's gaps in coverage, like coinsurance and deductibles. (Coinsurance is an amount you may be required to pay as your share of the cost for services, after you pay any deductibles. It's usually a percentage—for example, 20%. A deductible is the amount you must pay for health care or prescriptions, before Original Medicare, your prescription drug plan, or your other insurance begins to pay.)

I'm 65 or older, retired, and I have group health plan coverage from my spouse's current employer.

Your spouse's plan pays first and Medicare pays second when all the following apply:

- You're retired, but your spouse is still working, and
- You're covered by your spouse's group health plan coverage, and
- Your spouse's employer must have 20 or more employees, unless the employer has less than 20 employees, but is part of a multi-employer plan or multiple employer plan.

If the group health plan didn't pay all of your bill, the doctor or health care provider should send the bill to Medicare for secondary payment. Medicare may pay based on what the group health plan paid, what the group health plan allowed, and what the doctor or health care provider charged on the claim. You may have to pay any costs Medicare or the group health plan doesn't cover.

I'm under 65, disabled, retired and I have group health plan coverage from my former employer.

If you get group health plan coverage through your own former employer and you're not currently employed:

- Medicare pays first for your health care bills.
- Your group health plan (retiree) coverage pays second.

I'm under 65, disabled, retired and I have group health plan coverage from my family member's current employer.

Your spouse's plan pays first and Medicare pays second if all of these apply:

- You retire but your spouse is still working, and
- You're covered by your spouse's group health plan coverage, and
- Your spouse's employer has 100 or more employees, or the employer employs less than 100 employees but is part of a multi-employer plan or multiple employer plan (see page 18).

Medicare & Medigap

If I choose to buy a Medigap policy, when should I buy it?

The best time is during your 6-month Medigap Open Enrollment Period, because you can buy any Medigap policy sold in your state, even if you have health problems. This period automatically starts the month you're 65 **and** enrolled in Part B, and once it's over, you can't get it again.

Remember: You and your spouse would each have to buy your own Medigap policy, and you can only buy a policy when you're eligible for Medicare.

For more information about Medigap policies, visit Medicare.gov/publications to view the booklet "Choosing a Medigap Policy: A Guide to Health Insurance for People with Medicare." To find and compare Medigap polices, visit Medicare.gov/plan-compare, or call 1-800-MEDICARE (1-800-633-4227). TTY users can call 1-877-486-2048.

You may want to talk to your State Health Insurance Assistance Program (SHIP) for advice about whether to buy a Medigap policy. SHIPs give free, in-depth, unbiased, one-on-one health insurance counseling and assistance to people with Medicare, their families, and caregivers. To get the phone number for your state, visit Medicare.gov/contacts, or call 1-800-MEDICARE.

What happens if I have group health plan coverage after I retire, and my former employer goes bankrupt or out of business?

If your former employer goes bankrupt or out of business, federal COBRA rules may protect you if any other company within the same corporate organization still offers a group health plan to its employees. That plan is required to offer you COBRA continuation coverage. See pages 26–27. If you can't get COBRA continuation coverage, you may have the right to buy a Medigap policy even if you're no longer in your Medigap Open Enrollment Period

Medicare & group health plan coverage for people who are disabled (non-ESRD disability)

I'm under 65 and disabled. I have large group health plan coverage based on my own current employment status or the current employment status of a family member. Who pays first?

When an employer has 100 or more employees, the health plan it offers is called a large group health plan. If you're covered by a large group health plan because of your current employment status, or the current employment status of a family member (like a spouse, domestic partner, parent, son, daughter, or grandchild), the health plan pays first and Medicare pays second. A large group health plan can't treat any plan member differently because they're disabled and have Medicare.

Sometimes employers with less than 100 employees join with other employers to form a multi-employer plan or a multiple employer plan. If at least one employer in the multi-employer plan or multiple employer plan has 100 employees or more, your group health plan coverage pays first and Medicare pays second.

If the employer has less than 100 employees, then Medicare pays first. However, Medicare may pay second if both of the following apply:

- Your employer, which has less than 100 employees, joins with other employers or employee organizations (like unions) to sponsor a group health plan (called a multi-employer plan), and
- At least one or more of the other employers have 100 or more employees.

However, your plan may ask for an "exception" and request not to be part of a multi-employer group health plan. Check with your plan first and ask whether it will pay first or second for your claims.

Example: Mary works full-time for a company that has 120 employees. She has large group health plan coverage for herself and her husband. Her husband has Medicare because of a disability, so Mary's group health plan coverage pays first for Mary's husband, and Medicare pays second.

Medicare & group health plan coverage for people with End-Stage Renal Disease (ESRD)

I have Medicare due to ESRD and group health plan coverage (including a retirement plan). Who pays first?

When you're eligible for Medicare due to End-Stage Renal Disease (ESRD), permanent kidney failure requiring dialysis or a kidney transplant, the group health plan pays first and Medicare pays second on your hospital and medical bills during a coordination period of up to 30 months, regardless of how many employees the employer has or whether you're currently employed or retired. This is also true in dual entitlement situations—like if you were previously entitled to Medicare on the basis of age or disability and Medicare wasn't the first payer for you, and now you've become eligible or entitled to Medicare on the basis of ESRD.

If you're eligible for Medicare only because of ESRD, the coordination period begins when you become eligible for Medicare. Medicare pays second during this period even if your employer's plan says its policy is to pay second to Medicare, or otherwise rejects or limits its payments to people with Medicare. During the 30-month coordination period, your plan is billed first for services you get as a person with Medicare due to ESRD.

When you're within the 30-month coordination period, if your plan doesn't pay for covered services in full, Medicare may pay second for all Medicare covered items and services, not just ones for the treatment of ESRD.

Medicare & Indian Health Services (IHS)

Medicare pays first for your health care bills, before the IHS. However, if you have a group health plan through an employer, and the employer has 20 or more employees, then generally the plan pays first and Medicare pays second. If your employer has less than 20 employees, Medicare generally pays first and the plan pays second. If you have a group health plan through tribal self-insurance, Medicare generally pays first and the plan pays second.

Medicare & no-fault or liability insurance

What's no-fault insurance?

No-fault insurance may pay for health care services you get because you get injured or your property gets damaged in an accident, regardless of who is at fault for causing the accident. Some types of no-fault insurance include:

- Automobile
- Homeowners'
- Commercial insurance plans

Medicare & no-fault or liability insurance (continued)

What's liability insurance?

Liability insurance (including self-insurance) protects individuals who have liability insurance coverage against claims for things like negligence or other types of potential wrongdoing— for example, inappropriate action or inaction that causes someone to get injured or causes property damage.

Some types of liability insurance include:

- Homeowners'
- Automobile
- Product
- Malpractice
- Uninsured motorist
- Underinsured motorist

If you have an insurance claim for your medical expenses, you or your lawyer should notify Medicare as soon as possible.

Who pays first if I have a claim for no-fault or liability insurance?

No-fault insurance or liability insurance pays first and Medicare pays second for services related to the accident or injury.

If doctors or other providers are told you have a no-fault or liability insurance claim, they must try to get paid from the insurance company before billing Medicare. However, this may take a long time. If the insurance company doesn't pay the claim promptly (usually within 120 days), your doctor or other provider may bill Medicare. Medicare may make a conditional payment to pay the bill, and then later will recover the payment after a settlement, judgment, award, or other payment on the claim has been made.

Example: Nancy is 69 years old. She's a passenger in her granddaughter's car, and they have an accident. Nancy's granddaughter has Personal Injury Protection/ Medical Payments (Med Pay) coverage as part of her automobile insurance. While at the hospital emergency room, Nancy is asked about available coverage related to the accident. Nancy tells the hospital that her granddaughter has Med Pay coverage. Because this coverage pays regardless of fault, it's considered no-fault insurance. The hospital bills the no-fault insurance for the emergency room services and only bills Medicare if any Medicare-covered services aren't paid for by the no-fault insurance.

Medicare & no-fault or liability insurance (continued)

Who pays if the no-fault or liability insurance denies my medical bill or is found not liable for payment?

In certain circumstances, Medicare will make conditional payments when a no-fault insurer or liability insurer doesn't pay. If you also have group health plan coverage that pays first, the group health plan must be billed before Medicare, whether or not the no-fault or liability insurance pays or denies the claim. You're still responsible for your share of the bill, like coinsurance, copayment, or a deductible, and for services Medicare doesn't cover. A copayment is an amount you may be required to pay as your share of the cost for a medical service or supply, like a doctor's visit, hospital outpatient visit, or a prescription drug. It's usually a set amount, rather than a percentage. For example, you might pay $10 or $20 for a doctor's visit or prescription drug.

What's a conditional payment?

A conditional payment is a payment Medicare makes for services another payer may be responsible for. Medicare makes this conditional payment so you won't have to use your own money to pay the bill. The payment is "conditional" because it must be repaid to Medicare if you get a settlement, judgment, award, or other payment later.

Note: You're responsible for making sure Medicare gets repaid from the settlement, judgment, award, or other payment.

Example: Joan is driving her car when someone in another car hits her. Joan has to go to the hospital. The hospital tries to bill the other driver's insurance company. The insurance company disputes who was at fault and won't pay the claim right away. The hospital bills Medicare, and Medicare makes a conditional payment to the hospital for health care services Joan got. When a settlement is reached with the other driver's insurance company, Joan must make sure Medicare gets repaid for the conditional payment.

Example: Bob has a heart attack. Medicare pays for Bob's medical care for his heart attack and his recovery. Bob later learns that a prescription medication he takes may have triggered his heart attack. He's part of a class action lawsuit against the company that makes the medication, and he gets a settlement. Bob must make sure that Medicare gets repaid for any conditional payments it made for him and related to his settlement.

Medicare & no-fault or liability insurance (continued)

How does Medicare get repaid for the conditional payment?

If you file a no-fault insurance or liability insurance claim, you or your representative should call the Benefits Coordination & Recovery Center (BCRC) toll-free at 1-855-798-2627. TTY users can call 1-855-797-2627. The BCRC will set up and work on your recovery case, using information from you or your representative.

The BCRC will gather information about any conditional payments Medicare made related to your no-fault insurance or liability claim. If you get a settlement, judgment, award, or other payment, you or your representative should call the BCRC. The BCRC will determine the final repayment amount (if any) on your recovery case and send you a letter requesting repayment.

Where can I get more information?

If you have questions about a no-fault or liability insurance claim, call the insurance company. If you have questions about who pays first, call the BCRC.

Medicare & workers' compensation

Workers' compensation is a law or plan requiring employers to cover employees who get sick or injured on the job. Workers' compensation plans cover most employees. Talk to your employer, or contact your state workers' compensation division or department, to find out if you're covered.

If you think you have a work-related illness or injury, tell your employer, and file a workers' compensation claim.

You or your lawyer also need to call the Benefits Coordination & Recovery Center (BCRC) toll-free at 1-855-798-2627 as soon as you file your workers' compensation claim. TTY users can call 1-855-797-2627.

I have Medicare and filed a workers' compensation claim. Who pays first?

If you have Medicare and get injured on the job, workers' compensation pays first on health care items or services you got because of your work-related illness or injury. There can be a delay between when a bill is filed for the work-related illness or injury and when the state workers' compensation insurance decides if they should pay the bill. Medicare can't pay for items or services that workers' compensation will pay for promptly (generally within 120 days).

Medicare & workers' compensation (continued)

Medicare may make a conditional payment if the workers' compensation insurance company denies payment for your medical bills pending a review of your claim (generally 120 days or longer).

Note: This isn't the same situation as when your workers' compensation case has been settled and you're using funds from your Workers' Compensation Medicare Set-aside Arrangement (WCMSA) to pay for your medical care. See the next 2 pages for more information on WCMSAs.

Example: Tom was injured at work. He filed a workers' compensation claim. His doctor billed the state workers' compensation agency for payment, but she didn't get paid within 120 days, so she billed Medicare, requesting a conditional payment. Medicare made a conditional payment to Tom's doctor for the health care services Tom got. If Tom gets a settlement, judgment, award, or other payment from the state workers' compensation agency, Tom must make sure Medicare gets repaid for the conditional payment Medicare made to his doctor.

What if workers' compensation denies payment?

If workers' compensation insurance denies payment, and you give Medicare proof that the claim was denied, Medicare will pay for Medicare-covered items and services as appropriate.

Example: Mike was injured at work. He filed a workers' compensation claim. The workers' compensation agency denied payment for Mike's medical bills. Mike's doctor billed Medicare and sent Medicare a copy of the workers' compensation denial with the claim for Medicare payment. Medicare will pay Mike's doctor for the Medicare-covered items and services Mike got as part of his treatment. Mike must pay for anything Medicare doesn't cover.

Can workers' compensation decide not to pay my entire bill?

In some cases, workers' compensation insurance may not pay your entire bill. If you had an injury or illness before you started your job (called a "pre-existing condition"), and the job made it worse, workers' compensation may not pay your whole bill because the job didn't cause the original problem. In this case, workers' compensation insurance may agree to pay only a part of your doctor or hospital bills. You and workers' compensation insurance may agree to share the cost of your bill. If Medicare covers the treatment for your pre-existing condition, then Medicare may pay its share for part of the doctor or hospital bills that workers' compensation doesn't cover.

Medicare & workers' compensation (continued)

How does Medicare get repaid for the conditional payment?

If Medicare makes a conditional payment, and you or your lawyer haven't reported your worker's compensation claim to Medicare, call the Benefits Coordination & Recovery Center (BCRC) toll-free at 1-855-798-2627. TTY users can call 1-855-797-2627. The BCRC will work on your case using information from you or your representative, to see that Medicare gets repaid for the conditional payments.

The BCRC will gather information about any conditional payments Medicare made relating to your workers' compensation claim. If you get a settlement, judgment, award, or other payment, you or your lawyer should call the BCRC. The BCRC will calculate the repayment amount (if any) on your case and issue a letter requesting repayment.

You or your lawyer should contact the BCRC if you have a pending claim for workers' compensation benefits and then contact the BCRC again if your claim is settled, abandoned or dismissed.

My worker's compensation claim is getting ready to settle. When and why would I need a Workers' Compensation Medicare Set-aside Arrangement (WCMSA)?

If you settle your workers' compensation claim and have money in a Worker's Compensation Medicare Set-aside Arrangement, you must use the settlement money to pay for related medical care before Medicare will begin again to pay for related care. In many cases, the workers' compensation agency contacts Medicare before a settlement is reached to ask Medicare to approve an amount to be set aside to pay for future medical care. Medicare will look at certain medical documentation and approve an amount of money from the settlement that must be used up first before Medicare starts to pay for related care that's otherwise covered and reimbursable by Medicare.

You and the workers' compensation agency aren't required to set up a WCMSA—it's completely voluntary. However, if you set up a WCMSA, you must make sure the settlement money is used only for related medical care.

If you prefer to request approval of a proposed WCMSA amount yourself or if you'd like more information about WCMSAs, visit go.cms.gov/wcmsa.

Medicare & workers' compensation (continued)

What if I have a Medicare-approved WCMSA amount? How am I allowed to use the money if I manage the account myself?

Keep these in mind if you manage your WCMSA account:

- Money placed in your WCMSA is for paying future medical expenses, including prescription drug expenses related to your work injury or illness/disease that otherwise would've been paid by Medicare.

  You should also use WCMSA funds to pay for these medical services and items, as well as prescription drug expenses, if you're enrolled in a Medicare Advantage Plan (Part C), a type of Medicare health plan offered by a private company that contracts with Medicare to provide you with all your Part A and Part B benefits (most Medicare Advantage Plans also offer prescription drug coverage).

  Medicare Advantage Plans include Health Maintenance Organizations, Preferred Provider Organizations, Private Fee-for-Service Plans, Special Needs Plans, and Medicare Medical Savings Account Plans. If you're enrolled in a Medicare Advantage Plan, most Medicare services are covered through the plan and aren't paid for under Original Medicare.
- You can't use the WCMSA to pay for any other work injury, or any medical items or services that Medicare doesn't cover (like dental services).
- Medicare won't pay for any medical expenses related to the injury until after you've used all of your set-aside money appropriately.
- If you aren't sure what type of services Medicare covers, visit Medicare.gov or call 1-800-MEDICARE (1-800-633-4227) for more information, before you use any of the money that was placed in your WCMSA account. TTY users can call 1-877-486-2048.
- Keep records of your workers' compensation-related medical expenses, including prescription drug expenses. These records show what items and services you got and how much money you spent on your work-related injury, illness, or disease. You need these records to prove you used your WCMSA money to pay your workers' compensation-related medical expenses, including prescription drug expenses.
- After you use all of your WCMSA money appropriately, Medicare can start paying for Medicare-covered and otherwise reimbursable items and services related to your workers' compensation claim.

To find out how to manage (self-administer) your WCMSA, visit go.cms.gov/WCMSASelfAdm.

Medicare & Veterans' benefits

I have Medicare and Veterans' benefits. Who pays first?

If you have or can get both Medicare and Veterans' benefits, you can get treatment under either program. When you get health care, you must choose which benefits to use each time you see a doctor or get health care. Medicare can't pay for the same service that was covered by Veterans' benefits, and your Veterans' benefits can't pay for the same service that was covered by Medicare. Also, Medicare is never the secondary payer after the Department of Veterans Affairs (VA).

Note: To get the VA to pay for services, you must go to a VA facility or have the VA authorize services in a non-VA facility.

Are there any situations when both Medicare and the VA may pay?

Yes. If the VA authorizes services in a non-VA hospital, but didn't authorize all of the services you get during your hospital stay, then Medicare may pay for the Medicare-covered services the VA didn't authorize.

Example: Bob, a Veteran, goes to a non-VA hospital for a service authorized by the VA. While at the non-VA hospital, Bob gets other non-VA authorized services that the VA won't pay for. Some of these services are Medicare-covered services. Medicare may pay for some of the non-VA authorized services that Bob got.
Bob will have to pay for services that Medicare or the VA doesn't cover.

If the doctor **accepts** you as a patient and bills the VA for services, the doctor must accept the VA's payment as payment in full. The doctor can't bill you or Medicare for these services.

If your doctor **doesn't accept** the fee-basis ID card, you'll need to file a claim with the VA yourself. The VA will pay the approved amount either to you or to your doctor.

Where can I get more information on Veterans' benefits?

Visit VA.gov, call your local VA office, or call the national VA information number at 1-800-827-1000. TTY users can call 1-800-829-4833.

Medicare & TRICARE

What's TRICARE?

TRICARE is a health care program for active-duty and retired uniformed services members and their families that includes:

- TRICARE Prime
- TRICARE Extra
- TRICARE Standard
- TRICARE for Life (TFL)

TFL provides expanded medical coverage to Medicare-eligible uniformed services retirees 65 or older, to their eligible family members and survivors, and to certain former spouses. You **must** have Medicare Part A (Hospital Insurance) **and** Medicare Part B (Medical Insurance) to get TFL benefits.

Can I have both Medicare and TRICARE?

Some people can have both Medicare and other types of TRICARE, including:

- Dependents of active-duty service members who have Medicare for any reason.
- People under 65 with Part A because of a disability or End-Stage Renal Disease (ESRD) and with Part B.
- People 65 or older who can get Part A and who join Part B.

I have Medicare and TRICARE. Who pays first?

If you're on active duty, TRICARE pays first for Medicare-covered services. TRICARE will pay the Medicare deductible and coinsurance amounts and for any service not covered by Medicare that TRICARE covers. If you're not on active duty, Medicare pays first. TRICARE may pay second if you have TRICARE For Life coverage. You pay the costs of services Medicare or TRICARE doesn't cover.

Who pays if I get services from a military hospital?

If you get services from a military hospital or any other federal health care provider, TRICARE will pay the bills. Medicare usually doesn't pay for services you get from a federal health care provider or other federal agency.

Where can I get more information?

- Visit Tricare.mil/tfl.
- Call the health benefits advisor at a military hospital or clinic.
- Call TRICARE For Life at 1-866-773-0404.

Medicare & the Federal Black Lung Benefits Program

I have Medicare and coverage under the Federal Black Lung Benefits Program. Who pays first?

The Federal Black Lung Benefits Program pays first for any health care for black lung disease covered under that program. Medicare won't pay for doctor or hospital services covered under the Federal Black Lung Benefits Program. Your doctor or other health care provider should send all bills for the diagnosis or treatment of black lung disease to:

Federal Black Lung Program
P.O. Box 8302
London, Kentucky 40742-8302

For all other health care **not** related to black lung disease, Medicare pays first, and your doctor or health care provider should send your bills directly to Medicare.

What if the Federal Black Lung Benefits Program won't pay my bill?

Ask your doctor or other health care provider to send Medicare the bill. Ask them to include a copy of the letter from the Federal Black Lung Benefits Program that says why it won't pay your bill.

Where can I get more information?

Call 1-800-638-7072 if you have questions about the Federal Black Lung Benefits Program. If you have questions about who pays first, call the Benefits Coordination & Recovery Center (BCRC) toll-free at 1-855-798-2627. TTY users can call 1-855-797-2627.

Medicare & COBRA

What's COBRA?

COBRA is a federal law that may allow you to temporarily keep employer or union health coverage after the employment ends or after you lose coverage as a dependent of the covered employee. This is called "continuation coverage."

In general, COBRA only applies to employers with 20 or more employees. However, some state laws require insurance companies covering employers with less than 20 employees to let you keep your coverage for a period of time.

Medicare & COBRA (continued)

I have Medicare and COBRA continuation coverage. Who pays first?

If you have Medicare because you're 65 or over or because you have a disability other than End-Stage Renal Disease (ESRD), Medicare pays first.

If you have Medicare based on ESRD, COBRA continuation coverage pays first. Medicare pays second to the extent COBRA coverage overlaps the first 30 months of Medicare eligibility or entitlement based on ESRD.

It can be a very complicated decision to decide if and when you should elect COBRA coverage. When you lose employer coverage and you have Medicare, you need to be aware of your COBRA election period, your Part B enrollment period, and your Medigap Open Enrollment Period. These may all have different deadlines that overlap, so be aware that what you decide about one type of coverage (COBRA, Part B, and Medigap) might cause you to lose rights under one of the other types of coverage.

Where can I get more information about COBRA?

- Before you elect COBRA coverage, you can talk with your State Health Insurance Assistance Program (SHIP) about Part B and Medicare Supplement (Medigap) Insurance. To get the phone number for your state, visit Medicare.gov/contacts, or call 1-800-MEDICARE (1-800-633-4227). TTY users can call 1-877-486-2048.
- Call your employer's benefits administrator for questions about your specific COBRA options.
- If you have questions about Medicare and COBRA, call the Benefits Coordination & Recovery Center (BCRC) toll-free at 1-855-798-2627. TTY users can call 1-855-797-2627.
- If your group health plan coverage was from a private employer (not a government employer), visit the Department of Labor at dol.gov, or call 1-866-444-3272.
- If your group health plan coverage was from a state or local government employer, call the Centers for Medicare & Medicaid Services (CMS) at 1-877-267-2323, extension 61565.
- If your coverage was with the federal government, visit the Office of Personnel Management at opm.gov.

CMS Accessible Communications

To help ensure people with disabilities have an equal opportunity to participate in our services, activities, programs, and other benefits, we provide communications in accessible formats. The Centers for Medicare & Medicaid Services (CMS) provides free auxiliary aids and services, including information in accessible formats like Braille, large print, data/audio files, relay services and TTY communications. If you request information in an accessible format from CMS, you won't be disadvantaged by any additional time necessary to provide it. This means you'll get extra time to take any action if there's a delay in fulfilling your request.

To request Medicare or Marketplace information in an accessible format you can:

1. **Call us:**
   For Medicare: 1-800-MEDICARE (1-800-633-4227)
   TTY: 1-877-486-2048
2. **Email us:** altformatrequest@cms.hhs.gov
3. **Send us a fax:** 1-844-530-3676
4. **Send us a letter:**

   Centers for Medicare & Medicaid Services Offices of Hearings and Inquiries (OHI)
   7500 Security Boulevard, Mail Stop S1-13-25
   Baltimore, MD 21244-1850
   Attn: Customer Accessibility Resource Staff

Your request should include your name, phone number, type of information you need (if known), and the mailing address where we should send the materials. We may contact you for additional information.

Note: If you're enrolled in a Medicare Advantage Plan or Medicare Prescription Drug Plan, contact your plan to request its information in an accessible format. For Medicaid, contact your State or local Medicaid office.

Nondiscrimination Notice

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You can contact CMS in any of the ways included in this notice if you have any concerns about getting information in a format that you can use.

You may also file a complaint if you think you've been subjected to discrimination in a CMS program or activity, including experiencing issues with getting information in an accessible format from any Medicare Advantage Plan, Medicare Prescription Drug Plan, State or local Medicaid office, or Marketplace Qualified Health Plans. There are three ways to file a complaint with the U.S. Department of Health and Human Services, Office for Civil Rights:

1. **Online:**
   hhs.gov/civil-rights/filing-a-complaint/complaint-process/index.html.
2. **By phone:**
   Call 1-800-368-1019. TDD user can call 1-800-537-7697.
3. **In writing:** Send information about your complaint to:

   Office for Civil Rights
   U.S. Department of Health and Human Services
   200 Independence Avenue, SW
   Room 509F, HHH Building
   Washington, D.C. 20201

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U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

7500 Security Blvd.
Baltimore, Maryland 21244-1850

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CMS Product No. 02179
Revised August 2020

- Medicare.gov
- 1-800-MEDICARE (1-800-633-4227)
- TTY: 1-877-486-2048

¿ Necesita usted una copia en español?
Llame GRATIS al 1-800-MEDICARE (1-800-633-4227).

CMS
CENTERS FOR MEDICARE & MEDICAID SERVICES

EMERGING LEGAL ISSUES DUE TO COVID-19

PUBLIC SCHOOL DISTRICT REOPENING CHALLENGES (September 24, 2020)

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Introduction

Public school districts in New York were universally closed in March 2020 through the end of June 2020 in light of the COVID-19 Pandemic. Through an Executive Order, New York State Governor Andrew Cuomo permitted school districts to operate in-person summer special education programs subject to following certain guidance issued by the Department of Health.

Subsequently, the New York State Education Department issued a complex 150 page document titled "Reopening Guidance for School Districts to Follow in Order to Return to School in September." That initial guidance, followed by subsequent guidance issued by the New York State Department of Health has resulted in a myriad of challenges associated with schools reopening in September. Further complicating the challenges were federal and state laws that allow employees to receive accommodations and/or paid leave in connection with their employment resulting from the pandemic. In these materials we will examine some of the more significant issues that have developed and continue to arise in connection with the reopening of schools in a COVID-19 environment.

A. SCHOOL REOPENING PLANS

On Monday, July 13, 2020, at the New York Board of Regents Meeting, the New York State Education Department ("NYSED") presented the framework of guidance for a school district reopening plan. Later in the day, the New York Department of Health ("DOH") released its Interim COVID-19 Guidance for Schools.[1] Finally, on Thursday, July 16, 2020, NYSED issued its formal guidance for school reopening.[2] A summary of the reopening requirements are as follows:

1. Social Distancing and Use of Barriers

Under both the recently issued DOH guidance and NYSED guidance, schools are required to create reopening plans which implement social distancing in all school facilities and on school grounds, including transportation, where practicable. DOH guidance defines appropriate social distancing as "*six feet of space in all directions between individuals* ***or use of appropriate physical barriers between individuals that do not adversely affect air flow, heating, cooling, or ventilation or otherwise present a health or safety risk***." The NYSED guidance defines social distancing, also known as "physical distancing," as "*keeping six foot space between yourself and others*." Social distancing must be followed at all times unless "*safety or the core activity (such as instruction, moving equipment, using an elevator, traveling in common areas) requires a shorter distance*." There are certain activities where more than six feet of distance must be maintained. Specifically, both the DOH and NYSED guidance documents require that a distance of twelve feet in all directions is required when individuals are participating in activities that require voice projection such as singing, playing a wind instrument, or aerobic activity (*e.g.,* participating in physical

[1] The Department of Health guidance is available at: https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/Pre-K_to_Grade_12_Schools_MasterGuidence.pdf

[2] The NYSED guidance is available at: http://www.nysed.gov/common/nysed/files/programs/reopening-schools/nys-p12-school-reopening-guidance.pdf

education classes). When social distancing cannot be maintained, individuals are required to wear acceptable face coverings. NYSED issued additional information concerning social distancing by way of an FAQ. In the FAQ, NYSED indicates that **"….Schools must ensure that students and staff are protected by requiring at least one of the following: Social distancing of 6 Feet OR Barriers OR Face Masks/Coverings…."**[3]

Notably, according to the DOH's definition of appropriate social distancing,[4] school districts have the option of either spacing individuals, desks, and other school items six feet apart or installing appropriate barriers between individuals within less than six feet. It does not indicate that face coverings alone are permissible.

The DOH guidance states that if physical barriers (*e.g.* strip curtains, cubicle walls, plexiglass, or other impermeable divider or partitions) are used, they must be put in place in accordance with OSHA guidelines. If a school district elects to install barriers, the school district's architect should be consulted for assistance in determining which physical barriers are appropriate and may be used in a school setting. Ultimately, the guidance suggests that barriers are not required but can be used as an alternative to maintaining six feet apart or when social distancing is not feasible.

2. <u>Temperature Checks</u>

Both DOH and NYSED guidance require that school districts implement mandatory health screenings, including temperature checks, of students, faculty, staff, and, where applicable, contractors, vendors, and visitors. All individuals must have their temperature checked each day–ideally, at home, prior to departing to school–before entering any school facility. If an individual presents a temperature of greater than 100.0°F, the individual must be denied entry into the facility, or sent directly to a dedicated area prior to being picked up or otherwise sent home.

School districts must also use a daily screening questionnaire for faculty and staff reporting to school, and periodically use a questionnaire for students, particularly younger students who may require the assistance of their parent/legal guardian to answer. Both guidance documents recommend that school districts implement a remote screening procedure (*e.g.* by electronic survey, digital application, or telephone, which may involve the parent/legal guardian), before the individual reports to school, to the extent possible. DOH recommends that a questionnaire determine whether the individual has:

(a) knowingly been in close or proximate contact in the past 14 days with anyone who has tested positive through a diagnostic test for COVID-19 or who has or had symptoms of COVID-19;
(b) tested positive through a diagnostic test for COVID-19 in the past 14 days;

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[3] See NYSED, Frequently Asked Questions at Q.1, *available at*: **http://www.nysed.gov/common/nysed/files/programs/reopening-schools/school-reopening-faq-7-17-20.pdf** (last updated July 17, 2020).

[4] While the DOH's definition of appropriate social distancing does not conflict with NYSED's definition, the DOH's definition is more expansive and therefore controls, especially since the NYSED guidance states "*should any health and safety-related guidance in [the NYSED] document conflict with guidance issued by the NYS Department of Health (DOH), the DOH guidance shall apply*."

(c) has experienced any symptoms of COVID-19 including a temperature of greater than 100.0 F in the past 14 days; and/or
(d) has traveled internationally or from a state with widespread community transmission of COVID-19 per the New York State Travel Advisory in the past 14 days.

Where a parent or guardian has not performed a screening prior to a student's arrival at school, or where there is an unscheduled visitor, school districts should conduct an on-site temperature screening. On-site screenings should be coordinated in a manner that prevents individuals from intermingling in close or proximate contact with each other prior to completion of the screening. A staff member should be present to supervise students waiting to be screened.

Personnel performing screening activities should be trained by employer-identified individuals who are familiar with CDC, DOH, and OSHA protocols. School districts must ensure that any personnel performing in-person screening activities, including temperature checks are appropriately protected from exposure to potentially infectious individuals entering the facilities and provided and use personal protective equipment ("PPE"), which includes at a minimum, an acceptable face covering or mask, and may also include gloves, a gown, and/or a face shield.

3. Facility Alterations and Acquisition

DOH's guidance states that schools should consider and assess additional and/or alternative indoor spaces that may be repurposed for instruction or other required purposes in support of in-person instruction. DOH recommends that schools work to find additional or alternate space (*e.g.* municipal facilities, municipal grounds, community centers, etc.) with community-based organizations and other operators of alternative spaces (*e.g.* local governments) to maximize capacity for in-person learning. Similarly, the guidance document issued by NYSED contemplates a school district's creative use of space in developing a reopening plan and complying with the requirement for social distancing. A school district's decision to repurpose areas of its facility comes with limitations.

In considering alternate uses of existing space in a school or use of outdoor areas protected by a tent[5], **there is no relaxation of the requirement that school districts comply with the New York State Uniform Fire Prevention and Building Code and the State Energy Conservation Code**. Hence, any alternate uses must be reviewed for compliance with these codes. In addition, if the school district plans to alter physical space within a school, the district is required to make a submission to the Office of Facilities Planning for approval of the space for an alternate purpose.[6] This applies to any space alterations to the physical space or building (e.g. configuration of existing classrooms/spaces or introduction of temporary and/or moveable partitions, use of hallways/corridors). All submitted plans must indicate means of egress, fire alarm system, ventilation, and lighting which are affected.

[5] There are extensive requirements for the use of tented spaces as an alternate learning location. These requirements are outlined on pp. 51-52 of the NYSED guidance document. You should consult with your architect if this is one of the options you are considering in your reopening plan.
[6] *See* NYSED's Reopening Guidance at pp. 49-50.

4. **Drinking Fountains**

The DOH guidance recommends installing touch free amenities, such as water bottle refilling stations, where feasible, to reduce high-tough surfaces. DOH guidance also states that schools should consider closing water drinking fountains (unless configured as a bottle refilling station) and encourage students, faculty, and staff to bring their own water bottles or use disposable cups. However, as noted in the NYSED guidance, drinking fountains are a code required plumbing fixture and one fountain is required for each one hundred (100) occupants. Therefore, where drinking fountains are taken out of service, it is suggested that districts replace fountains with bottle filler units, supply students with bottled water or water in disposable cups at specified locations. Alternatively, districts can provide students with personal containers to fill at home.

5. **Child Nutrition**

DOH guidance states that school districts must continue to provide school breakfast and/or lunch to students who were previously receiving school meals, both on site and remotely. However, NYSED guidance states that meal benefits may have been available to many students during the 2019-2020 school year closure due to the COVID-19 crisis that would not usually have access to free meals. Upon reopening, school districts should communicate to families that all meals may not be available at no cost to all children. Additionally, more families may now qualify for free or reduced-price meals. School districts should remind families, before school starts, that they can submit a new application for free or reduced-price meals.

6. **Transportation**

One of the more challenging aspects of reopening school centers on the school district's obligation to provide transportation to and from school in accordance with the mandated transportation mileage limitations and/or expanded limitations authorized by the voters of the school district. NYSED has not relaxed this requirement and expressly provides that "….all students are entitled to transportation by the district to the extent required by law…."[7]

The NYSED guidance sets forth several mandatory requirements for students receiving transportation services.

A conflict between NYSED and DOH guidance created an issue of whether students need to be separated by six feet when they are wearing face coverings on school buses. On July 17th, SED spokesman J.P. O'Hare clarified by stating "*students on a school bus must wear face masks and they should social distance to the extent practicable*." Further, the NYSED FAQ issued provides support for the wearing of face coverings while students are on a bus.

NYSED has noted that school districts should explore options such as adding additional buses, staggering start/dismissal times and "*…pursue every avenue to provide transportation for their student populations using creative means….*," in planning transportation for September. Further, the NYSED guidance suggests that the installation of sneeze guards in between seats would permit increased capacity; however, neither the NYSED nor the DOH guidance provides clarification on

[7] *See* NYSED's Reopening Guidance at p. 50.

the increase in capacity. Given J.P. O'Hare's statement above, even if sneeze guards have been installed students must still wear masks and social distance where practicable.

Finally, the NYSED guidance contemplates the use of "parent contracts" for the provision of transportation. We read this to mean that school districts can enter into individual contracts with parents for the purpose of reimbursement to the parent if a parent transports their child(ren) to school. The guidance document is silent, however, concerning the implementation of this option. As such, it is advisable that in the event the school district provides this method of transportation as an option for the provision of transportation, the contract provide for mileage reimbursement to the parent. In addition, school districts should consider several factors in offering this as an option, to wit: how to determine the appropriate distance to be reimbursed, how to account for student absence, who will monitor the expense and how the expense will be audited.

Prior to a student boarding a bus, the parent/guardian will be required to ensure that the student is not experiencing any signs/symptoms of COVID-19 and does not have a fever of 100 degrees or more. The reopening plan developed should provide a mechanism for monitoring this requirement and should include specific protocols in the event that (1) the parent does not provide the information prior to the time the student is to board the bus; (2) a student exhibits symptoms of COVID-19 and that information is reported by the parent; or (3) a student has been reported to have a fever of 100 degrees or more and is present and ready to board the bus. The implementation of this aspect of the plan will be quite challenging as communication between and amongst the school district, parents, and bus drivers/bus companies will have to be developed.

Students are required to wear a mask on the bus if they are physically able[8]. However, students who do not have a mask cannot be denied transportation. Where a student does not have a mask, the school district must provide one for use by the student.

We note that hand sanitizer is not permitted on school buses and personal bottles of hand sanitizer must not be carried by bus drivers, attendants, monitors and/or students.

7. <u>180 Day Requirement</u>

It is widely known that school districts are required to be in session for a minimum of 180 days and must deliver a yearly aggregate of instructional hours (i.e., 900 hours for kindergarten and grades 1 through 6, and 990 hours for grades 7 through 12). The information for such requirements must be reported through the State Aid Management System (SAMS), i.e., aggregate instructional days and hours, as well as daily calendars. For the 2019-2020 and 2020-2021 school years, such information must continue to be reported, but the instructional requirement information need only be provided based on the schedule for the average student rather than reporting for each individual student.

However, school districts unable to meet the foregoing minimum instructional hours requirement for the 2019-2020 and 2020-2021 school years may be eligible for a waiver. In light of

[8] Students with disabilities which prevent them from wearing a mask cannot be forced to do so and are permitted to board a bus without a mask.

the ongoing pandemic, on July 13, 2020, the Board of Regents amended Section 175.5 of the Commissioner's Regulations on an emergency basis, which took effect on July 17, 2020. The amendment provides that for the 2019-2020 and 2020-2021 school years, school districts may be eligible to apply for a waiver from the minimum instructional hour requirement of 900/990 hours if "the district is unable to meet such requirement as a result of an Executive Order(s) of the Governor pursuant to the State of Emergency declared for the COVID-19 crisis, or pursuant to Education Law §3604(8), as amended by Chapter 107 of the Laws of 2020, or reopening procedures implemented as a result of the COVID-19 crisis." School districts who are approved for such waiver will not suffer from a reduction in State Aid based on the failure to meet the minimum yearly instructional hour requirements. However, school districts are still required to meet the 180 days of session requirement for the 2020-2021 school year. Even though the amendment provides relief from the 180-day requirement for the 2019-2020 school year, such amendment does not currently apply for the 2020-2021 school year. But the guidance promulgated by NYSED states that days where instruction is provided either in-person, remotely, or through a hybrid model shall count toward the 180-day requirement.

8. Special Education

The school reopening plan guidance does not delineate new specific requirements for the delivery of special education services. Instead, the guidance document repeats general service delivery principles and sets forth some reopening plan mandatory requirements. The reopening plan must contain the following:

- Address the provision of a "free appropriate public education" whether services are delivered in-person, remotely, or through a hybrid model.
- Address meaningful parental engagement.
- Provide collaboration between parents and the CPSE and CSE to provide IEP services and plan for monitoring student progress.
- Ensure access to the IEP accommodations, modifications, supplementing aides and services and technology.
- Provide a mechanism to document programs and services being offered.

Significantly, the guidance document repeats the provision stated in previous SED guidance that flexibility will be permitted in the implementation of IEPs and the delivery of special education and related services.

B. SUPPLEMENTAL GUIDANCE

On August 7, 2020, Governor Cuomo announced that in addition to complying with previously released Department of Health ("DOH") guidance, school districts will also be required to follow newly released supplemental guidance issued by the DOH for the reopening of schools. The Supplemental Guidance is available at:

https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/Supplemental_Guidance_PreK-12.pdf

The supplemental guidance focuses on three topics: remote learning, testing and contact tracing.

1. Remote Learning

The DOH supplemental guidance requires school districts to explain how remote learning will be accomplished. Specifically, school district plans must detail the numbers of students, mode of remote learning, asynchronous and synchronous learning opportunities, internet and device access among students, and alternatives available for students who have neither a device nor consistent access.

2. Testing

The original DOH guidance states that school districts "may consider developing testing systems in school facilities or self-testing systems in collaboration with local health departments or local health care providers, as able." Further, the original DOH guidance provides that individuals who screen positive for COVID-19 exposure or symptoms at school "must be immediately sent home with instructions to contact their health care provider for assessment and testing," and that a school district's policy about when individuals who screen positive can return to an in-person learning environment must at a minimum include "documentation from a health care provider evaluation, negative COVID-19 testing, and symptom reduction, or if COVID-19 positive, release from isolation."

The supplemental guidance states that school districts need to have a plan for testing protocol and procedures which includes "where the testing will take place and who will be providing the testing and what circumstances the testing will occur, and describe how the district will work with local departments of health."

Neither guidance document expressly states that school districts must test individuals. Rather, both documents support the notion that school districts must develop a testing plan which can be performed either by its own school health office staff or in collaboration with local health care providers or the local health department.

3. Contact Tracing

With the exception of the significant ambiguity in the supplemental guidance regarding testing, as noted above, the supplemental guidance simply specifies that school districts are required to provide details about how it plans to work with, support, and supplement the contact tracing efforts of their local health department. School district plans must "include protocols for symptomatic individuals and positive cases in school, and proximate contacts; and a determination for how students and or staff need to be tested to adequately isolate and mitigate additional exposure to COVID-19."

C. IMPLEMENTATION ISSUES

As one would expect given the complexity of the reopening guidance issued by New York State in various forms, significant implementation issues arose in planning for development of hybrid and remote learning plans and social distancing concerns.

1. Social Distancing

School districts across the state were confronted with the difficult task of having students 6 feet apart in the classroom. Indeed, in many instances schools needed to remove desks so as to be able to meet the 6 feet requirement which, in accordance with Department of Health guidelines, meant 6 feet between students' bodies. School district reopening plans filed with New York State in July were based on this criteria.

However, on August 5, 2020, the New York State Education (Office of Facilities Planning) issued a FAG's guidance document which reflected that the 6 feet is measured "from the edge of workstation (desk) to the edge of the adjacent workstation." That unexpected change in the measurement criteria caused significant consternation amongst school districts across the state. Pressure was brought to bear on SED and revised guidance was published clarifying that the appropriate measurement of 6 feet is between students' bodies; not their workspace.

2. FERPA Considerations

As school districts began to roll out their reopening plans for Hybrid and Full Remote instructional models, a considerable number of concerns were being raised by teacher associations with respect to the potential dissemination of personally identifiable information on students. The concern was that having lessons potentially viewed by parents and others would be violative of the Family Educational Rights and Privacy Act ("FERPA").

As an initial matter, FERPA protects personally identifiable information[9] from a student's education records from unauthorized disclosure.[10] "Education records" are defined as ". . . those records that are (1) directly related to a student; and (2) maintained by an educational agency or institution or by a party acting on behalf of the educational agency or institution."[11] School districts may disclose "directory information" if it has given public notice of the same to parents of students in attendance.[12] Significantly, while a student's name is considered personally identifiable information, as defined above, the directory information exception permits certain personally identifiable information from education records which has been designated as directory information to be disclosed during classroom instruction to students who are enrolled in, and attending, a class.[13] Therefore, a teacher's use of students' names in a virtual learning

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[9] "Personally Identifiable Information" is defined as "the term includes, but is not limited to: (a) The student's name; (b) The name of the student's parent or other family members; (c) The address of the student or student's family; (d) A personal identifier, such as the student's social security number, student number, or biometric record; (e) Other indirect identifiers, such as the student's date of birth, place of birth, and mother's maiden name; (f) Other information that, alone or in combination, is linked or linkable to a specific student that would allow a reasonable person in the school community, who does not have personal knowledge of the relevant circumstances, to identify the student with reasonable certainty; or (g) Information requested by a person who the educational agency or institution reasonably believes knows the identity of the student to whom the education record relates." *See* 34. C.F.R. § 99.3.

[10] *See* 20 U.S.C. § 1232g and 34 C.F.R. Part 99.

[11] *See* 34 C.F.R. § 99.3.

[12] *See* 34.C.F.R. § 99.37(a). "Directory information" is defined as "information contained in an education record of a student that would not generally be considered harmful or an invasion of privacy if disclosed."

[13] *See* 34. C.F.R. § 99.37(c)(1).

environment is not a disclosure of personally identifiable information if students' names are included on its list of directory information.

The Supreme Court of the United States has explicitly dismissed the notion that student homework or classroom work constitutes a protected education record pursuant to FERPA. The Court stated that to do so would "impose substantial burdens on teachers across the country. It would force all instructors to take time, which otherwise could be spent teaching and in preparation, to correct an assortment of daily student assignments."[14] The Court further noted that it would unduly interfere with teachers providing students immediate guidance and would force teachers to abandon practices such as group grading of team assignments.

As such, student work that is performed in class is not considered an education record under FERPA. It would be a significant departure from *Owasso* to conclude that the streaming of a teacher's lesson and classroom participation among the classroom participants constitutes the creation of an education record.

Accordingly, virtual live streaming learning of instruction that occurs in a classroom environment is not an education record of the individual student which would require consent of the parent/guardian prior to commencement of the instruction.

Issues have been raised concerning the ability of third parties (e.g., student, parent, household member) from recording live streamed or remote lessons. Generally, as long as no personally identifiable information from student education records is disclosed during virtual lessons, FERPA does not prohibit a non-student from observing the lesson.[15] In its Letter to Mamas, (2003), the Director in the Family Policy Compliance Office of the United States Department of Education ("USDOE") Office of Innovation and Improvement opined that FERPA did not prohibit a parent and/or a professional working with a parent from observing the parent's child in the classroom. That guidance from the USDOE noted that "FERPA does not protect the confidentiality of information in general; rather FERPA applies to the disclosure of tangible records and of information derived from tangible records."[16]

The USDOE in its "*FERPA and Virtual Learning Resources*" Memorandum, which was issued in March 2020 in response to the pandemic, envisions the need for virtual learning and opines:

> Under FERPA, the determination of who can observe a virtual classroom, similar to an in-person classroom, is a local school decision as teachers generally do not disclose personally identifiable information from a student's education record

[14] *Owasso Independent Sch. Dist. v. Falvo*, 534 U.S. 426, 122 S.Ct. 934, (2002).
[15] U.S. Dep't of Educ., Student Priv. Policy Off., *FERPA & Virtual Learning During COVID-19*, (March 2020), at 19, *available at*: https://studentprivacy.ed.gov/sites/default/files/resource_document/file/FERPAandVirtualLearning.pdf
[16] U.S. Dep't of Educ., Off. of Innovation and Improvement., *Letter to Mamas*, (December 8, 2003) *available at:* https://studentprivacy.ed.gov/sites/default/files/resource_document/file/Letter%20to%20Mamas%28Recreated%29v508.pdf

during classroom instruction. ***FERPA neither requires nor prohibits individuals from observing a classroom***.[17]

The USDOE Student Privacy Policy Office states that it is a best practice for educational agencies and institutions to discourage non-students from observing virtual classrooms in the event that personally identifiable information from a student's education record is, in fact, disclosed.[18]

Additionally, with respect to a claim by a teacher to a right to privacy concerning the lesson, courts have held that teachers do not have a reasonable expectation of privacy in their classrooms and that teaching in a public classroom does not "fall within the expected zone of privacy."[19]

Video of a student is an education record protected under FERPA when the video is (1) directly related to a student; and (2) is maintained by an educational agency or institution or by a party acting on its behalf.[20]

As FERPA regulations do not define what it means for a record to be "directly related" to a student, the USDOE Student Privacy Policy Office released guidance entitled "*Frequently Asked Questions on Photos and Videos under FERPA*," which provides some clarity on the issue. The FAQ states that determining whether a video is directly related to a student is context-specific and should be determined on a case-by-case basis.

The following factors should be considered in determining whether a video is "directly related" to a student:

1. The educational agency or institution uses the video for disciplinary action (or other official purposes) involving the student (including the victim of any such disciplinary incident);

2. The video contains a depiction of an activity:
   i. that resulted in an educational agency or institution's use of the photo or video for disciplinary action (or other official purposes) involving a student (or, if disciplinary action is pending or has not yet been taken, that would reasonably result in use of the video for disciplinary action involving a student);
   ii. that shows a student in violation of local, state, or federal law;
   iii. that shows a student getting injured, attacked, victimized, ill, or having a health emergency;

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[17] U.S. Dep't of Educ., Student Priv. Policy Off., *FERPA and Virtual Learning Related Resources*, (March 2020) *available at:* https://studentprivacy.ed.gov/resources/ferpa-and-virtual-learning (emphasis added).

[18] U.S. Dep't of Educ., Student Priv. Policy Off., *FERPA & Virtual Learning During COVID-19*, (March 2020), at 20.

[19] *Roberts v. Houston ISD*, 788 S.W. 2d 107 (Tex. App. 1990). *See also Plock v. Bd. of Edn. of Freeport School Dist. No 145*, 545 F. Supp. 2d 755 (N.D. Ill. 2007).

[20] U.S. Dep't of Educ., Student Priv. Policy Off., *FAQs on Photos and Videos under FERPA*, available at: https://studentprivacy.ed.gov/faq/faqs-photos-and-videos-under-ferpa

3. The person or entity taking the video intends to make a specific student the focus of the photo or video (e.g., a recording of a student presentation); or
4. The audio or visual content of the photo or video otherwise contains personally identifiable information contained in a student's education record.

Absent these factors, a video will not be considered directly related to a student. Additionally, if a student's image is incidental to or captured only as part of the background, or without a specific focus on them, it is not directly related to the student. If the video only shows the teacher, it is not an education record and FERPA does not limit its use. However, if the video includes students asking questions, making presentations, or otherwise participating in a way that personally identifies the students and causes them to be the focal point in the video, those portions of the video will likely constitute protected education records and can only be used as permitted by FERPA. Hence, the recording of a classroom instructional period should focus on the teacher and not the students in class.

As noted herein NYSED's guidance for the reopening of schools in September requires school districts to prepare a reopening plan which includes provision for instruction in multiple modalities. FERPA does not prohibit a teacher from making a recording of the lesson available to students enrolled in the class, assuming the recording does not disclose personally identifiable information from a student's education records.

Live streaming would not qualify as an education record as there is no recording being made which the school district is maintaining. If the live stream is being recorded, or the school district is recording virtual classroom lessons, the recording may qualify as an education record protected under FERPA, **but only if the video directly relates to a student and is maintained by the school district**. If such a recording exists and is directly related to a student and maintained by the school district, it would then become an education record requiring parental consent to subsequent disclosure of the recorded lesson.

For example, if a video recording depicts just the teacher and does not directly relate to a student then it would not qualify as an education record. However, if during the course of the lesson a student's personally identifiable information is revealed, then the video recording would become an education record.

3. Vulnerable Populations and Reasonable Accommodations

One of the most challenging issues that has developed with the reopening of schools is the implementation of providing accommodations for vulnerable populations in the COVID-19 pandemic era.

The DOH Guidance includes a section on addressing the needs of "vulnerable populations." Specifically, the DOH Guidance requires reopening plans to incorporate:

> …policies regarding vulnerable populations, including students, faculty and staff who are at increased risk for severe COVID-19 illness, and individuals who may not feel comfortable returning to an in-person educational environment, to allow them to safely participate in educational activities and, where appropriate,

> accommodate their specific circumstances. These accommodations may include, but are not limited to remote learning or telework, modified educational or work settings, or providing additional PPE to individuals with underlying health conditions….[21]

Similarly, the NYSED guidance document required school districts to include in its reopening plan "*…a written protocol detailing how the district/school will provide accommodations to all students and staff who are at high risk or live with a person at high risk….*"[22] The NYSED guidance document defines this population as follows:

- Individuals age 65 or older
- Pregnant individuals
- Individuals with underlying health conditions including, but not limited to: chronic lung disease or moderate to severe asthma
- Serious heart conditions
- Immunocompromised
- Severe obesity (body mass index [BMI] of 30 or higher)
- Diabetes
- Chronic kidney disease undergoing dialysis
- Liver disease
- Sickle cell anemia
- Children who are medically complex, who have neurologic, genetic, metabolic conditions, or who have congenital heart disease

In addition, the Equal Employment Opportunity Commission ("EEOC"), the federal agency charged with enforcing workplace anti-discrimination laws, including the Americans with Disabilities Act ("ADA"), The Rehabilitation Act of 1973, Title VII of the Civil Rights Act, and the Age Discrimination in Employment Act ("ADEA"), has issued guidance regarding the accommodation of employees due to the COVID-19 pandemic ("EEOC Guidance").[23] This guidance states that being considered to be more "vulnerable" to the COVID-19 virus or being fearful of exposing members of one's household to the virus does not automatically entitle an employee to an accommodation. In connection with a request for an accommodation, school districts should review whether an employee's medical condition and/or risk factors constitute a disability as defined by law, which may require reasonable accommodation(s). Both employers and employees are responsible for determining an appropriate accommodation through an interactive process.

The EEOC has indicated that this interactive process is still applicable during the COVID-19 pandemic.[24] The EEOC suggests that there may be reasonable accommodations that "could offer protection to an individual whose disability puts him at greater risk from COVID-19 and who

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[21] *See* DOH's Interim COVID-19 Guidance for Schools at p. 4.
[22] *See* NYSED's Reopening Guidance at p. 18.
[23] *What You Should Know About COVID-19 and the ADA, Rehabilitation Act, and Other EEOC Laws*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws (last updated June 17, 2020).
[24] *Id.*

therefore requests such actions to eliminate possible exposure."[25] Some low-cost solutions suggested by the EEOC to accommodate those who request reduced contact with others include changes to the work environment (e.g., designating one-way aisles) and using barriers to ensure distance between individuals.[26] Interestingly, the EEOC's examples of reasonable accommodations as a result of COVID-19 concerns focuses on steps to disrupt and limit the transmission of the disease to health compromised employees. EEOC's suggested accommodations do not include allowing the employee to remain at home on full pay. Of course, if remote work opportunities remain as part of the school district's reopening plan this fall, these will have to be considered for faculty seeking an accommodation due to compromised health.

Under the ADA, an employer is required to provide an employee with a reasonable accommodation, unless doing so would pose an undue hardship (i.e., significant difficulty or expense) on the operation of the business of the employer. An employee may request accommodations at any time during the period of employment, and may do so in conversation or any other mode of communication.[27] Requests for accommodation require the employee to provide medical documentation to demonstrate that a disabling condition actually exists. For example, the doctor must indicate with specificity why an employee cannot return to work because of a medical condition and must be permitted to continue to work from home. Mandated review of an employee's proffered medical reason for an accommodation may be reviewed through a subsequent school district mandated Section 913 medical examination, including the production of employee medical records relied upon by the employee's physician.

Under the ADEA, a request by an employee aged 65 or older without the existence of an underlying medical condition is insufficient for a reasonable accommodation to be made.

The law requires that the school district review and evaluate each request for an accommodation on a case-by-case basis considering the facts and circumstances of the request for an accommodation. Finally, according to the EEOC Guidance, employees seeking accommodations because a member of their household is high risk are not entitled to accommodations under the ADA or Section 504.[28]

4. <u>New York State and Federal Paid Leave Laws</u>

The Families First Coronavirus Response Act ("FFCRA") that was signed into law in March by President Trump provides for two types of leave: (1) expansion of unpaid leave under the Family and Medical Leave Act ("FMLA"); and (2) emergency paid sick leave.

Division C of the FFCRA entitled "Emergency Family and Medical Leave Expansion Act" provides that employers with 500 or fewer employees and certain public employers, including school districts, provide up to twelve (12) weeks of job-protected leave to any employee who

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[25] *Id*.
[26] *Id*.
[27] *Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the ADA,* EEOC-CVG-2003-1, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, (Oct. 17, 2002), *available at* https://www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada.
[28] *See* EEOC Guidance, Question and Answer at D.13.

meets the following requirements: (1) has been employed for at least thirty (30) calendar days; and (2) is unable to work (or telework/work remotely) due to the need to care for the employee's child (under 18 years of age) if the child's school or place of care is closed, or the childcare provider is unavailable, as a result of a "public health emergency," which is an emergency related to COVID-19 declared by a federal, state, or local authority.

The first ten (10) days of leave out of the twelve (12) weeks taken pursuant to the foregoing is unpaid but the employee may elect to substitute accrued paid time off (*i.e.,* vacation, personal, or sick leave) for the unpaid leave. Following the initial ten (10) day period, the employee must be paid at two-thirds (2/3) of the employee's regular rate of pay for the number of hours the employee would usually be scheduled to work, up to the maximum of $200 per day and a total of $10,000 for the entire 12-week period of leave.

The Act requires an employee to provide his/her employer with notice of the foregoing leave "as is practicable." Upon an employee's return from the emergency family leave, the employer must make reasonable efforts to restore the employee to the same or an equivalent position.

In addition to the foregoing expansion of FMLA leave, the FFCRA also provides a paid sick leave obligation. Employers with 500 or fewer employees and public agencies that employ one or more persons must immediately provide employees with 80 hours of paid sick leave for **full-time** employees (or, for part-time employees, the equivalent of the average number of hours the employee works in a two-week period) for any of the following reasons:

1. Employee is subject to a federal, state, or local quarantine or isolation order related to COVID-19; or
2. Employee has been advised by a healthcare provider to self-quarantine due to concerns related to COVID-19; or
3. Employee is experiencing symptoms of COVID-19 and is seeking a medical diagnosis; or
4. Employee is caring for an individual who is subject to an order as described in paragraph (1) above or has been advised to self-quarantine as described in paragraph (2) above; or
5. Employee is caring for their child if the child's school or place of care is closed, or the child's childcare provider is unavailable, due to COVID-19 precautions; or
6. Employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services, in consultation with the Secretary of the Treasury and the Secretary of Labor.

The foregoing paid sick leave is to be paid at the employee's regular rate of pay for the number of hours the employee would otherwise be normally scheduled to work, but is capped at $511 per day and a total of $5,110 for the use of leave pursuant to paragraphs (1), (2), or (3) above; and $200 per day and a total of $2,000 for the use of leave pursuant to paragraphs (4), (5), or (6) above.

Paid sick leave is available to all employees regardless of the duration of their employment, i.e., there is no requirement that the employee be employed for at least 30 days like the FMLA leave expansion discussed above in Section A. The Act does not contain a specific notice provision but it does state that after the first workday that an employee receives paid sick leave, an employer may require the employee to follow reasonable notice procedures in order to continue receiving the paid sick leave. Furthermore, an employer may **not** require an employee to use other paid

leave time provided by the employer before the employee uses the paid sick leave available under the FFCRA. Please note that the 80 hours of paid sick leave must be available immediately, there is no accrual rate or period and employers may not require employees to cover a missed shift nor may they take any adverse employment action against an employee who requests or uses paid sick leave.

The FFCRA also states under Section G that employers will receive tax credits for providing both of the foregoing benefits, i.e., emergency FMLA Leave and paid sick leave.

In response to this immediate crisis, the State of New York also passed legislation in March which states that public employers, including school districts and boards of cooperative educational services, must provide job-protected leave to "each employee who is subject to a mandatory or precautionary order of quarantine or isolation issued by the state of New York, the department of health, local board of health, or any governmental entity duly authorized to issue such order due to COVID-19."[29] Public employees shall be provided with at least fourteen (14) days paid leave, and unpaid leave for the remainder of the employee's period of quarantine or isolation. Said sick leave is in addition to any sick leave or other paid time off already provided by the employer, and such leave is to be provided **without** a reduction to the employee's accrued sick leave or paid time off.

Similar to the federal legislation, the foregoing paid leave is to be paid at the employee's regular rate of pay for his/her regular work hours. Also, the 14 days of paid leave is available to all employees who have been officially quarantined or isolated by the government. However, such days are not available to employees who are in voluntary quarantine or isolation, who fear they have been infected by the virus, or who refuse to report to work for fear of contracting the virus. Furthermore, the recently enacted statute provides the following exceptions, meaning the paid leave shall not apply to: (1) employees who have been subjected to a mandatory or precautionary quarantine or isolation, are asymptomatic or not yet diagnosed with any medical condition, and are able to work remotely or through other similar means; and (2) employees who have traveled to a country for which the Center for Disease Control and Prevention has a level two or three travel health notice, provided that travel to that country was not taken as part of the employee's employment or at the direction of the employer, and provided further that the employee had notice of the CDC travel health notice and that he or she would be ineligible for the benefits provided under this statute prior to such travel. However, employees that are denied the 14-day paid leave benefit under the second exception must be permitted to use his/her accrued leave time and once that leave time is exhausted he/she shall be provided with unpaid sick leave for the duration of the quarantine or isolation.

Upon an employee's return to work following leave taken pursuant to the recently enacted statute, the employee must be restored to the same position with the same pay and other terms and conditions of employment held prior to the leave taken. Additionally, employers may not take any adverse employment action against an employee who uses the foregoing paid sick leave.

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[29] N.Y. Assemb 10153, 2019 Leg., 243rd Sess. (N.Y. 2020), *available at:* https://nyassembly.gov/leg/?default_fld=&leg_video=&bn=A10153&term=2019&Summary=Y&Actions=Y&Memo=Y&Text=Y.

The recently enacted statute also provides that for any periods of quarantine or isolation during which the employee is not receiving paid leave from his/her employer, the employee will immediately be eligible for paid family leave and disability benefits under the respective statutes. To this end, the statute: (1) expands the definition of "disability" for purposes of the workers' compensation law to include the "inability … to perform the regular duties of his or her employment or the duties of any other employment which his or her employer may offer him or her as a result of a mandatory or precautionary order of quarantine or isolation … due to COVID-19 and [after] the employee has exhausted all paid sick leave," which will entitle eligible employees to a percentage of their average weekly wages, up to a maximum of $2,043.92 in benefits per week; and (2) expands the definition of "family leave" for purposes of the workers' compensation law to include (a) leave taken to comply with a mandatory or precautionary order of quarantine or isolation issued by the state, the department of health, a local board of health, or any government entity authorized to issue such order, or (b) to provide care for the employee's minor dependent child who is subject to a mandatory or precautionary order of quarantine or isolation, which will entitle eligible employees to a percentage of their average weekly wages up to a maximum of $840.70 in benefits per week.

Lastly, the state statute provides that if at any point the federal government provides sick leave and/or employee benefits for employees related to COVID-19, then the foregoing state provisions relating to paid sick leave, paid family leave, and disability benefits, shall not be available to any employee covered by the state statute. However, if the paid sick leave or other benefits provided under the recent state statute provide benefits in excess of those provided by the federal law or regulation, then employees shall be able to claim the additional sick leave and/or employee benefits in an amount that shall be the difference between the benefits provided under the new state statute and the benefits provided pursuant to the federal law or regulation (*i.e.*, the difference between the benefits provided above under the new state legislation and the benefits provided above under FFCRA).

5. <u>Intermittent Leave Under FFCRA</u>

Another significant challenge that has forced school districts is the request by employees for intermittent leave under FFCRA. This issue arise most significantly in situations where teachers' child(ren) are on a hybrid instructional model (i.e. coming to school every other day), thereby prompting requests from the teacher to take intermittent leave under FFCRA.

In initial guidance promulgated by the U.S. Department of Labor in June 2020, it was concluded that employees were not required to offer intermittent leave under FFCRA. However, the United States District Court in New York in <u>State of New York v. United States Department of Labor</u>, 20-CV-2030 (August 3, 2020) found the U.S. Department of Labor exceeded its regulatory authority pertaining to the conclusion that intermittent leave under FFCRA required employer consent.

In response, the U.S. Department of Labor modified its guidance on August 27, 2020 by updating its Q and A and adding the following guidance relevant to this issue as follows:

"98. **My child's school is operating on an alternate day (or other hybrid-attendance) basis. The school is open each day, but students alternate between days attending school in**

person and days participating in remote learning. They are permitted to attend school only on their allotted in-person attendance days. May I take paid leave under the FFCRA in these circumstances? (added 08/27/20)

Yes, you are eligible to take paid leave under the FFCRA on days when your child is not permitted to attend school in person and must instead engage in remote learning, as long as you need the leave to actually care for your child during that time and only if no other suitable person is available to do so. For purposes of the FFCRA and its implementing regulations, the school is effectively "closed" to your child on days that he or she cannot attend in person. You may take paid leave under the FFCRA on each of your child's remote-learning days.

99. **My child's school is giving me a choice between having my child attend in person or participate in a remote learning program for the fall. I signed up for the remote learning alternative because, for example, I worry that my child might contract COVID-19 and bring it home to the family. Since my child will be at home, may I take paid leave under the FFCRA in these circumstances?** (added 08/27/2020)

No, you are not eligible to take paid leave under the FFCRA because your child's school is not "closed" due to COVID-19 related reasons; it is open for your child to attend. FFCRA leave is not available to take care of a child whose school is open for in-person attendance. If your child is home not because his or her school is closed, but because you have chosen for the child to remain home, you are not entitled to FFCRA paid leave. However, if, because of COVID-19, your child is under a quarantine order or has been advised by a health care provider to self-isolate or self-quarantine, you may be eligible to take paid leave to care for him or her. See FAQ 63.

Also, as explained more fully in FAQ 98, if your child's school is operating on an alternate day (or other hybrid-attendance) basis, you may be eligible to take paid leave under the FFCRA on each of your child's remote-learning days because the school is effectively "closed" to your child on those days."

In the most recent guidance issued by the U.S. Department of Labor in mid-September, it was concluded, once again, that intermittent leave under FFCRA required employer consent. (See, Federal Register, 29 CFR Part 826.) Notwithstanding that conclusion the U.S. Department of Labor carved out the following exception:

"In an alternate day or other hybrid-attendance schedule implemented due to COVID-19, the school is physically closed with respect to certain students on particular days as determined and directed by the school, not the employee. The employee might be required to take FFCRA leave on Monday, Wednesday, and Friday of one week and Tuesday and Thursday of the next, provided that leave is needed to actually care for the child during that time and no other suitable person is available to do so. For the purposes of the FFCRA, each day of school closure constitutes a separate reason for FFCRA leave that ends when the school opens the next day. The employee may take leave due to a school closure until that qualifying reason ends (*i.e.,* the school opened the next day), and then take leave again when a new qualifying reason arises (*i.e.*, school closes against the day after that). Under the FFCRA, intermittent leave is not needed because the school

literally closes (as that term is used in the FFCRA and 29 CFR 826.20) and opens repeatedly. The same reasoning applies to longer and shorter alternating schedules, such as where the employee's child attends in-person classes for half of each school day or where the employee's child attends in-person classes every other week and the employee takes FFCRA leave to care for the child during the half-days or weeks in which the child does not attend."

The flip-flopping guidance provided by the U.S. Department of Labor with respect to intermittent leave under FFCRA has caused havoc in school districts as they have worked tirelessly to staff its in-person and hybrid educational models while navigating the ever changing waters of intermittent leave under FFCRA.

NEW YORK STATE | Department of Health

NY FORWARD SAFETY PLAN TEMPLATE

Each business or entity, including those that have been designated as essential under Empire State Development's Essential Business Guidance, must develop a written Safety Plan outlining how its workplace will prevent the spread of COVID-19. A business may fill out this template to fulfill the requirement, or may develop its own Safety Plan. **This plan does not need to be submitted to a state agency for approval** but must be retained on the premises of the business and must made available to the New York State Department of Health (DOH) or local health or safety authorities in the event of an inspection.

Business owners should refer to the State's industry-specific guidance for more information on how to safely operate. For a list of regions and sectors that are authorized to re-open, as well as detailed guidance for each sector, please visit: **forward.ny.gov**. If your industry is not included in the posted guidance but your businesses has been operating as essential, please refer to ESD's **Essential Business Guidance** and adhere to the guidelines within this Safety Plan. Please continue to regularly check the New York Forward site for guidance that is applicable to your business or certain parts of your business functions, and consult the state and federal resources listed below.

COVID-19 Reopening Safety Plan

Name of Business:

Industry:

Address:

Contact Information:

Owner/Manager of Business:

Human Resources Representative and Contact Information, if applicable:

I. PEOPLE

A. Physical Distancing. To ensure employees comply with physical distancing requirements, you agree that you will do the following:

- [ ] Ensure 6 ft. distance between personnel, unless safety or core function of the work activity requires a shorter distance. Any time personnel are less than 6 ft. apart from one another, personnel must wear acceptable face coverings.

- [ ] Tightly confined spaces will be occupied by only one individual at a time, unless all occupants are wearing face coverings. If occupied by more than one person, will keep occupancy under 50% of maximum capacity.

- [ ] Post social distancing markers using tape or signs that denote 6 ft. of spacing in commonly used and other applicable areas on the site (e.g. clock in/out stations, health screening stations)

- [ ] Limit in-person gatherings as much as possible and use tele- or video-conferencing whenever possible. Essential in-person gatherings (e.g. meetings) should be held in open, well-ventilated spaces with appropriate social distancing among participants.

- [ ] Establish designated areas for pick-ups and deliveries, limiting contact to the extent possible.

List common situations that may not allow for 6 ft. of distance between individuals. What measures will you implement to ensure the safety of your employees in such situations?

How you will manage engagement with customers and visitors on these requirements (as applicable)?

How you will manage industry-specific physical social distancing (e.g., shift changes, lunch breaks) (as applicable)?

II. PLACES

A. Protective Equipment. To ensure employees comply with protective equipment requirements, you agree that you will do the following:

- [ ] Employers must provide employees with an acceptable face covering at no-cost to the employee and have an adequate supply of coverings in case of replacement.

What quantity of face coverings – and any other PPE – will you need to procure to ensure that you always have a sufficient supply on hand for employees and visitors? How will you procure these supplies?

- [ ] Face coverings must be cleaned or replaced after use or when damaged or soiled, may not be shared, and should be properly stored or discarded.

What policy will you implement to ensure that PPE is appropriately cleaned, stored, and/or discarded?

- [ ] Limit the sharing of objects and discourage touching of shared surfaces; or, when in contact with shared objects or frequently touched areas, wear gloves (trade-appropriate or medical); or, sanitize or wash hands before and after contact.

List common objects that are likely to be shared between employees. What measures will you implement to ensure the safety of your employees when using these objects?

B. Hygiene and Cleaning. To ensure employees comply with hygiene and cleaning requirements, you agree that you will do the following:

- [ ] Adhere to hygiene and sanitation requirements from the Centers for Disease Control and Prevention (CDC) and Department of Health (DOH) and maintain cleaning logs on site that document date, time, and scope of cleaning.

Who will be responsible for maintaining a cleaning log? Where will the log be kept?

- [ ] Provide and maintain hand hygiene stations for personnel, including handwashing with soap, water, and paper towels, or an alcohol-based hand sanitizer containing 60% or more alcohol for areas where handwashing is not feasible.

Where on the work location will you provide employees with access to the appropriate hand hygiene and/or sanitizing products and how will you promote good hand hygiene?

☐ Conduct regular cleaning and disinfection at least after every shift, daily, or more frequently as needed, and frequent cleaning and disinfection of shared objects (e.g. tools, machinery) and surfaces, as well as high transit areas, such as restrooms and common areas, must be completed.

*What policies will you implement to ensure regular cleaning and disinfection of your worksite and any shared objects or materials, using **products** identified as effective against COVID-19?*

C. Communication. To ensure the business and its employees comply with communication requirements, you agree that you will do the following:

☐ Post signage throughout the site to remind personnel to adhere to proper hygiene, social distancing rules, appropriate use of PPE, and cleaning and disinfecting protocols.

☐ Establish a communication plan for employees, visitors, and customers with a consistent means to provide updated information.

☐ Maintain a continuous log of every person, including workers and visitors, who may have close contact with other individuals at the work site or area; excluding deliveries that are performed with appropriate PPE or through contactless means; excluding customers, who may be encouraged to provide contact information to be logged but are not mandated to do so.

Which employee(s) will be in charge of maintaining a log of each person that enters the site (excluding customers and deliveries that are performed with appropriate PPE or through contactless means), and where will the log be kept?

☐ If a worker tests positive for COVID-19, employer must immediately notify state and local health departments and cooperate with contact tracing efforts, including notification of potential contacts, such as workers or visitors who had close contact with the individual, while maintaining confidentiality required by state and federal law and regulations.

If a worker tests positive for COVID-19, which employee(s) will be responsible for notifying state and local health departments?

III. PROCESS

A. Screening. To ensure the business and its employees comply with protective equipment requirements, you agree that you will do the following:

☐ Implement mandatory health screening assessment (e.g. questionnaire, temperature check) before employees begin work each day and for essential visitors, asking about (1) COVID-19 symptoms in past 14 days, (2) positive COVID-19 test in past 14 days, and/or (3) close contact with confirmed or suspected COVID-19 case in past 14 days. Assessment responses must be reviewed every day and such review must be documented.

What type(s) of daily health and screening practices will you implement? Will the screening be done before employee gets to work or on site? Who will be responsible for performing them, and how will those individuals be trained?

If screening onsite, how much PPE will be required for the responsible parties carrying out the screening practices? How will you supply this PPE?

B. Contact tracing and disinfection of contaminated areas. To ensure the business and its employees comply with contact tracing and disinfection requirements, you agree that you will do the following:

☐ Have a plan for cleaning, disinfection, and contact tracing in the event of a positive case.

In the case of an employee testing positive for COVID-19, how will you clean the applicable contaminated areas? What products identified as effective against COVID-19 will you need and how will you acquire them?

In the case of an employee testing positive for COVID-19, how will you trace close contacts in the workplace? How will you inform close contacts that they may have been exposed to COVID-19?

IV. OTHER

Please use this space to provide additional details about your business's Safety Plan, including anything to address specific industry guidance.

Staying up to date on industry-specific guidance:

To ensure that you stay up to date on the guidance that is being issued by the State, you will:

- [ ] Consult the NY Forward website at forward.ny.gov and applicable Executive Orders at governor.ny.gov/executiveorders on a periodic basis or whenever notified of the availability of new guidance.

State and Federal Resources for Businesses and Entities

As these resources are frequently updated, please stay current on state and federal guidance issued in response to COVID-19.

General Information

- New York State Department of Health (DOH) Novel Coronavirus (COVID-19) Website
- Centers for Disease Control and Prevention (CDC) Coronavirus (COVID-19) Website
- Occupational Safety and Health Administration (OSHA) COVID-19 Website

Workplace Guidance

- CDC Guidance for Businesses and Employers to Plan, Prepare and Respond to Coronavirus Disease 2019
- OSHA Guidance on Preparing Workplaces for COVID-19

Personal Protective Equipment Guidance

- DOH Interim Guidance on Executive Order 202.16 Requiring Face Coverings for Public and Private Employees
- OSHA Personal Protective Equipment

Cleaning and Disinfecting Guidance

- New York State Department of Environmental Conservation (DEC) Registered Disinfectants of COVID-19
- DOH Interim Guidance for Cleaning and Disinfection of Public and Private Facilities for COVID-19
- CDC Cleaning and Disinfecting Facilities

Screening and Testing Guidance

- DOH COVID-19 Testing
- CDC COVID-19 Symptoms

What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws

Technical Assistance Questions and Answers - Updated on Sep. 8, 2020

INTRODUCTION

- *All EEOC materials related to COVID-19 are collected at www.eeoc.gov/coronavirus.*
- The EEOC enforces workplace anti-discrimination laws, including the Americans with Disabilities Act (ADA) and the Rehabilitation Act (which include the requirement for reasonable accommodation and non-discrimination based on disability, and rules about employer medical examinations and inquiries), Title VII of the Civil Rights Act (which prohibits discrimination based on race, color, national origin, religion, and sex, including pregnancy), the Age Discrimination in Employment Act (which prohibits discrimination based on age, 40 or older), and the Genetic Information Nondiscrimination Act. Note: Other federal laws, as well as state or local laws, may provide employees with additional protections.
- Title I of the ADA applies to private employers with 15 or more employees. It also applies to state and local government employers, employment agencies, and labor unions. All nondiscrimination standards under Title I of the ADA also apply to federal agencies under Section 501 of the Rehabilitation Act. Basic background information about the ADA and the Rehabilitation Act is available on EEOC's disability page.
- The EEO laws, including the ADA and Rehabilitation Act, continue to apply during the time of the COVID-19 pandemic, but they do not interfere with or prevent employers from following the guidelines and suggestions made by the CDC or state/local public health authorities about steps employers should take regarding COVID-19. **Employers should remember that guidance from public health authorities is likely to change as the COVID-19 pandemic evolves. Therefore, employers should continue to follow the most current information on maintaining workplace safety.** Many common workplace inquiries about the COVID-19 pandemic are addressed in the CDC publication "General Business Frequently Asked Questions."

- The EEOC has provided guidance (a publication entitled Pandemic Preparedness in the Workplace and the Americans With Disabilities Act [PDF version]) ("Pandemic Preparedness"), consistent with these workplace protections and rules, that can help employers implement strategies to navigate the impact of COVID-19 in the workplace. This pandemic publication, which was written during the prior H1N1 outbreak, is still relevant today and identifies established ADA and Rehabilitation Act principles to answer questions frequently asked about the workplace during a pandemic. It has been updated as of March 19, 2020 to address examples and information regarding COVID-19; **the new 2020 information appears in bold and is marked with an asterisk**.
- On March 27, 2020 the EEOC provided a webinar ("3/27/20 Webinar") which was recorded and transcribed and is available at www.eeoc.gov/coronavirus. The World Health Organization (WHO) has declared COVID-19 to be an international pandemic. The EEOC pandemic publication includes a separate section that answers common employer questions about what to do after a pandemic has been declared. Applying these principles to the COVID-19 pandemic, the following may be useful:

A. Disability-Related Inquiries and Medical Exams

The ADA has restrictions on when and how much medical information an employer may obtain from any applicant or employee. Prior to making a conditional job offer to an applicant, disability-related inquiries and medical exams are generally prohibited. They are permitted between the time of the offer and when the applicant begins work, provided they are required for everyone in the same job category. Once an employee begins work, any disability-related inquiries or medical exams must be job related and consistent with business necessity.

A.1. How much information may an employer request from an employee who calls in sick, in order to protect the rest of its workforce during the COVID-19 pandemic? *(3/17/20)*

During a pandemic, ADA-covered employers may ask such employees if they are experiencing symptoms of the pandemic virus. For COVID-19, these include symptoms such as fever, chills, cough, shortness of breath, or sore throat. Employers must maintain all information about employee illness as a confidential medical record in compliance with the ADA.

A.2. When screening employees entering the workplace during this time, may an employer only ask employees about the COVID-19 symptoms EEOC has identified as examples, or may it ask about any symptoms identified by public health authorities as associated with COVID-19? *(4/9/20)*

As public health authorities and doctors learn more about COVID-19, they may expand the list of associated symptoms. 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, 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.

A.3. When may an ADA-covered employer take the body temperature of employees during the COVID-19 pandemic? *(3/17/20)*

Generally, measuring an employee's body temperature is a medical examination. Because the CDC and state/local health authorities have acknowledged community spread of COVID-19 and issued attendant precautions, employers may measure employees' body temperature. However, employers should be aware that some people with COVID-19 do not have a fever.

A.4. Does the ADA allow employers to require employees to stay home if they have symptoms of the COVID-19? *(3/17/20)*

Yes. The CDC states that employees who become ill with symptoms of COVID-19 should leave the workplace. The ADA does not interfere with employers following this advice.

A.5. When employees return to work, does the ADA allow employers to require a doctor's note certifying fitness for duty? *(3/17/20)*

Yes. Such inquiries are permitted under the ADA either because they would not be disability-related or, if the pandemic 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.

A.6. May an employer administer a COVID-19 test (a test to detect the presence of the COVID-19 virus) when evaluating an employee's initial or continued presence in the workplace? *(4/23/20; updated 9/8/20 to address stakeholder questions about updates to CDC guidance)*

The ADA requires that any mandatory medical test of employees be "job related and consistent with business necessity." Applying this standard to the current circumstances of the COVID-19 pandemic, employers may take screening steps to determine if employees entering the workplace have COVID-19 because an individual with the virus will pose a direct threat to the health of others. Therefore an employer may choose to administer

COVID-19 testing to employees before initially permitting them to enter the workplace and/or periodically to determine if their presence in the workplace poses a direct threat to others. The ADA does not interfere with employers following recommendations by the CDC or other public health authorities regarding whether, when, and for whom testing or other screening is appropriate. Testing administered by employers consistent with current CDC guidance will meet the ADA's "business necessity" standard.

Consistent with the ADA standard, employers should ensure that the tests are considered accurate and reliable. For example, employers may review information from the U.S. Food and Drug Administration about what may or may not be considered safe and accurate testing, as well as guidance from CDC or other public health authorities. Because the CDC and FDA may revise their recommendations based on new information, it may be helpful to check these agency websites for updates. Employers may wish to consider the incidence of false-positives or false-negatives associated with a particular test. Note that a positive test result reveals that an individual most likely has a current infection and may be able to transmit the virus to others. A negative test result means that the individual did not have detectable COVID-19 at the time of testing.

A negative test does not mean the employee will not acquire the virus later. Based on guidance from medical and public health authorities, employers should still require–to the greatest extent possible–that employees observe infection control practices (such as social distancing, regular handwashing, and other measures) in the workplace to prevent transmission of COVID-19.

Note: Question A.6 and A.8 address screening of employees generally. See Question A.9 regarding decisions to screen individual employees.

A.7. CDC said in its Interim Guidelines that antibody test results "should not be used to make decisions about returning persons to the workplace." In light of this CDC guidance, under the ADA may an employer require antibody testing before permitting employees to re-enter the workplace? *(6/17/20)*

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 already stated that COVID-19 viral tests are permissible under the ADA.

The EEOC will continue to closely monitor CDC's recommendations, and could update this discussion in response to changes in CDC's recommendations.

A.8. May employers ask all employees physically entering the workplace if they have been diagnosed with or tested for COVID-19? *(9/8/20; adapted from 3/27/20 Webinar Question 1)*

Yes. Employers may ask all employees who will be physically entering the workplace if they have COVID-19 or symptoms associated with COVID-19, and ask if they have been tested for COVID-19. Symptoms associated with COVID-19 include, for example, fever, chills, cough, and shortness of breath. The CDC has identified a current list of symptoms.

An employer may exclude those with COVID-19, or symptoms associated with COVID-19, from the workplace because, as EEOC has stated, their presence would pose a direct threat to the health or safety of others. However, for those employees who are teleworking and are not physically interacting with coworkers or others (for example, customers), the employer would generally not be permitted to ask these questions.

A.9. May a manager ask only one employee—as opposed to asking all employees—questions designed to determine if she has COVID-19, or require that this employee alone have her temperature taken or undergo other screening or testing? *(9/8/20; adapted from 3/27/20 Webinar Question 3)*

If an employer wishes to ask only a particular employee to answer such questions, or to have her temperature taken or undergo other screening or testing, the ADA requires the employer to have a reasonable belief based on objective evidence that this person might have the disease. So, it is important for the employer to consider why it wishes to take these actions regarding this particular employee, such as a display of COVID-19 symptoms. In addition, the ADA does not interfere with employers following recommendations by the CDC or other public health authorities regarding whether, when, and for whom testing or other screening is appropriate.

A.10. May an employer ask an employee who is physically coming into the workplace whether they have family members who have COVID-19 or symptoms associated with COVID-19? *(9/8/20; adapted from 3/27/20 Webinar Question 4)*

No. The Genetic Information Nondiscrimination Act (GINA) prohibits employers from asking employees medical questions about family members. GINA, however, does not prohibit an employer from asking employees whether they have had contact with anyone diagnosed with COVID-19 or who may have symptoms associated with the disease.

Moreover, from a public health perspective, only asking an employee about his contact with family members would unnecessarily limit the information obtained about an employee's potential exposure to COVID-19.

A.11. What may an employer do under the ADA if an employee refuses to permit the employer to take his temperature or refuses to answer questions about whether he has COVID-19, has symptoms associated with COVID-19, or has been tested for COVID-19? *(9/8/20; adapted from 3/27/20 Webinar Question 2)*

Under the circumstances existing currently, the ADA allows an employer to bar an employee from physical presence in the workplace if he refuses to have his temperature taken or refuses to answer questions about whether he has COVID-19, has symptoms associated with COVID-19, or has been tested for COVID-19. To gain the cooperation of employees, however, employers may wish to ask the reasons for the employee's refusal. The employer may be able to provide information or reassurance that they are taking these steps to ensure the safety of everyone in the workplace, and that these steps are consistent with health screening recommendations from CDC. Sometimes, employees are reluctant to provide medical information because they fear an employer may widely spread such personal medical information throughout the workplace. The ADA prohibits such broad disclosures. Alternatively, if an employee requests reasonable accommodation with respect to screening, the usual accommodation process should be followed; this is discussed in Question G.7.

A.12. During the COVID-19 pandemic, may an employer request information from employees who work on-site, whether regularly or occasionally, who report feeling ill or who call in sick? *(9/8/20; adapted from Pandemic Preparedness Question 6)*

Due to the COVID-19 pandemic, at this time employers may ask employees who work on-site, whether regularly or occasionally, and report feeling ill or who call in sick, questions about their symptoms as part of workplace screening for COVID-19.

A.13. May an employer ask an employee why he or she has been absent from work? *(9/8/20; adapted from Pandemic Preparedness Question 15)*

Yes. Asking why an individual did not report to work is not a disability-related inquiry. An employer is always entitled to know why an employee has not reported for work.

A.14. When an employee returns from travel during a pandemic, must an employer wait until the employee develops COVID-19 symptoms to ask questions about where the person has traveled? *(9/8/20; adapted from Pandemic Preparedness Question 8)*

No. Questions about where a person traveled would not be disability-related inquiries. If

the CDC or state or local public health officials recommend that people who visit specified locations remain at home for a certain period of time, an employer may ask whether employees are returning from these locations, even if the travel was personal.

B. Confidentiality of Medical Information

With limited exceptions, the ADA requires employers to keep confidential any medical information they learn about any applicant or employee. Medical information includes not only a diagnosis or treatments, but also the fact that an individual has requested or is receiving a reasonable accommodation.

B.1. May an employer store in existing medical files information it obtains related to COVID-19, including the results of taking an employee's temperature or the employee's self-identification as having this disease, or must the employer create a new medical file system solely for this information? *(4/9/20)*

The ADA requires that all medical information about a particular employee be stored separately from the employee's personnel file, thus limiting access to this confidential information. An employer may store all medical information related to COVID-19 in existing medical files. This includes an employee's statement that he has the disease or suspects he has the disease, or the employer's notes or other documentation from questioning an employee about symptoms.

B.2. If an employer requires all employees to have a daily temperature check before entering the workplace, may the employer maintain a log of the results? *(4/9/20)*

Yes. The employer needs to maintain the confidentiality of this information.

B.3. May an employer disclose the name of an employee to a public health agency when it learns that the employee has COVID-19? *(4/9/20)*

Yes.

B.4. May a temporary staffing agency or a contractor that places an employee in an employer's workplace notify the employer if it learns the employee has COVID-19? *(4/9/20)*

Yes. The staffing agency or contractor may notify the employer and disclose the name of the employee, because the employer may need to determine if this employee had contact with anyone in the workplace.

B.5. Suppose a manager learns that an employee has COVID-19, or has symptoms associated with the disease. The manager knows she must report it but is worried about violating ADA confidentiality. What should she do? *(9/8/20; adapted from 3/27/20 Webinar Question 5)*

The ADA requires that an employer keep all medical information about employees confidential, even if that information is not about a disability. Clearly, the information that an employee has symptoms of, or a diagnosis of, COVID-19, is medical information. But the fact that this is medical information does not prevent the manager from reporting to appropriate employer officials so that they can take actions consistent with guidance from the CDC and other public health authorities.

The question is really what information to report: is it the fact that an employee—unnamed—has symptoms of COVID-19 or a diagnosis, or is it the identity of that employee? Who in the organization needs to know the identity of the employee will depend on each workplace and why a specific official needs this information. Employers should make every effort to limit the number of people who get to know the name of the employee.

The ADA does not interfere with a designated representative of the employer interviewing the employee to get a list of people with whom the employee possibly had contact through the workplace, so that the employer can then take action to notify those who may have come into contact with the employee, without revealing the employee's identity. For example, using a generic descriptor, such as telling employees that "someone at this location" or "someone on the fourth floor" has COVID-19, provides notice and does not violate the ADA's prohibition of disclosure of confidential medical information.For small employers, coworkers might be able to figure out who the employee is, but employers in that situation are still prohibited from confirming or revealing the employee's identity. Also, all employer officials who are designated as needing to know the identity of an employee should be specifically instructed that they must maintain the confidentiality of this information. Employers may want to plan in advance what supervisors and managers should do if this situation arises and determine who will be responsible for receiving information and taking next steps.

B.6. An employee who must report to the workplace knows that a coworker who reports to the same workplace has symptoms associated with COVID-19. Does ADA confidentiality prevent the first employee from disclosing the coworker's symptoms to a supervisor? *(9/8/20; adapted from 3/27/20 Webinar Question 6)*

No. ADA confidentiality does not prevent this employee from communicating to his supervisor about a coworker's symptoms. In other words, it is not an ADA confidentiality violation for this employee to inform his supervisor about a coworker's symptoms. After

learning about this situation, the supervisor should contact appropriate management officials to report this information and discuss next steps.

B.7. An employer knows that an employee is teleworking because the person has COVID-19 or symptoms associated with the disease, and that he is in self-quarantine. May the employer tell staff that this particular employee is teleworking without saying why? *(9/8/20; adapted from 3/27/20 Webinar Question 7)*

Yes. If staff need to know how to contact the employee, and that the employee is working even if not present in the workplace, then disclosure that the employee is teleworking without saying why is permissible. Also, if the employee was on leave rather than teleworking because he has COVID-19 or symptoms associated with the disease, or any other medical condition, then an employer cannot disclose the reason for the leave, just the fact that the individual is on leave.

B.8. Many employees, including managers and supervisors, are now teleworking as a result of COVID-19. How are they supposed to keep medical information of employees confidential while working remotely? *(9/8/20; adapted from 3/27/20 Webinar Question 9)*

The ADA requirement that medical information be kept confidential includes a requirement that it be stored separately from regular personnel files. If a manager or supervisor receives medical information involving COVID-19, or any other medical information, while teleworking, and is able to follow an employer's existing confidentiality protocols while working remotely, the supervisor has to do so. But to the extent that is not feasible, the supervisor still must safeguard this information to the greatest extent possible until the supervisor can properly store it. This means that paper notepads, laptops, or other devices should not be left where others can access the protected information.

Similarly, documentation must not be stored electronically where others would have access. A manager may even wish to use initials or another code to further ensure confidentiality of the name of an employee.

C. Hiring and Onboarding

Under the ADA, prior to making a conditional job offer to an applicant, disability-related inquiries and medical exams are generally prohibited. They are permitted between the time of the offer and when the applicant begins work, provided they are required for everyone in the same job category.

C.1. If an employer is hiring, may it screen applicants for symptoms of COVID-19? *(3/18/20)*

Yes. An employer may screen job applicants for symptoms of COVID-19 after making a conditional job offer, as long as it does so for all entering employees in the same type of job. This ADA rule applies whether or not the applicant has a disability.

C.2. May an employer take an applicant's temperature as part of a post-offer, pre-employment medical exam? *(3/18/20)*

Yes. Any medical exams are permitted after an employer has made a conditional offer of employment. However, employers should be aware that some people with COVID-19 do not have a fever.

C.3. May an employer delay the start date of an applicantwho has COVID-19 or symptoms associated with it? *(3/18/20)*

Yes. According to current CDC guidance, an individual who has COVID-19 or symptoms associated with it should not be in the workplace.

C.4. May an employer withdraw a job offer when it needs the applicant to start immediately but the individual has COVID-19 or symptoms of it? *(3/18/20)*

Based on current CDC guidance, this individual cannot safely enter the workplace, and therefore the employer may withdraw the job offer.

C.5. May an employer postpone the start date or withdraw a job offer because the individual is 65 years old or pregnant, both of which place them at higher risk from COVID-19? *(4/9/20)*

No. The fact that the CDC has identified those who are 65 or older, or pregnant women, as being at greater risk does not justify unilaterally postponing the start date or withdrawing a job offer. However, an employer may choose to allow telework or to discuss with these individuals if they would like to postpone the start date.

D. Reasonable Accommodation

Under the ADA, reasonable accommodations are adjustments or modifications provided by an employer to enable people with disabilities to enjoy equal employment opportunities. If a reasonable accommodation is needed and requested by an individual with a disability to apply for a job, perform a job, or enjoy benefits and privileges of employment, the employer must provide it unless it would pose an undue hardship, meaning significant difficulty or expense. An employer has the discretion to choose among effective accommodations. Where a requested accommodation would result in undue hardship, the employer must offer an alternative accommodation if one is available absent undue hardship. In discussing accommodation requests, employers and

employees may find it helpful to consult the Job Accommodation Network (JAN) website for types of accommodations, www.askjan.org. JAN's materials specific to COVID-19 are at https://askjan.org/topics/COVID-19.cfm.

D.1. If a job may only be performed at the workplace, are there reasonable accommodations for individuals with disabilities, absent undue hardship, that could offer protection to an employee who, due to a preexisting disability, is at higher risk from COVID-19? *(4/9/20)*

There may be reasonable accommodations that could offer protection to an individual whose disability puts him 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.

D.2. If an employee has a preexisting mental illness or disorder that has been exacerbated by the COVID-19 pandemic, may he now be entitled to a reasonable accommodation (absent undue hardship)? *(4/9/20)*

Although 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.

D.3. In a workplace where all employees are required to telework during this

time, should an employer postpone discussing a request from an employee with a disability for an accommodation that will not be needed until he returns to the workplace when mandatory telework ends? *(4/9/20)*

Not necessarily. An employer may give higher priority to discussing requests for reasonable accommodations that are needed while teleworking, but the employer may begin discussing this request now. The employer may be able to acquire all the information it needs to make a decision. If a reasonable accommodation is granted, the employer also may be able to make some arrangements for the accommodation in advance.

D.4. What if an employee was already receiving a reasonable accommodation prior to the COVID-19 pandemic and now requests an additional or altered accommodation? *(4/9/20)*

An employee who was already receiving a reasonable accommodation prior to the COVID-19 pandemic may be entitled to an additional or altered accommodation, absent undue hardship. For example, an employee who is teleworking because of the pandemic may need a different type of accommodation than what he uses in the workplace. The employer may discuss with the employee whether the same or a different disability is the basis for this new request and why an additional or altered accommodation is needed.

D.5. During the pandemic, if an employee requests an accommodation for a medical condition either at home or in the workplace, may an employer still request information to determine if the condition is a disability? *(4/17/20)*

Yes, if it 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).

D.6. During the pandemic, may an employer still engage in the interactive process and request information from an employee about why an accommodation is needed? *(4/17/20)*

Yes, if it is not obvious or already known, an employer may ask questions or request medical documentation to determine whether the employee's disability necessitates an accommodation, either the one he requested or any other. Possible questions for the employee 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).

D.7. If there is some urgency to providing an accommodation, or the

employer has limited time available to discuss the request during the pandemic, may an employer provide a temporary accommodation? *(4/17/20)*

Yes. Given the pandemic, some employers may choose to forgo or shorten the exchange of information between an employer and employee known as the "interactive process" (discussed in D.5 and D.6., above) and grant the request. In addition, when government restrictions change, or are partially or fully lifted, the need for accommodations may also change. This may result in more requests for short-term accommodations. Employers may wish to adapt the interactive process—and devise end dates for the accommodation—to suit changing circumstances based on public health directives.

Whatever the reason for shortening or adapting the interactive process, an employer may also choose to place an end date on the accommodation (for example, either a specific date such as May 30, 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. This could also apply to employees who have disabilities exacerbated by the pandemic.

Employees may request an extension that an employer must consider, particularly if current government restrictions are extended or new ones adopted.

D.8. May an employer invite employees now to ask for reasonable accommodations they may need in the future when they are permitted to return to the workplace? *(4/17/20; updated 9/8/20 to address stakeholder questions)*

Yes. Employers may inform the workforce that employees with disabilities may request accommodations in advance that they believe they may need when the workplace re-opens. This is discussed in greater detail in Question G.6. If advance requests are received, employers may begin the "interactive process" – the discussion between the employer and employee focused on whether the impairment is a disability and the reasons that an accommodation is needed. If an employee chooses not to request accommodation in advance, and instead requests it at a later time, the employer must still consider the request at that time.

D.9. Are the circumstances of the pandemic relevant to whether a requested accommodation can be denied because it poses an undue hardship? *(4/17/20)*

Yes. An employer does not have to provide a particular reasonable accommodation if it poses an "undue hardship," which means "significant difficulty or expense." As described in the two questions that follow, in some instances, an accommodation that would not have posed an undue hardship prior to the pandemic may pose one now.

D.10. What types of undue hardship considerations may be relevant to determine if a requested accommodation poses "significant difficulty" during the COVID-19 pandemic? *(4/17/20)*

An employer may consider whether current circumstances create "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. 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.

D.11. What types of undue hardship considerations may be relevant to determine if a requested accommodation poses "significant expense" during the COVID-19 pandemic? *(4/17/20)*

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). But, the sudden loss of some or all of an employer's income stream because of this pandemic is a relevant consideration. Also relevant is the amount of discretionary funds available at this time—when considering other expenses—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). These considerations do not mean that an employer can reject any accommodation that costs money; an employer must weigh the cost of an accommodation against its current budget while taking into account constraints created by this pandemic. For example, even under current circumstances, there may be many no-cost or very low-cost accommodations.

D.12. Do the ADA and the Rehabilitation Act apply to applicants or employees who are classified as "critical infrastructure workers" or "essential critical workers" by the CDC? *(4/23/20)*

Yes. These CDC designations, or any other designations of certain employees, do not eliminate coverage under the ADA or the Rehabilitation Act, or any other equal employment opportunity law. Therefore, employers receiving requests for reasonable accommodation under the ADA or the Rehabilitation Act from employees falling in these categories of jobs must accept and process the requests as they would for any other employee. Whether the request is granted will depend on whether the worker is an individual with a disability, and whether there is a reasonable accommodation that can be provided absent undue hardship.

D.13. 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? *(6/11/20)*

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.

D.14. When an employer requires some or all of its employees to telework because of COVID-19 or government officials require employers to shut down their facilities and have workers telework, is the employer required to provide a teleworking employee with the same reasonable accommodations for disability under the ADA or the Rehabilitation Act that it provides to this individual in the workplace? *(9/8/20; adapted from 3/27/20 Webinar Question 20)*

If such a request is made, the employer and employee should discuss what the employee needs and why, and whether the same or a different accommodation could suffice in the home setting. For example, an employee may already have certain things in their home to enable them to do their job so that they do not need to have all of the accommodations that are provided in the workplace.

Also, the undue hardship considerations might be different when evaluating a request for accommodation when teleworking rather than working in the workplace. A reasonable accommodation that is feasible and does not pose an undue hardship in the workplace

might pose one when considering circumstances, such as the place where it is needed and the reason for telework. For example, the fact that the period of telework may be of a temporary or unknown duration may render certain accommodations either not feasible or an undue hardship. There may also be constraints on the normal availability of items or on the ability of an employer to conduct a necessary assessment.

As a practical matter, and in light of the circumstances that led to the need for telework, employers and employees should both be creative and flexible about what can be done when an employee needs a reasonable accommodation for telework at home. If possible, providing interim accommodations might be appropriate while an employer discusses a request with the employee or is waiting for additional information.

D.15. Assume that an employer grants telework to employees for the purpose of slowing or stopping the spread of COVID-19. When an employer reopens the workplace and recalls employees to the worksite, does the employer automatically have to grant telework as a reasonable accommodation to every employee with a disability who requests to continue this arrangement as an ADA/Rehabilitation Act accommodation? *(9/8/20; adapted from 3/27/20 Webinar Question 21)*

No. Any time an employee requests a reasonable accommodation, the employer is entitled to understand the disability-related limitation that necessitates an accommodation. If there is no disability-related limitation that requires teleworking, then the employer does not have to provide telework as an accommodation. Or, if there is a disability-related limitation but the employer can effectively address the need with another form of reasonable accommodation at the workplace, then the employer can choose that alternative to telework.

To the extent that an employer is permitting telework to employees because of COVID-19 and is choosing to excuse an employee from performing one or more essential functions, then a request—after the workplace reopens—to continue telework as a reasonable accommodation does not have to be granted if it requires continuing to excuse the employee from performing an essential function. The ADA never requires an employer to eliminate an essential function as an accommodation for an individual with a disability.

The fact that an employer temporarily excused performance of one or more essential functions when it closed the workplace and enabled employees to telework for the purpose of protecting their safety from COVID-19, or otherwise chose to permit telework, does not mean that the employer permanently changed a job's essential functions, that telework is always a feasible accommodation, or that it does not pose an undue hardship. These are fact-specific determinations. The employer has no obligation under the ADA to refrain

from restoring all of an employee's essential duties at such time as it chooses to restore the prior work arrangement, and then evaluating any requests for continued or new accommodations under the usual ADA rules.

D.16. Assume that prior to the emergence of the COVID-19 pandemic, an employee with a disability had requested telework as a reasonable accommodation. The employee had shown a disability-related need for this accommodation, but the employer denied it because of concerns that the employee would not be able to perform the essential functions remotely. In the past, the employee therefore continued to come to the workplace. However, after the COVID-19 crisis has subsided and temporary telework ends, the employee renews her request for telework as a reasonable accommodation. Can the employer again refuse the request? *(9/8/20; adapted from 3/27/20 Webinar Question 22)*

Assuming all the requirements for such a reasonable accommodation are satisfied, the temporary telework experience could be relevant to considering the renewed request. In this situation, for example, the period of providing telework because of the COVID-19 pandemic could serve as a trial period that showed whether or not this employee with a disability could satisfactorily perform all essential functions while working remotely, and the employer should consider any new requests in light of this information. As with all accommodation requests, the employee and the employer should engage in a flexible, cooperative interactive process going forward if this issue does arise.

D.17. Might the pandemic result in excusable delays during the interactive process? *(9/8/20; adapted from 3/27/20 Webinar Question 19)*

Yes. The rapid spread of COVID-19 has disrupted normal work routines and may have resulted in unexpected or increased requests for reasonable accommodation. Although employers and employees should address these requests as soon as possible, the extraordinary circumstances of the COVID-19 pandemic may result in delay in discussing requests and in providing accommodation where warranted. Employers and employees are encouraged to use interim solutions to enable employees to keep working as much as possible.

D.18. Federal agencies are required to have timelines in their written reasonable accommodation procedures governing how quickly they will process requests and provide reasonable accommodations. What happens if circumstances created by the pandemic prevent an agency from meeting this timeline? *(9/8/20; adapted from 3/27/20 Webinar Question 19)*

Situations created by the current COVID-19 crisis may constitute an "extenuating circumstance"—something beyond a Federal agency's control—that may justify exceeding the normal timeline that an agency has adopted in its internal reasonable accommodation procedures.

E. Pandemic-Related Harassment Due to National Origin, Race, or Other Protected Characteristics

E.1. What practical tools are available to employers to reduce and address workplace harassment that may arise as a result of the COVID-19 pandemic? *(4/9/20)*

Employers can help reduce the chance of harassment by explicitly communicating to the workforce that fear of the COVID-19 pandemic should not be misdirected against individuals because of a protected characteristic, including their national origin, race, or other prohibited bases.

Practical anti-harassment tools provided by the EEOC for small businesses can be found here:

- Anti-harassment policy tips for small businesses
- Select Task Force on the Study of Harassment in the Workplace (includes detailed recommendations and tools to aid in designing effective anti-harassment policies; developing training curricula; implementing complaint, reporting, and investigation procedures; creating an organizational culture in which harassment is not tolerated):
    - report;
    - checklists for employers who want to reduce and address harassment in the workplace; and
    - chart of risk factors that lead to harassment and appropriate responses.

E.2. Are there steps an employer should take to address possible harassment and discrimination against coworkers when it re-opens the workplace? *(4/17/20)*

Yes. An employer may remind all employees that it is against the federal EEO laws to harass or otherwise discriminate against coworkers based on race, national origin, color, sex, religion, age (40 or over), disability, or genetic information. It may be particularly helpful for employers to advise supervisors and managers of their roles in watching for, stopping, and reporting any harassment or other discrimination. An employer may also make clear that it will immediately review any allegations of harassment or discrimination and take appropriate action.

E.3. How may employers respond to pandemic-related harassment, in particular against employees who are or are perceived to be Asian? *(6/11/20)*

Managers should be alert to demeaning, derogatory, or hostile remarks directed to employees who are or are perceived to be of Chinese or other Asian national origin, including about the coronavirus or its origins.

All employers covered by Title VII should ensure that management understands in advance how to recognize such harassment. Harassment may occur using electronic communication tools—regardless of whether employees are in the workplace, teleworking, or on leave—and also in person between employees at the worksite. Harassment of employees at the worksite may also originate with contractors, customers or clients, or, for example, with patients or their family members at health care facilities, assisted living facilities, and nursing homes. Managers should know their legal obligations and be instructed to quickly identify and resolve potential problems, before they rise to the level of unlawful discrimination.

Employers may choose to send a reminder to the entire workforce noting Title VII's prohibitions on harassment, reminding employees that harassment will not be tolerated, and inviting anyone who experiences or witnesses workplace harassment to report it to management. Employers may remind employees that harassment can result in disciplinary action up to and including termination.

E.4. An employer learns that an employee who is teleworking due to the pandemic is sending harassing emails to another worker. What actions should the employer take? *(6/11/20)*

The employer should take the same actions it would take if the employee was in the workplace. Employees may not harass other employees through, for example, emails, calls, or platforms for video or chat communication and collaboration.

F. Furloughs and Layoffs

F.1. Under the EEOC's laws, what waiver responsibilities apply when an employer is conducting layoffs? *(4/9/20)*

Special rules apply when an employer is offering employees severance packages in exchange for a general release of all discrimination claims against the employer. More information is available in EEOC's technical assistance document on severance agreements.

F.2. What are additional EEO considerations in planning furloughs or layoffs? *(9/8/20; adapted from 3/27/20 Webinar Question 13)*

The laws enforced by the EEOC prohibit covered employers from selecting people for furlough or layoff because of that individual's race, color, religion, national origin, sex, age, disability, protected genetic information, or in retaliation for protected EEO activity.

G. Return to Work

G.1. As government stay-at-home orders and other restrictions are modified or lifted in your area, how will employers know what steps they can take consistent with the ADA to screen employees for COVID-19 when entering the workplace? *(4/17/20)*

The ADA permits employers to make disability-related inquiries and conduct medical exams if job-related and consistent with business necessity. Inquiries and reliable medical exams meet this standard if it is necessary to exclude employees with a medical condition that would pose a direct threat to health or safety.

Direct threat is to be determined based on the best available objective medical evidence. The guidance from CDC or other public health authorities is such evidence. Therefore, employers will be acting consistent with the ADA as long as any screening implemented is consistent with advice from the CDC and public health authorities for that type of workplace at that time.

For example, this may include continuing to take temperatures and asking questions about symptoms (or require self-reporting) **of all those entering the workplace**. Similarly, the CDC recently posted information on return by certain types of critical workers.

Employers should make sure not to engage in unlawful disparate treatment based on protected characteristics in decisions related to screening and exclusion.

G.2. An employer requires returning workers to wear personal protective gear and engage in infection control practices. Some employees ask for accommodations due to a need for modified protective gear. Must an employer grant these requests? *(4/17/20)*

An employer may require employees to wear protective gear (for example, masks and gloves) and observe infection control practices (for example, regular hand washing and social distancing protocols).

However, where 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.

G.3. What does an employee need to do in order to request reasonable accommodation from her employer because she has one of the medical conditions that CDC says may put her at higher risk for severe illness from COVID-19? *(5/5/20)*

An employee—or a third party, such as an employee's doctor—must let the employer know that she needs a change for a reason related to a medical condition (here, the underlying condition). Individuals may request accommodation in conversation or in writing. While the employee (or third party) does not need to use the term "reasonable accommodation" or reference the ADA, she may do so.

The employee or her representative should communicate that she has a medical condition that necessitates a change to meet a medical need. After receiving a request, the employer may ask questions or seek medical documentation to help decide if the individual has a disability and if there is a reasonable accommodation, barring undue hardship, that can be provided.

G.4. The CDC identifies a number of medical conditions that might place individuals at "higher risk for severe illness" if they get COVID-19. An employer knows that an employee has one of these conditions and is concerned that his health will be jeopardized upon returning to the workplace, but the employee has not requested accommodation. How does the ADA apply to this situation? *(5/7/20)*

First, if the employee does not request a reasonable accommodation, the ADA does not mandate that the employer take action.

If the employer is concerned about the employee's health being jeopardized upon returning to the workplace, the ADA does not allow the employer to exclude the employee—or take any other adverse action—*solely* because the employee has a disability that the CDC identifies as potentially placing him at "higher risk for severe illness" if he gets COVID-19. Under the ADA, such action is not allowed unless the employee's disability poses a "direct threat" to his health that cannot be eliminated or reduced by reasonable accommodation.

The ADA direct threat requirement is a high standard. As an affirmative defense, direct threat requires an employer to show that the individual has a disability that poses a "significant risk of substantial harm" to his own health under 29 C.F.R. section 1630.2(r) (regulation addressing direct threat to health or safety of self or others). A direct threat assessment cannot be based solely on the condition being on the CDC's list; the determination must be an individualized assessment based on a reasonable medical judgment about this employee's disability—not the disability in general—using the most

current medical knowledge and/or on the best available objective evidence. The ADA regulation requires an employer to consider the duration of the risk, the nature and severity of the potential harm, the likelihood that the potential harm will occur, and the imminence of the potential harm. Analysis of these factors will likely include considerations based on the severity of the pandemic in a particular area and the employee's own health (for example, is the employee's disability well-controlled), and his particular job duties. A determination of direct threat also would include the likelihood that an individual will be exposed to the virus at the worksite. Measures that an employer may be taking in general to protect all workers, such as mandatory social distancing, also would be relevant.

Even if an employer determines that an employee's disability poses a direct threat to his own health, the employer still cannot exclude the employee from the workplace—or take any other adverse action—unless there is no way to provide a reasonable accommodation (absent undue hardship). The ADA regulations require an employer to consider whether there are reasonable accommodations that would eliminate or reduce the risk so that it would be safe for the employee to return to the workplace while still permitting performance of essential functions. This can involve an interactive process with the employee. If there are not accommodations that permit this, then an employer must consider accommodations such as telework, leave, or reassignment (perhaps to a different job in a place where it may be safer for the employee to work or that permits telework). An employer may only bar an employee from the workplace if, after going through all these steps, the facts support the conclusion that the employee poses a significant risk of substantial harm to himself that cannot be reduced or eliminated by reasonable accommodation.

G.5. What are examples of accommodation that, absent undue hardship, may eliminate (or reduce to an acceptable level) a direct threat to self? *(5/5/20)*

Accommodations may include additional or enhanced protective gowns, masks, gloves, or other gear beyond what the employer may generally provide to employees returning to its workplace. Accommodations also may include additional or enhanced protective measures, for example, erecting a barrier that provides separation between an employee with a disability and coworkers/the public or increasing the space between an employee with a disability and others. Another possible reasonable accommodation may be elimination or substitution of particular "marginal" functions (less critical or incidental job duties as distinguished from the "essential" functions of a particular position). In addition, accommodations may include temporary modification of work schedules (if that decreases contact with coworkers and/or the public when on duty or commuting) or moving the location of where one performs work (for example, moving a person to the end of a production line rather than in the middle of it if that provides more social distancing).

These are only a few ideas. Identifying an effective accommodation depends, among other

things, on an employee's job duties and the design of the workspace. An employer and employee should discuss possible ideas; the Job Accommodation Network (www.askjan.org) also may be able to assist in helping identify possible accommodations. As with all discussions of reasonable accommodation during this pandemic, employers and employees are encouraged to be creative and flexible.

G.6. As a best practice, and in advance of having some or all employees return to the workplace, are there ways for an employer to invite employees to request flexibility in work arrangements? *(6/11/20)*

Yes. The ADA and the Rehabilitation Act permit employers to make information available in advance to **all** employees about who to contact—if they wish—to request accommodation for a disability that they may need upon return to the workplace, even if no date has been announced for their return. If requests are received in advance, the employer may begin the interactive process. An employer may choose to include in such a notice all the CDC-listed medical conditions that may place people at higher risk of serious illness if they contract COVID-19, provide instructions about who to contact, and explain that the employer is willing to consider on a case-by-case basis any requests from employees who have these or other medical conditions.

An employer also may send a general notice to all employees who are designated for returning to the workplace, noting that the employer is willing to consider requests for accommodation or flexibilities on an individualized basis. The employer should specify if the contacts differ depending on the reason for the request – for example, if the office or person to contact is different for employees with disabilities or pregnant workers than for employees whose request is based on age or child-care responsibilities.

Either approach is consistent with the ADEA, the ADA, and the May 29, 2020 CDC guidance that emphasizes the importance of employers providing accommodations or flexibilities to employees who, due to age or certain medical conditions, are at higher risk for severe illness.

Regardless of the approach, however, employers should ensure that whoever receives inquiries knows how to handle them consistent with the different federal employment nondiscrimination laws that may apply, for instance, with respect to accommodations due to a medical condition, a religious belief, or pregnancy.

G.7. What should an employer do if an employee entering the worksite requests an alternative method of screening due to a medical condition? *(6/11/20)*

This is a request for reasonable accommodation, and an employer should proceed as it would for any other request for accommodation under the ADA or the Rehabilitation Act. If the requested change is easy to provide and inexpensive, the employer might voluntarily choose to make it available to anyone who asks, without going through an interactive process. Alternatively, if the disability is not obvious or already known, an employer may ask the employee for information to establish that the condition is a disability and what specific limitations require an accommodation. If necessary, an employer also may request medical documentation to support the employee's request, and then determine if that accommodation or an alternative effective accommodation can be provided, absent undue hardship.

Similarly, if an employee requested an alternative method of screening as a religious accommodation, the employer should determine if accommodation is available under Title VII.

H. Age

H.1. The CDC has explained that individuals age 65 and over are at higher risk for a severe case of COVID-19 if they contract the virus and therefore has encouraged employers to offer maximum flexibilities to this group. Do employees age 65 and over have protections under the federal employment discrimination laws? *(6/11/20)*

The Age Discrimination in Employment Act (ADEA) prohibits employment discrimination against individuals age 40 and older. The ADEA would prohibit a covered employer from involuntarily excluding an individual from the workplace based on his or her being 65 or older, even if the employer acted for benevolent reasons such as protecting the employee due to higher risk of severe illness from COVID-19.

Unlike the ADA, the ADEA does not include a right to reasonable accommodation for older workers due to age. However, employers are free to provide flexibility to workers age 65 and older; the ADEA does not prohibit this, even if it results in younger workers ages 40-64 being treated less favorably based on age in comparison.

Workers age 65 and older also may have medical conditions that bring them under the protection of the ADA as individuals with disabilities. As such, they may request reasonable accommodation for their disability as opposed to their age.

H.2. If an employer is choosing to offer flexibilities to other workers, may older comparable workers be treated less favorably based on age? *(9/8/20; adapted from 3/27/20 Webinar Question 12)*

No. If an employer is allowing other comparable workers to telework, it should make sure it is not treating older workers less favorably based on their age.

I. Caregivers/Family Responsibilities

I.1. If an employer provides telework, modified schedules, or other benefits to employees with school-age children due to school closures or distance learning during the pandemic, are there sex discrimination considerations? *(6/11/20)*

Employers may provide any flexibilities as long as they are not treating employees differently based on sex or other EEO-protected characteristics. For example, under Title VII, female employees cannot be given more favorable treatment than male employees because of a gender-based assumption about who may have caretaking responsibilities for children.

J. Pregnancy

J.1. Due to the pandemic, may an employer exclude an employee from the workplace involuntarily due to pregnancy? *(6/11/20)*

No. Sex discrimination under Title VII of the Civil Rights Act includes discrimination based on pregnancy. Even if motivated by benevolent concern, an employer is not permitted to single out workers on the basis of pregnancy for adverse employment actions, including involuntary leave, layoff, or furlough.

J.2. Is there a right to accommodation based on pregnancy during the pandemic? *(6/11/20)*

There are two federal employment discrimination laws that may trigger accommodation for employees based on pregnancy.

First, pregnancy-related medical conditions may themselves be disabilities under the ADA, even though pregnancy itself is not an ADA disability. If an employee makes a request for reasonable accommodation due to a pregnancy-related medical condition, the employer must consider it under the usual ADA rules.

Second, Title VII as amended by the Pregnancy Discrimination Act specifically requires that women affected by pregnancy, childbirth, and related medical conditions be treated the same as others who are similar in their ability or inability to work. This means that a pregnant employee may be entitled to job modifications, including telework, changes to work schedules or assignments, and leave to the extent provided for other employees who are similar in their ability or inability to work. Employers should ensure that supervisors, managers, and human resources personnel know how to handle such requests to avoid

disparate treatment in violation of Title VII.

Employment Law Issues During the Covid-19 Pandemic

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THE FAMILIES FIRST CORONAVIRUS RESPONSE ACT (FFCRA)

On March 18, 2020 the U.S. Senate passed H.R. 6201 and President Trump signed the Families First Coronavirus Response Act, following the U.S. House of Representatives action on the legislation several days earlier.

The law focuses on the anticipated economic toll of the COVID-19 pandemic on workers and includes paid leave guarantees for certain workers, among other measures.

Emergency Paid Sick Leave Act (EPSLA)

The Emergency Paid Sick Leave Act (EPSLA) is contained in Division E of H.R. 6201 and requires certain employers to provide employees with two weeks of paid sick time if the employee is unable to work or telework for the following coronavirus-related reasons:

- The employee is subject to a Federal, State, or local quarantine or isolation due to concerns related to the coronavirus;
- The employee has been advised by a health care provider to self-quarantine due to concerns related to the coronavirus;
- The employee is experiencing symptoms of coronavirus and is seeking a medical diagnosis;
- The employee is caring for an individual who is subject to quarantine or isolation order or advised to self-quarantine by a health care provider;
- The employee is caring for a child whose school/care provider is closed or unavailable due to coronavirus precautions (nothing to do with anyone being sick); and
- The employee is experiencing any other condition substantially similar to the coronavirus, as specified by the U.S. Department of Health and Human Services (HHS).

Covered Employees and Employers:

- Private sector employers with fewer than 500 employees, government employers, and all other non-private entity employers with more than one employee are required to provide their employees with this paid sick leave.
- The law entitles employees of covered employers to paid sick leave regardless of how long the employee has worked for the employer.
- The legislation further gives the Secretary of Labor the authority to exempt small businesses with fewer than 50 employees from the law's paid leave requirements if those requirements would jeopardize the viability of the business.

Exception for Health Care Providers and Emergency Responders. Employers of health care providers or emergency responders may elect to exclude their employees from the Public Health Emergency Leave provisions of the law.

Amount Paid Sick Time: Full-time employees are entitled to 80 hours of paid sick leave. Part-time employees are entitled to the number of hours that the employee works, on average, over a two-week period.

With regard to hourly employees whose schedules vary, the employee's paid leave should equal the average number of hours that the employee was scheduled per day over the six-month period prior to the leave. If the employee did not work the preceding six-month period, the paid leave rate should equal the "reasonable expectation" of the employee at the time of hiring with respect to the average number of hours per day that the employee would be scheduled to work.

Once an employee's coronavirus-related need for using the emergency paid sick leave ends, then the employer may discontinue the paid sick time. Paid sick time provided under H.R. 6201 does not carry from one year to the next.

Paid Leave Rate: Employees who take paid sick leave because they are subject to a quarantine or isolation order, have been advised by a health care provider to self-quarantine, or are experiencing coronavirus symptoms and seeking medical diagnosis are entitled to be paid at their regular pay rate or at the federal, state or local minimum wage, whichever is greater. In these circumstances, the paid sick leave rate may not exceed $511 per day, or $5,110 in aggregate.

Employees who take paid sick leave to care for another individual or child or because they are experiencing another substantially similar illness (as specified by HHS) are entitled to be paid at two-thirds their regular rate. In these circumstances, the paid sick leave rate may not exceed $200 per day, or $2,000 in aggregate.

Tax Credits: Each quarter, employers subject to these requirements are entitled to a fully refundable tax credit equal to 100 percent of the qualified paid sick leave wages paid by the employer (see more information below).

Effect on Existing Paid Leave Agreements: An employer may not require an employee to use other paid leave provided by the employer before using paid sick time provided under H.R. 6201. However, nothing prohibits employers from changing their leave programs after the law goes into effect, provided any collective bargaining agreement allows such a change.

Employer Notice Requirement: Employers are required to post and keep posted, in conspicuous places, notice of emergency paid sick leave requirements made available under H.R. 6201. Within seven days of the enactment of the law, the Secretary of Labor will provide a model notice for use by employers.

Prohibitions and Enforcement: Employers may not discharge, discipline, or discriminate against any employee who (a) takes paid sick leave or (b) has filed a complaint or proceeding or testified in any such proceeding related to the benefits and protections provide by H.R.6201. Further, employers may not require, as a condition of providing paid sick time, that an employee search for a or find a replacement employee to cover the hours during which the employee is using paid sick time.

Employers who violate the paid sick leave requirements or retaliation prohibitions of H.R. 6201 shall be subject to civil penalties under the Fair Labor Standards Act.

Effective Date and Expiration: The requirements set forth under Division E of H.R. 6201 are in effect 15 days after the enactment of the legislation (April 2, 2020) through December 31, 2020.

EMPLOYER TAX CREDITS

H.R. 6201 provides for employer tax credits to offset the costs associate with the paid public health emergency leave and sick leave required for employees under Divisions C and E of the law.

Payroll Tax Credit: The law provides a refundable tax credit worth 100 percent of qualified public health emergency leave wages (as provided by Division C) and qualified paid sick leave wages (as provided by Division E) paid by an employer for each calendar quarter through the end of 2020. The tax credit is allowed against the tax imposed under the employer portion of Social Security and Railroad Retirement payroll taxes.

Credit Amount: The law allows employers to take tax credits for qualified public health emergency leave wages and qualified sick leave wages:

Credit Amount for Public Health Emergency Leave Wages. The amount of qualified public health leave wages taken into account for each employee is capped at $200 per day and $10,000 for all calendar quarters.

Emergency Family And Medical Leave Expansion Act (EFMLA)

Division C of H.R. 6201 is known as the Emergency Family and Medical Leave Expansion Act (EFMLA) and uses the existing Family and Medical Leave Act (FMLA) as a framework to provide certain employees with the right to take up to 12 weeks of job-protected leave.

Under the law, eligible employees may take leave if the employee is unable to work or telework because they must care for a child (under 18 years of age) whose school or care provider is closed or unavailable due to a coronavirus emergency as declared by a Federal, State, or local authority. This is the only reason this form of leave is permissible. This expansion of the FMLA does not change any of the other provisions of the FMLA.

Covered Employees and Employers:

- For purposes of this leave, H.R. 6201 amends the FMLA definitions of covered employees and employers.
- Under H.R. 6201, eligible employees include those who work for employers with fewer than 500 employees (and government employers) who have been on the job for at least 30 days.
- The legislation also gives the Secretary of Labor the authority to exempt small businesses with fewer than 50 employees from the law's paid leave requirements if those requirements would jeopardize the viability of the business.

Exception for Health Care Providers and Emergency Responders. Employers of employees who are health care providers or emergency responders may elect to exclude those employees from the public health emergency leave provisions of the law.

First 10 days of Leave: The first 10 days in which an employee takes emergency leave will typically use Emergency Paid Sick Leave (EPSLA). If the employee has already used up EPSLA leave for the first 10 days, he/she may elect to substitute accrued paid vacation leave, personal leave, or medical or sick leave for unpaid leave. If the employee has used up all EPLSA and other leave time, the first ten days could be unpaid.

Paid Leave Rate for Subsequent Days: After 10 days of unpaid leave, an employer is required to provide paid leave at an amount not less than two-thirds of an employee's regular rate of pay up to $200 per day or $10,000 in the aggregate.

The law also addresses hourly employees whose schedules vary such that the employer is unable to determine the exact number of hours the employee would have worked. With regard to those employees, the employee's paid leave rate should equal the average number of hours that the employee was scheduled per day over the six-month period prior to the leave. If the employee did not work the preceding six-month period, the paid leave rate should equal the "reasonable expectation" of the employee at the time of hiring with respect to the average number of hours per day that the employee would be scheduled to work.

Tax Credits: Each quarter, employers subject to these requirements are entitled to a fully refundable tax credit equal to 100 percent of the qualified paid Family and Medical Leave Act wages paid by the employer (see more information below).

Job Restoration: Generally, eligible employees who take emergency paid leave are entitled to be restored to the position they held when the leave commenced or to obtain an equivalent position with their employer. H.R. 6201 limits this rule for employers with fewer than 25 employees. In such circumstances, if an employee takes emergency leave, then the employer does not need to return the employee to their position if:

- The position does not exist due to changes in the employer's economic or operating condition that affect employment and were caused by the coronavirus emergency;
- The employer makes "reasonable efforts" to restore the employee to an equivalent position; and
- If these efforts fail, the employer makes an additional reasonable effort to contact the employee if an equivalent position becomes available. The "contact period" is the one-year window beginning on the earlier of (a) the date on which the employee no longer needs to take leave to care for the child or (b) 12 weeks after the employee's paid leave commences.

Effective Date and Expiration: The requirements set forth under Division C of H.R. 6201 are in effect 15 days after the enactment of the legislation (April 2, 2020) through December 31, 2020.

FFCRA FAQ 99:

My child's school is giving me a choice between having my child attend in person or participate in a remote learning program for the fall. I signed up for the remote learning alternative because, for example, I worry that my child might contract COVID-19 and bring it home to the family. Since my child will be at home, may I take paid leave under the FFCRA in these circumstances? (added 08/27/2020) ***[Updated to reflect the Department's revised regulations which are effective as of the date of publication in the Federal Register.]***

No, you are not eligible to take paid leave under the FFCRA because your child's school is not "closed" due to COVID–19 related reasons; it is open for your child to attend. FFCRA leave is not available to take care of a child whose school is open for in-person attendance. If your child is home not because his or her school is closed, but because you have chosen for the child to remain home, you are not entitled to FFCRA paid leave. However, if, because of COVID-19, your child is under a quarantine order or has been advised by a health care provider to self-isolate or self-quarantine, you may be eligible to take paid leave to care for him or her. See FAQ 63.

Also, as explained more fully in FAQ 98, if your child's school is operating on an alternate day (or other hybrid-attendance) basis, you may be eligible to take paid leave under the FFCRA on each of your child's remote-learning days because the school is effectively "closed" to your child on those days. FAQ's 20-22 further address this scenario.

FFCRA FAQ 98:

My child's school is operating on an alternate day (or other hybrid-attendance) basis. The school is open each day, but students alternate between days attending school in person and days participating in remote learning. They are permitted to attend school only on their allotted in-person attendance days. May I take paid leave under the FFCRA in these circumstances? (added 08/27/2020) ***[Updated to reflect the Department's revised regulations which are effective as of the date of publication in the Federal Register.]***

Yes, you are eligible to take paid leave under the FFCRA on days when your child is not permitted to attend school in person and must instead engage in remote learning, as long as you need the leave to actually care for your child during that time and only if no other suitable person is available to do so. For purposes of the FFCRA and its implementing regulations, the school is effectively "closed" to your child on days that he or she cannot attend in person. You may take paid leave under the FFCRA on each of your child's remote-learning days. FAQ's 20-22 further address this scenario.

NEW YORK QUARANTINE/ISOLATION ORDER LEAVE

All New York State employers must now provide up to two weeks paid leave to employees who have been subjected to mandatory precautionary orders of quarantine or isolation due to COVID-19 (those issued by New York State, a local health board, or any other governmental entity authorized to issue such order). The employer's size and net income will dictate the duration of that leave, and whether it is paid or unpaid. Outside of health care providers, this law has not had a huge effect because largely duplicates FFCRA and burden of getting Quarantine Order (outside of health care facilities). Since then, and in response to and August 3, 2020 federal SDNY case *New York v. U.S. Department of Labor, et al.*, No. 1:20-cv-03020, the US DOL has narrowed the definition of health care providers that may be exempted from the FFCRA.

Who is a "health care provider" who may be excluded by their employer from paid sick leave and/or expanded family and medical leave? ***[Updated to reflect the Department's revised regulations which are effective as of the date of publication in the Federal Register.]*** For the purposes of defining the set of employees who may be excluded from taking paid sick leave or expanded family and medical leave by their employer under the FFCRA, a health care provider includes two groups.

This first group is anyone who is a licensed doctor of medicine, nurse practitioner, or other health care provider permitted to issue a certification for purposes of the FMLA.

The second group is any other person who is employed to provide diagnostic services, preventive services, treatment services, or other services that are integrated with and necessary to the provision of patient care and, if not provided, would adversely impact patient care. This group includes employees who provide direct diagnostic, preventive, treatment, or other patient care services, such as nurses, nurse assistants, and medical technicians. It also includes employees who directly assist or are supervised by a direct provider of diagnostic, preventive, treatment, or other patient care services.

Finally, employees who do not provide direct heath care services to a patient but are otherwise integrated into and necessary to the provision those services—for example, a laboratory technician who processes medical test results to aid in the diagnosis and treatment of a health condition—are health care providers.

A person is not a health care provider merely because his or her employer provides health care services or because he or she provides a service that affects the provision of health care services. For example, IT professionals, building maintenance staff, human resources personnel, cooks, food services workers, records managers, consultants, and billers are not health care providers, even if they work at a hospital or a similar health care facility.

NEW YORK PAID SICK LEAVE

In addition to paid leave related to Covid-19 Quarantines/Isolation Orders, at the same time New York State also passed a broader law mandating paid sick/safe leave. The number of sick days, and determination whether they are paid or unpaid, depends upon the number of employees employed by the employer and its annual income. The law is largely based on a similar New York City Law, but it is more generous in mandating up to fifty-six (56) hours of paid sick leave per year for larger employers. Sick leave is typically accrued at the rate of one (1) hour for every thirty (30) hours worked. Accrual is supposed to start as of September 30, 2020 and the first paid sick days must be available as of January 1, 2021.

NEW YORK PAUSE ORDER

In March 2020 *All* business were ordered closed except those deemed "essential".

Since then, depending upon the region, various business have been permitted to open-up, subject to various restrictions to avoid a resurgence in the Pandemic.

Essential Businesses

Requiring Employees to Return To Work

QUESTION: If my business is determined to be an "Essential Business" are all employees permitted to work at the business location?

ANSWER: No. Only those employees that are needed to provide the products and services that are essential to provide such products or services are permitted to work at the business location. In addition, Essential Businesses are still required to utilize telecommuting or work from home procedures to the maximum extent possible. Those employees who do report to work must adhere to the requirements set forth in the Department of Health guidelines , which can be found at https://coronavirus.health.ny.gov/home.

For example, if your firm has three production lines, one of which manufactures medical equipment and the other two manufacture toys, your business is exempt from the employment reduction requirements of Executive Orders 202.8 to the extent that employees are needed to maintain the production capacity of the line manufacturing medical equipment. All other employees are subject to the workforce reduction requirements. In additional, to the maximum extent possible, employees needed to support the medical manufacturing line (i.e. human resources, accounting, legal, etc.) are still required to utilize telecommuting or work from home procedures to the maximum extent possible.

Phased Plan To Reopen New York

• New York Forward

• Decision to reopen has been made and will occur in phases, and on a regional basis.

• At least 2 weeks in between each phase.

• 10 Regions: Capital Region; Central New York; Finger Lakes; Long Island; Mid-Hudson; Mohawk Valley; New York City; North Country; Southern Tier; Western New York.

• The Governor's office has created the New York Forward Advisory Board, which will help shape the state's reopening policies.

Phased Plan To Reopen New York

Phase 1
• Construction, manufacturing, wholesale trade, select retail for curbside pickup only, agriculture, forestry, and fishing.

Phase 2:
• Professional services, finance and insurance, retail, administrative support, real estate, rental and leasing.

Phase 3:
• Restaurants and food services.

Phase 4:
• Arts, entertainment, recreation, and education.

Five Steps for Safely & Successfully Re-Opening Workplaces

- Develop a Return to Work Plan
- Implement Pre-Placement Protocols to Ensure Safe and Lawful Return to Work
- Implement Policies and Practices to Address New COVID-19 Operating Realities
- Anticipate Responses to COVID-19 Related Scenarios Upon Employees' Return to Work
- Begin Preparing for a Potential Second Wage of COVID-19 Infections (Pandemic Planning)

Review New York State Reopening Template.

How to Safely & Successfully Re-Opening the Workplace

The following five points serve as a guide as to how to best re-open while mitigating business and compliance risks.

Developing a Return to Work Plan

a. Identify Individuals Who Will Be Brought Back to Work

• Consider phases – do any state or local mandates limit or impact the reopening of the facilities – may be different rules for different places.

• Businesses must consider: Who will you choose? Use neutral selection criteria, consider disparate impact to avoid potential claims of discrimination.

• Consider which employees can or should continue to work remotely.

• Data privacy

• Wage and hour –recording of time • Workers' Comp • Consider work share programs

• CBA considerations?

• Consider whether WARN is triggered by those furloughed who are not returning

• Consider new size –legal compliance (FMLA)

Developing a Return to Work Plan

b. Establish Return to Work Dates

c. Develop and Use Written Employee Communications

• Address an employee's position/role, pay rate, work schedule, proposed start date, forms to be completed, pre-placement testing/screening, consequences of not responding.

• At-will disclaimer.

• Comply with any state law requirements regarding advance written notice of pay changes and/or required pay rate notices.

Developing a Return to Work Plan

d. Identify and Procure Supplies Required For Safe Operations

- PPE –masks and gloves –amounts, cleaning, storage, disposal
- Wipes, sanitizers, disinfectants, etc.

e. Determine Potential Need to Change Workspaces

- Structural changes
- Relocation of workspaces and equipment
- Social distancing markers
- Shared surfaces and objects (ex. the coffee machine)

New York State Re-Opening Templates

Consider Industry Specific Guidance for reopening on New York State Website

Review general New York Re-opening Template with Audience

ADA and Confidentiality During the Pandemic

ADA is the Primary Law Governing
Gathering Medical Information of Employees and Maintaining Confidentiality Regarding this Information

The Americans With Disabilities Act (ADA) is the primary law governing employer medical inquiries to employees and permitted medical tests, as well as protecting the privacy of employee medical information in the workplace.

Overview of ADA Confidentiality Provisions

Although Health Insurance Portability and Accountability Act (HIPAA) usually thought of first regarding medical privacy, it generally does not apply to non-health care providers. The Health Insurance Portability and Accountability Act (HIPAA) regulates the use and disclosure of health information of patients held by health care providers, health plans or insurers, and organizations that support these entities. It is not applicable for most employers (even if they are within the health care industry) as long as they are not actually providing medical treatment (e.g., a provider) or paying for the costs of medical treatment (e.g., insurers and plans), medical care, or providing services to companies that do these things. Because most employers will learn of a COVID-19 diagnosis from the employee or his or her family in the employer's role as an employer, HIPAA usually will not be implicated.

Rather, as discussed more fully below, for employers, the ADA is the primary law mandating that employer maintain confidentiality of employer medical information.

Overview of ADA limitations on Medical Inquiries and Tests

The ADA limits medical inquiries and employer mandated testing

Under the ADA, an employer's ability to make disability-related inquiries or require medical examinations is analyzed in three stages: pre-offer, post-offer, and employment. At the first stage **(prior to an offer of employment)**, the ADA usually prohibits all disability-related inquiries and medical examinations, *even if* they are related to the job. At the second stage **(after an applicant is given a conditional job offer, but before s/he starts work)**, an employer may make disability-related inquiries and conduct medical examinations, regardless of whether they are related to the job, as long as it does so for all entering employees in the same job category. At the third stage **(after employment begins)**, an employer may make disability-related inquiries and require medical examinations *only* if they are job-related and consistent with business necessity.

Testing, Screening, reporting and tracking

Employers are permitted (and may be required) to check temperatures, inquire about symptoms associated with Covid-19, inquire about contacts with people diagnosed with Covid-19, inquire about people with contacts with other who had symptoms associated with Covid-19. etc. The CDC website provides additional information.

The CDC Guidance for Business and Employers recommends employers determine which employees may have been exposed to the virus and inform co-employees of their possible exposure to COVID-19 in the workplace. However, employers should maintain confidentiality as required by the Americans with Disabilities Act (ADA), and the information disclosed and method of disclosure must comply with applicable federal, state, and local laws.

Employers and workers can visit the U.S. Equal Employment Opportunity Commission's COVID-19 webpage and frequently asked questions to learn more about this topic.

ADA Restrictions on Testing and Medical Inquiries

In light of the danger posed by COVID-19, employers have been granted permission (in some cases mandated) to make medical inquiries as to employees (as well as visitors) that may have not been otherwise permitted.

Employers during the Pandemic are required (and in some cases required by State law) to inquire into employee temperatures, symptoms that may evidence exposure to COVID-19, and interaction with other people who were either diagnosed who exhibited symptoms of COVID-19.

In fact, the EEOC has gone further and determined that, during the Pandemic, employers may require that employees submit results of COVID-19 testing as a condition coming into the workplace: The EEOC has **A.6. May an employer administer a COVID-19 test (a test to detect the presence of the COVID-19 virus) when evaluating an employee's initial or continued presence in the workplace?** *(4/23/20; updated 9/8/20 to address stakeholder questions about updates to CDC guidance)*

The ADA requires that any mandatory medical test of employees be "job related and consistent with business necessity." Applying this standard to the current circumstances of the COVID-19 pandemic, employers may take screening steps to determine if employees entering the workplace have COVID-19 have because an individual with the virus will pose a direct threat to the health of others. Therefore an employer may choose to administer COVID-19 testing to employees before initially permitting them to enter the workplace and/or periodically to determine if their presence in the workplace poses a direct threat to others. The ADA does not interfere with employers following recommendations by the CDC or other public health authorities regarding whether, when, and for whom testing or other screening is appropriate. Testing administered by employers consistent with current CDC guidance will meet the ADA's "business necessity" standard.

A.1. **How much information may an employer request from an employee who calls in sick, in order to protect the rest of its workforce during the COVID-19 pandemic?** *(3/17/20)*

During a pandemic, ADA-covered employers may ask such employees if they are experiencing symptoms of the pandemic virus. For COVID-19, these include symptoms such as fever, chills, cough, shortness of breath, or sore throat. Employers must maintain all information about employee illness as a confidential medical record in compliance with the ADA.

A.3. **When may an ADA-covered employer take the body temperature of employees during the COVID-19 pandemic?** *(3/17/20)*

Generally, measuring an employee's body temperature is a medical examination. Because the CDC and state/local health authorities have acknowledged community spread of COVID-19 and issued attendant precautions, employers may measure employees' body temperature. However, employers should be aware that some people with COVID-19 do not have a fever.

A.4. **Does the ADA allow employers to require employees to stay home if they have symptoms of the COVID-19?** *(3/17/20)*

Yes. The CDC states that employees who become ill with symptoms of COVID-19 should leave the workplace. The ADA does not interfere with employers following this advice.

A.5. **When employees return to work, does the ADA allow employers to require a doctor's note certifying fitness for duty?** *(3/17/20)*

Yes. Such inquiries are permitted under the ADA either because they would not be disability-related or, if the pandemic 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.

A.6. May an employer administer a COVID-19 test (a test to detect the presence of the COVID-19 virus) when evaluating an employee's initial or continued presence in the workplace? *(4/23/20; updated 9/8/20 to address stakeholder questions about updates to CDC guidance)*

The ADA requires that any mandatory medical test of employees be "job related and consistent with business necessity." Applying this standard to the current circumstances of the COVID-19 pandemic, employers may take screening steps to determine if employees entering the workplace have COVID-19 because an individual with the virus will pose a direct threat to the health of others. Therefore an employer may choose to administer COVID-19 testing to employees before initially permitting them to enter the workplace and/or periodically to determine if their presence in the workplace poses a direct threat to others. The ADA does not interfere with employers following recommendations by the CDC or other public health authorities regarding whether, when, and for whom testing or other screening is appropriate. Testing administered by employers consistent with current CDC guidance will meet the ADA's "business necessity" standard.

Consistent with the ADA standard, employers should ensure that the tests are considered accurate and reliable. For example, employers may review information from the U.S. Food and Drug Administration (FDA) about what may or may not be considered safe and accurate testing, as well as guidance from CDC or other public health authorities. Because the CDC and FDA may revise their recommendations based on new

information, it may be helpful to check these agency websites for updates. Employers may wish to consider the incidence of false-positives or false-negatives associated with a particular test. Note that a positive test result reveals that an individual most likely has a current infection and may be able to transmit the virus to others. A negative test result means that the individual did not have detectable COVID-19 at the time of testing.

A negative test does not mean the employee will not acquire the virus later. Based on guidance from medical and public health authorities, employers should still require–to the greatest extent possible–that employees observe infection control practices (such as social distancing, regular handwashing, and other measures) in the workplace to prevent transmission of COVID-19.

A.7. CDC said in its Interim Guidelines that antibody test results "should not be used to make decisions about returning persons to the workplace." In light of this CDC guidance, under the ADA may an employer require antibody testing before permitting employees to re-enter the workplace? *(6/17/20)*

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 already stated that COVID-19 viral tests are permissible under the ADA.

The EEOC will continue to closely monitor CDC's recommendations, and could update this discussion in response to changes in CDC's recommendations.

A.8. May employers ask all employees physically entering the workplace if they have been diagnosed with or tested for COVID-19? *(9/8/20; adapted from 3/27/20 Webinar Question 1)*
Yes. Employers may ask all employees who will be physically entering the workplace if they have COVID-19 or symptoms associated with COVID-19, and ask if they have been tested for COVID-19. Symptoms associated with COVID-19 include, for example, fever, chills, cough, and shortness of breath. The CDC has identified a current list of symptoms.

An employer may exclude those with COVID-19, or symptoms associated with COVID-19, from the workplace because, as EEOC has stated, their presence would pose a direct threat to the health or safety of others. However, for those employees who are teleworking and are not physically interacting with coworkers or others (for example, customers), the employer would generally not be permitted to ask these questions.

The ADA imposes confidentiality restrictions on Employers

Employer will have access to employee medical information in a number of contexts, including doctor notes and medical certifications regarding absences from work. In the COVID-19 context this would also apply to temperature checks, inquiries regarding symptoms of COVID-19, COVID-19 test results, etc.

All medical information should be treated the same, regardless of how it was obtained (during post-offer examinations, voluntary disclosure, etc.). **It should be kept in a file separate from the employee's personnel file and in a location that is accessible only to authorized personnel.** Generally, only human resources personnel are entitled to the medical information, however, the Equal Employment Opportunity Commission identifies a few exceptions, which are as follows:

- Supervisors and managers may be informed about necessary restrictions on the work or duties of an employee and necessary accommodations.
- First aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment or if any specific procedures are needed in the case of fire or other evacuations.

The ADA imposes confidentiality restrictions on Employers

- Government officials investigating compliance with the ADA and other Federal and state laws prohibiting discrimination on the basis of disability or handicap should be provided relevant information on request. (Other Federal laws and regulations also may require disclosure of relevant medical information.)
- Relevant information may be provided to state workers' compensation offices or "second injury" funds, in accordance with state workers' compensation laws.
- Relevant information may be provided to insurance companies where the company requires a medical examination to provide health or life insurance for employees.

More on Confidentiality of Employee Medical Records

B.1. May an employer store in existing medical files information it obtains related to COVID-19, including the results of taking an employee's temperature or the employee's self-identification as having this disease, or must the employer create a new medical file system solely for this information? *(4/9/20)*

The ADA requires that all medical information about a particular employee be stored separately from the employee's personnel file, thus limiting access to this confidential information. An employer may store all medical information related to COVID-19 in existing medical files. This includes an employee's statement that he has the disease or suspects he has the disease, or the employer's notes or other documentation from questioning an employee about symptoms.

B.2. If an employer requires all employees to have a daily temperature check before entering the workplace, may the employer maintain a log of the results? *(4/9/20)*

Yes. The employer needs to maintain the confidentiality of this information.

B.3. May an employer disclose the name of an employee to a public health agency when it learns that the employee has COVID-19? *(4/9/20)*

Yes.

B.4. May a temporary staffing agency or a contractor that places an employee in an employer's workplace notify the employer if it learns the employee has COVID-19? *(4/9/20)*

Yes. The staffing agency or contractor may notify the employer and disclose the name of the employee, because the employer may need to determine if this employee had contact with anyone in the workplace.

B.6. An employee who must report to the workplace knows that a coworker who reports to the same workplace has symptoms associated with COVID-19. Does ADA confidentiality prevent the first employee from disclosing the coworker's symptoms to a supervisor? *(9/8/20; adapted from 3/27/20 Webinar Question 6)*

No. ADA confidentiality does not prevent this employee from communicating to his supervisor about a coworker's symptoms. In other words, it is not an ADA confidentiality violation for this employee to inform his supervisor about a coworker's symptoms. After learning about this situation, the supervisor should contact appropriate management officials to report this information and discuss next steps.

B.7. An employer knows that an employee is teleworking because the person has COVID-19 or symptoms associated with the disease, and that he is in self-quarantine. May the employer tell staff that this particular employee is teleworking without saying why? *(9/8/20; adapted from 3/27/20 Webinar Question 7)*

Yes. If staff need to know how to contact the employee, and that the employee is working even if not present in the workplace, then disclosure that the employee is teleworking without saying why is permissible. Also, if the employee was on leave rather than teleworking because he has COVID-19 or symptoms associated with the disease, or any other medical condition, then an employer cannot disclose the reason for the leave, just the fact that the individual is on leave.

B.8. Many employees, including managers and supervisors, are now teleworking as a result of COVID-19. How are they supposed to keep medical information of employees confidential while working remotely? *(9/8/20; adapted from 3/27/20 Webinar Question 9)*

The ADA requirement that medical information be kept confidential includes a requirement that it be stored separately from regular personnel files. If a manager or supervisor receives medical information involving COVID-19, or any other medical information, while teleworking, and is able to follow an employer's existing confidentiality protocols while working remotely, the supervisor has to do so. But to the extent that is not feasible, the supervisor still must safeguard this information to the greatest extent possible until the supervisor can properly store it. This means that paper notepads, laptops, or other devices should not be left where others can access the protected information.

Similarly, documentation must not be stored electronically where others would have access. A manager may even wish to use initials or another code to further ensure confidentiality of the name of an employee.

Disability and Leave of Absence Management

•ADA accommodations must still be made for employees working from home.

•Remote work: attendance policies and standards tested as people come back to the workplace.

Is attendance an essential function of the job?

•“Regarded as disabled claims. “No clear guidance yet as to whether COVID-19 is a disability under the ADA.

Disability and Leave of Absence Management

A request by an individual placed at an increased risk for severe illness from COVID must be treated as a request for a reasonable accommodation.

•The employer and employee must engage in the interactive process once the request has been raised.

•The employee must request an accommodation, the employer cannot mandate an employee at higher risk for COVID-19 complications work from home.

REASONABLE ACCOMODATIONS AND TELEWORK

An employee who was already receiving a reasonable accommodation prior to the COVID-19 pandemic, or who has a qualifying disability, may be entitled to an additional or altered accommodation, absent undue hardship.

•For example, an employee who is teleworking because of the pandemic may need a different type of accommodation than what he uses in the workplace. The employer may discuss with the employee whether the same or a different disability is the basis for this new request and why an additional or altered accommodation is needed.

OTHER REASONABLE ACCOMODATIONS

•Permitting employees to work from home is not the only reasonable accommodation recognized by the EEOC to help limit COVID-19 exposure.

•The EEOC has explained that accommodations may include additional or enhanced protective gowns, masks, gloves, or other gear beyond what the employer may generally provide to employees returning to its workplace.

•Accommodations also may include additional or enhanced protective measures, for example, erecting a barrier that provides separation between an employee with a disability and coworkers/the public or increasing the space between an employee with a disability and others.

EEOC Guidelines on Barring Vulnerable Employees From Workplace

C.5. May an employer postpone the start date or withdraw a job offer because the individual is 65 years old or pregnant, both of which place them at higher risk from COVID-19? *(4/9/20)*

No. The fact that the CDC has identified those who are 65 or older, or pregnant women, as being at greater risk does not justify unilaterally postponing the start date or withdrawing a job offer. However, an employer may choose to allow telework or to discuss with these individuals if they would like to postpone the start date.

Wage and Hour –Considerations for Non-exempt Employees

• To avoid off-the-clock claims for employees working remotely, ensure that rules are clear, conduct is monitored, and reporting is accurate.

• Ensure that pay reductions for non-exempt employee do not fall below federal or state minimum wage levels.

• When increasing hours, be aware of the daily overtime requirement and seventh day rest requirements that exist in some states.

• When changing pay rates, be aware of state-level notification requirements.

• Predictability pay – some jurisdictions require schedule change premiums if sufficient notice is not given.

• Reimbursement of expenses.

Wage and Hour –Considerations for Non-exempt Employees

• When businesses furlough salaried employees, consider the pay week and be deliberate about the day they leave.

• Ensure that salary reductions do not fall below minimum requirements at both federal and state levels.

• When reclassifying employees from exempt to non-exempt, make sure they know the rules applicable to non-exempt employees.

• Examine what exempt employees are doing and ensure they still meet the duties test under the exemption.

Discrimination, Harassment, and Retaliation Claims

•When implementing furloughs, reorganizations, and layoffs, carefully consider and document selection criteria and implementation so that decisions can be well supported. These decisions may be challenged.

•Make sure your agreements comply with OWBPA and the exhibits to your group severance agreements are accurate and have been tested under privilege for disparate impact.

Unemployment Issues

Pandemic Unemployment Assistance:

“Gig Employees”

Pandemic Unemployment Compensation:

$600.00 more dollars a week up to $1104 (Now $300 up to $804.00 new max)

Pandemic Unemployment Compensation:

13 extended weeks unemployment benefits

CARES ACT: PAYROLL PROTECTION PROGRAM

Now 24 weeks to use loan

Now 60% spent on payroll

Loan forgiveness and Reemployment

Incentivizing Employees to Return to Work

40. Question: Will a borrower's PPP loan forgiveness amount (pursuant to Section 1106 of the CARES Act and SBA's implementing rules and guidance) be reduced if the borrower laid off an employee, offered to rehire the same employee, but the employee declined the offer?

Answer: No. As an exercise of the Administrator's and the Secretary's authority under Section 1106(d)(6) of the CARES Act to prescribe regulations granting de minimis exemptions from the Act's limits on loan forgiveness, SBA and Treasury intend to issue an interim final rule excluding laid-off employees whom the borrower offered to rehire (for the same salary/wages and same number of hours) from the CARES Act's loan forgiveness reduction calculation. The interim final rule will specify that, to qualify for this exception, the borrower must have made a good faith, written offer of rehire, and the employee's rejection of that offer must be documented by the borrower. Employees and employers should be aware that employees who reject offers of re-employment may forfeit eligibility for continued unemployment compensation.

SBA announced that it would not reduce loan forgiveness amounts for borrowers that have laid off employees and offered to rehire them at the same wage rate and number of hours, but the employee refuses the job offer. The Loan Forgiveness Application states that employees do not count as an FTE reduction if they: (i) refuse a written offer to return, (ii) voluntarily resign, (iii) are fired for cause, or (iv) voluntarily requested and received a reduction in hours. The Loan Forgiveness Regulations add the requirement that, for employees who refuse a written offer to return, the borrower must inform the state unemployment insurance office within 30 days of the rejection. In any of these circumstances, the borrower must maintain documentation and provide it to SBA upon request. In each of these cases, the employee does not count as an FTE only if the position was not filled by a new employee. Note that this only provides employers with relief on the reduction in FTEs—it does not allow borrowers to count what the excluded employee would have earned as salary or wages toward the compensation forgiveness reduction component. Finally, this provision applies only to employees who leave employment or refuse an offer to return during the Covered Period or Alternative Payroll Covered Period. It does not apply to employee separations that occur before the loan period begins.

WARN Act

•Many employers are furloughing people and intending to bring them back within 6 months.

However:
•What happens if a business does not bring them back and does not provide the required 60-day notice?
•Will a business be able to avail itself of the “unforeseen circumstances” exception?
•When should the employer have foreseen that a furlough would last beyond 6 months?

•Be prepared to litigate:
•What was happening in the country and economy.
•What the company knew and when it knew it.
•What guidance was coming from CDC and the government.
•What was the media saying about the continued closures.
•Internal C-suite discussions.

COBRA

•COBRA Notices – whether they comply with the statute.

•Many companies are intending to keep furloughed employees on benefit plans and offering to pay premiums.
However:

•Good intent does not mean that the employee is still covered.
•Consult with a benefits attorney to ensure furloughed employees can be covered or whether COBRA notices must be issued. Employers will face massive exposure if employees are denied coverage after falling ill.

Preventative Practices

- Protect the work force
- Implement policies and procedures
- Disseminate information based on CDC and state DOH guidance for best practices
- Continue to follow anti-discrimination protocols:
- Job loss decisions
- Accommodation/leave requests
- Require employees to engage in preventative behavior
- Assess availability of remote work environments
- Have a plan for addressing exposure
- Crisis management: non-legal issues/public relations

Questions?

Thank You!

APPENDIX: NY REOPENING PAGES

General NY Reopening Template

https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwihpffI-43qAhWioHIEHYhGDScQFjAAegQIBRAB&url=https%3A%2F%2Focfs.ny.gov%2Fmain%2Fnews%2F2020%2FCOVID-2020Jun08-Guidance-Reopening-Plan-Template.pdf&usg=AOvVaw1bC-S_PP_evYxj7cJ3_JkV

Phase 1 NY Reopening Page:

https://forward.ny.gov/phase-one-industries

Phase 2 Reopening Page:

https://forward.ny.gov/phase-two-industries

Phase 3 Reopening Page:

https://forward.ny.gov/phase-three-industries

Phase 4 Reopening Page:

https://forward.ny.gov/phase-four-industries

APPENDIX: CDC, EEOC and DOL PAGES

General Business Frequently Asked Questions (Includes guidance on returning employee to work who is diagnosed or suspected to have Covid-19)

https://www.cdc.gov/coronavirus/2019-ncov/community/general-business-faq.html

Interim Guidance for Businesses and Employers Responding to Coronavirus Disease 2019 (COVID-19), May 2020

https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html

Reopening Guidance for Cleaning and Disinfecting Public Spaces, Workplaces, Businesses, Schools, and Homes

https://www.cdc.gov/coronavirus/2019-ncov/community/reopen-guidance.html

EEOC

https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws

DOL

https://www.dol.gov/agencies/whd/pandemic/ffcra-questions#98